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IN THE

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OF THE

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FEBRUARY—MAY, 1884.

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UNITED STATES CIRCUIT AND DISTRICT COURTS

WITH THE

SUBJECTS OF THE OPINIONS REPORTED IN THIS VOLUME.

FIRST CIRCUIT.

HORACE GRAY, Associate Justice of the Supreme Court.

JOHN LOWELL, Circuit Judge.

Admiralty—liability of schooner for supplies—home port—name of port on stern—master—acting and managing owner—insurance, 127.

Contempt—power of court to revoke its orders, 810.

Foreign corporations—power to hold land—deed—acknowledgment—estoppel, 73.

Fraud on creditors—conveyance in lieu of attachment, 237.

Joint-stock company—fraud of directors—action, 468.

Patent—expiration of demurrer, 823.

Patent—personal property, 753.

Patent—patentability—improved monkey wrench, 498.

Patent—laches—pending litigation, 420.

Patent—infringement—second action for damages, 258.

NATHAN WEBB, District Judge, Maine.

DANIEL CLARK, District Judge, New Hampshire.

Jurisdiction—foreclosure of railroad mortgage—receiver—evidence, 342.

THOMAS L. NELSON, District Judge, Massachusetts.

Equity pleading—survival of liability for breach of trust—joint breach of trust—jurisdiction, 471.

Jurisdiction of circuit and district courts—bill of revivor—statute of limitations—laches, 53.

Patent—horse-shoe nail—infringement, 819.

Patent—reissue—sewing-machine, 428.

Patent—extraction of gelatine from fish-skins—decision of patent-office, 426.

Railroad consolidation—equity—pooling agent—parties to suit—contract—estoppel, 804.

LE BARON B. COLT, District Judge, Rhode Island.

Patent—contempt—evidence, 602.

Patent—improvement in looms, 600.

Trade-mark—transfer by general conveyance, 596.

SECOND CIRCUIT.

SAMUEL BLATCHFORD, Associate Justice of the Supreme Court.

Jurisdiction of circuit court—appeal from district court—equity proceedings, 337.

Patent—motion for injunction, 97.

Patent—invention, 815.

WILLIAM J. WALLACE, Circuit Judge.

Collision—division of loss, 46.
 Corporations—contract with stockholders—mortgage of franchise, 388.
 Equity practice—application for rehearing—laches, 828.
 Fire insurance—description of premises—warranties—conditions—forfeiture, 887.
 Internal revenue—notes redeemable in goods, 723.
 Municipal bonds—statutory requirements—tax-payers defined, 725.
 Negligence—personal injury—priority of contract, 926.
 Negotiable paper—qualified indorsement—notice—action for money had and received, 301.
 New trial—damages—personal injury, 808.
 Patent—tiling—previous state of art, 756.
 Patent—reissue—chemical thermometer, 749.
 Patent—crimping-machine—claims, 599.
 Patent—estoppel, 322.

Patent—paper oox, 320.
 Patent—evidence—judgment—strangers to suit, 321.
 Patent—perforated cigar, 319.
 Patent—basket lantern—decree—right to relief, 317.
 Post-roads—railroads—telegraph companies, 660.
 Railroad mortgage bonds—action for interest—tender of scrip, 867.
 Removal of cause—amending complaint, 801.
 Removal of cause—case involving federal law—separate controversy, 561.
 Removal of cause—practice in state court—survival of proceedings in state courts, 235.
 Removal of cause—separate controversy—bill against fraudulent trustees—filing petition before trial, 145.
 Removal of cause—Rev. St. § 639, subd. 3—citizenship at institution of suit, 49.
 Service of process on attorney—injunction, 346.

NATHANIEL SHIPMAN, District Judge, CONNECTICUT.

New trial—verdict against evidence, 405.
 Patent—previous state of art—copy distributor, 422.

Railroad companies—receivers—collusion, 663.

A. C. COXE, District Judge, N. D. NEW YORK.

Admiralty—costs—settlement, 800.
 Bankruptcy—renewal note, 873.
 Bankruptcy—debts contracted after proceedings, 874.
 Collision—negligence—sudden emergency, 792.
 Contract—construction—pleading—amendment, 727.
 Customs duties—appraiser impeaching his own valuation, 408.
 Customs duties—woolen stockings, 250.

Jurisdiction of federal courts—separate controversy, 803.
 Maritime lien—draft, 607.
 Patent—infringement—glove fastener, 835.
 Patent—non-claim of apparent device—abandonment, 641.
 Patent—utility—assignability of license, 323.
 Shipping—retaining vessel by shipkeeper, 799.

ADDISON BROWN, District Judge, S. D. NEW YORK.

Admiralty practice—new trial—appeal, 527.
 Admiralty practice—jury trial—Rev. St. § 566—verdict, 558.
 Bankruptcy—discharge—sale of property after petition filed, 94.
 Collision—steam-tug with tow—duty of schooner becalmed, 788.
 Collision—hugging shore—rounding Battery—mutual fault—pleading—amendments, 551.
 Collision—river and harbor navigation—signals—inspectors' rules—mutual fault, 529.

Collision—negligence—burden of proof—custom—line across channel, 463.
 Collision—anchored vessel—ringing bell—snow, 449.
 Collision—old boats—repairs—costs—excessive damages, 141.
 Collision—Erie canal—suction—canal regulations, 111.
 Collision—tort—answer—negligence—inspectors' rules, 119.
 Customs duties—moiety—act of June 22, 1874—suit *in personam*, 893.

ADDISON BROWN, continued.

Demurrage—bill of lading—readiness to discharge, 525.
 Demurrage—reasonable time—change of berth—custom, 136.
 Guaranty—consideration—assignment of mortgage—bankruptcy, 732.
 Patent—false stamping—penalty—complaint—demurrer, 501, 507.
 Salvage—vessel and cargo—apportionment—average bond, 795.
 Seamen—shipping articles—evidence 528.
 Seamen—shipping articles—discharge—extra wages, 523.
 Seamen's wages—advance note—discharge, 521.
 Seamen's wages—fines—shipping act of Great Britain—shipping articles—summary proceedings, 139.
 Shipping—stowage—damage to cargo—master's authority to sell—bill of lading—evidence, 536.

Shipping—obstructing navigation—rope across channel—damage—proximate cause, 455.
 Shipping—lien for freight—contract to take on board wire cable—private agreement between manufacturer and owner, 444.
 Shipping—supplies—maritime lien—mortgage—priority, 219.
 Shipping—assignment of bill of lading—charter-party—demurrage, 143.
 Shipping—bill of lading—*bona fide* indorser—freight—charter-party, 123.
 Shipping—*lex loci*—insurance—bill of lading—stowage—injury to goods—seaworthiness—custom—liability of ship-owner, 101.
 Shipping—through bill of lading—insurance—construction—transfer of goods, 115.

CHARLES L. BENEDIOT, DISTRICT JUDGE, E. D. NEW YORK.

Admiralty practice—propounding interrogatories, 224.
 Admiralty practice—stenographer's fees on trial—when taxed, 847.
 Collision—claim of salvage by vessel in fault, 844.
 Collision—canal-boat and propeller—contributory negligence, 880.
 Collision—rules of the road—burden of proof, 797.
 Contract—permission to extract guano, 798.
 Damage to canal-boat by suction and surge caused by ferry-boat, 841.
 Liability of canal-boat for damage by steamers careening, 223.
 Patent—interference—plea in bar, 817.

Removal of cause—jurisdiction of state court—motion for security of costs, 802.
 Salvage—amount, 923.
 Salvage—compensation—costs, 221.
 Salvage service—award—costs, 918.
 Seamen—contract to send home—damages, 924.
 Shipping—delivery—perishable cargo—bill of lading—negligence, 875.
 Shipping—damage to cargo—bill of lading—advances, 877.
 Ship's husband—lien—sale of vessel—exceptions to libel, 843.
 Supervisors of elections—accounts, 809.

HOYT H. WHEELER, DISTRICT JUDGE, VERMONT.

Contract—construction—dependent and independent stipulation, 233.
 Corporation—bill by stockholder—majority rule—excess of authority, 283.
 Patent—patentability—calculation—experiment—mechanical skill—public use, 99.
 Patent—reissue, 263.
 Patent—previous description, 307.
 Patent—reissue, 308.
 Patent—reissue, 311.
 Patent—infringement—cake-pans, 312.

Patent—suspension of injunction—public interest, 313.
 Patent—preliminary injunction, 419.
 Patent—infringement—reissue, 315.
 Patent—reissue—infringement—disclaimer, 823.
 Patent—infringement—license—jurisdiction, 825.
 Patent—infringement by corporation—personal liability of president, 826.
 Trust—revocation, 677.

THIRD CIRCUIT.

JOSEPH P. BRADLEY, ASSOCIATE JUSTICE OF THE SUPREME COURT.

WILLIAM McKENNAN, CIRCUIT JUDGE.

Collision—vessels meeting in narrow channel—crossing courses, 213.
 Internal revenue—notes used for circulation, 401.
 Patent—infringement, 417.

Trust—parol agreement respecting land—bankrupt act—adverse interest—limitation—witness—action by or against executor—equity—pleading, 286.

E. G. BRADFORD, DISTRICT JUDGE, DELAWARE.

JOHN T. NIXON, DISTRICT JUDGE, NEW JERSEY.

Abatement of suit by death—foreign administrator—Rev. St. § 955.
 Action on judgment obtained by fraud in another state, 488.
 Collusive suit—plea in abatement—evidence—injunction, 153.
 Conditional sale—attachment—conflict of laws, 760.
 Maritime lien—captain of vessel—pleadings—amendment, 463.

Patent—injunction—contempt—agreement—decree, 98.
 Patent—anticipation—public use—infringement, 205.
 Patent—infringement—foreign invention, 744.
 Seamen—desertion—discharge—recovery of wages, 332.

WILLIAM BUTLER, DISTRICT JUDGE, E. D. PENNSYLVANIA.

Bankruptcy—equitable assignment—subrogation—construction of statutes, 88.
 Collision—floating barge and sailing vessel—duty in narrow channel, 335.

Negligence—explosion of boiler—liability of public inspectors—evidence—insurers, 246.
 Patent—license—sale to satisfy judgment, 649.

MARCUS W. ACHESON, DISTRICT JUDGE, W. D. PENNSYLVANIA.

Copyright—infringement—text-books—key for use of teachers—injunction, 325.
 Patent—death of patentee—construction of patent, 913.
 Patent—puddling furnace—infringement, 915.

Municipal corporation—remedy for damage caused by unreasonable ordinance, 231.
 Wharves—right to moor vessels—position of steam-boat—collision with tow—mutual fault, 328.

FOURTH CIRCUIT.

MORRISON R. WAITE, CHIEF JUSTICE OF THE SUPREME COURT.

HUGH L. BOND, CIRCUIT JUDGE.

THOMAS J. MORRIS, DISTRICT JUDGE, MARYLAND.

Carrier of goods—destruction by fire—bill of lading, 56.
 Patent—combination—patentability, 260.

Shipment of cattle—unfit drinking water—liability of vessel, 131.

AUGUSTUS S. SEYMOUR, DISTRICT JUDGE, E. D. NORTH CAROLINA.

Clerk of court—payment to—judgment—order of court—commissions, 204.

ROBERT P. DICK, DISTRICT JUDGE, W. D. NORTH CAROLINA.

Marshall—powers and duties as to precepts—expiration of term, 586.
 Master and servant—monthly salary—false representations—incompe-

tency—rescission of contract—breach—violation of confidence—wrongful discharge—damage, 59.

GEORGE S. BRYAN, DISTRICT JUDGE, SOUTH CAROLINA.

R. W. HUGHES, DISTRICT JUDGE, E. D. VIRGINIA.

Admiralty practice—libel—amendment—action for death caused by negligence—contributory negligence, 430.

Government—limitations—laches of agents—specific performance—damages—cloud on title, 609.

Public statutes—constructive notice—act of congress—statute of limitations, 614.

Salvage service—award, 436.

JOHN PAUL, DISTRICT JUDGE, W. D. VIRGINIA.

JOHN J. JACKSON, DISTRICT JUDGE, WEST VIRGINIA.

Criminal law—province of jury—indictment—manslaughter—collision—violation of navigation laws, 633.

FIFTH CIRCUIT.

WILLIAM B. WOODS, ASSOCIATE JUSTICE OF THE SUPREME COURT.

DON A. PARDEE, CIRCUIT JUDGE.

Admiralty appeal—bond—parties—amendment of process, 460.

Admiralty jurisdiction, 461.

Arbitration—contract, 731.

Assignment for benefit of creditors, 719, 721, 722.

Charter-party—bill of lading, 216.

Charter-party—demurrage, 459.

Contracts—lease, 863.

Equity—demurrer—rehearing—receiver, 858.

Equity—intervention—injunction—trust fund, 659.

Equity jurisdiction—injunction, 855.

Habeas corpus—jurisdiction—Rev. St. 753, 631.

Practice—appeal—*remittitur*, 330.

Prescription—pledge—act of Louisiana, No. 73, of 1872, 870.

Salvage—costs, 651.

JOHN BRUCE, DISTRICT JUDGE, S., M., AND N. D. ALABAMA.

Maritime lien—vessels—dredge and scow, 544.

THOMAS SETTLE, DISTRICT JUDGE, N. D. FLORIDA.

JAMES W. LOCKE, DISTRICT JUDGE, S. D. FLORIDA.

H. K. McCAY, DISTRICT JUDGE, N. D. GEORGIA.

JOHN ERSKINE, DISTRICT JUDGE, S. D. GEORGIA.

EDWARD C. BILLINGS, DISTRICT JUDGE, E. D. LOUISIANA.

Admiralty practice—joinder of parties, 653.

Admiralty practice—amendments—rule No. 24, 655.

Contempt—violation of injunction, 678.

Equity practice—verbal agreements of counsel, 676.

Injunction—criminal proceedings, 671.

Insolvency—laws of Louisiana, 191.

ALECK BOARMAN, DISTRICT JUDGE, W. D. LOUISIANA.

Removal of cause—separable controversy—intervenor, 227.

ROBERT A. HILL, DISTRICT JUDGE, N. AND S. D. MISSISSIPPI.

Assignment by insolvent—validity—burden of proof, 714.

Misjoinder of causes of action—joint and several liability, 630.

Patent—contract to assign—specific performance—jurisdiction, 647.

Receiver—torts of employees—proceeding *in rem*—discharge of receiver—claim for personal injuries, 477.

AMOS MORRILL, DISTRICT JUDGE, E. D. TEXAS.

A. P. McCORMICK, DISTRICT JUDGE, N. D. TEXAS.

E. B. TURNER, DISTRICT JUDGE, W. D. TEXAS.

False account — evidence — agency, 593. Promissory note — transfer to one partner — payment to another, 575.

Municipal bonds — power conferred by municipal charter, 483.

SIXTH CIRCUIT.

STANLEY MATTHEWS, ASSOCIATE JUSTICE OF THE SUPREME COURT.

JOHN BAXTER, CIRCUIT JUDGE.

Railroads — legislative control — vested rights, 679.

JOHN WATSON BARR, DISTRICT JUDGE, KENTUCKY.

Removal of cause — petition — jurisdiction — separate controversy — parties — defendant corporation, 51.

HENRY B. BROWN, DISTRICT JUDGE, E. D. MICHIGAN.

Collision — propeller and tug — signals — fault, 765.

Collision — vessel at anchor — fault — St. Clair river — inscrutable fault, 836.

Maritime lien — enforcing — *bona fide* purchaser, 782.

Towage — choice of route — master's discretion — refusal to cross lake — intoxication of master — abandonment of tow — general average, 264.

SOLOMON J. WITHEY, DISTRICT JUDGE, W. D. MICHIGAN.

MARTIN WELKER, DISTRICT JUDGE, N. D. OHIO.

G. R. SAGE, DISTRICT JUDGE, S. D. OHIO.

Taxation — national bank shares — United States bonds, 372.

D. M. KEY, DISTRICT JUDGE, E. AND M. D. TENNESSEE.

Removal of cause — citizenship — separate controversy, 150.

Public use — private park — contract to exclude persons not brought by

certain party — taxation — jurisdiction — removal of cause, 156.

Taxation — assessment of railroad property — constitutional law, 395.

E. S. HAMMOND, DISTRICT JUDGE, W. D. TENNESSEE.

Cotton exchange — rules and regulations — construction — loss by fire, 619.

Interstate commerce — state regulation of railroads, 679.

Removal of cause — repleading — uniformity in practice — Rev. St. § 639 — act of March 3, 1875 — pleading under Tennessee Code, 273.

SEVENTH CIRCUIT.

JOHN M. HARLAN, ASSOCIATE JUSTICE OF THE SUPREME COURT.

THOMAS DRUMMOND, CIRCUIT JUDGE.

Removal of cause — separate controversy, 465.

HENRY W. BLODGETT, DISTRICT JUDGE, N. D. ILLINOIS.

Collision — navigation laws — speed — evidence — damages, 771.

Copyright — infringement — pleading, 758.

Customs duties — silk and cotton shawls, 417.

Customs duties — stearine, 416.

Customs duties — taffeta gloves, 413.

Customs duties — tire blooms — steel partly manufactured, 412.

Customs duties — watch enamel, 411.

Life insurance — policy — lapse by collusion — policy in favor of assured, 671.

Maritime lien — assignment of debt, 879.

Patent — public use — infringement, 735.

Sending matter concerning lotteries through the mail, 39.

Statute — mistake — title — customs duties, 304.

SAMUEL H. TREAT, DISTRICT JUDGE, S. D. ILLINOIS.**WILLIAM A. WOODS, DISTRICT JUDGE, INDIANA.**

Bankruptcy—fraudulent conveyance —judgment—liens—assignee, 589.
 Jurisdiction of United States courts —how affected by state laws, 657.

Patent—accounting—damages—evidence—license—royalty, 830.
 Patent—construction—license—damages—record of patent, 514.

CHARLES E. DYER, DISTRICT JUDGE, E. D. WISCONSIN.

Public lands—entry—right to cut timber, 910.

Surety—alteration of instrument—internal revenue, 567.

ROMANZO BUNN, DISTRICT JUDGE, W. D. WISCONSIN.

Assignment for benefit of creditors—unlawful preference—action on demand not due—Wisconsin Statutes, 295.

Federal practice—process—garnishment—summons—amendment, 252.
 Jurisdiction—citizenship, 155.

EIGHTH CIRCUIT.**SAMUEL F. MILLER, ASSOCIATE JUSTICE OF THE SUPREME COURT.****GEORGE W. MCCRARY, CIRCUIT JUDGE.**

Contributory negligence—sudden fright—injury causing death—damages, 83.
 Income tax—corporations—period from August 1, 1870, to January 1, 1871—action to recover taxes, 66.
 Mailing obscene publication—indictment, 497.

Railroad mortgage—foreclosure—appraisement—receiver, 173.
 Removal of cause—garnishment under statute of Minnesota, 49.
 Specific performance—award—reasonable time—entire tract to be appraised, 5.

HENRY C. CALDWELL, DISTRICT JUDGE, E. D. ARKANSAS.

Contract—stipulated damages for failure to perform—delay—good faith—assuming risks—construction—province of jury—waiver—extension of time, 239.

ISAAC C. PARKER, DISTRICT JUDGE, W. D. ARKANSAS.**O. P. SHIRAS, DISTRICT JUDGE, N. D. IOWA.**

Removal of cause—action by assignee, 225.

Taxation—railroad bridge—Statutes of Iowa, 177.

JAMES M. LOVE, DISTRICT JUDGE, S. D. IOWA.**C. G. FOSTER, DISTRICT JUDGE, KANSAS.****RENSSELAER R. NELSON, DISTRICT JUDGE, MINNESOTA.**

Assignment for benefit of creditors—possession of assignee—attachment, 406.
 Counsel fees—law of Ontario—bill of exchange, 87.
 Marine insurance—description of vessel, 24.

Officers—double compensation—Indian agent, 807.
 Practice—new trial, 490.
 Removal of cause—practice—issue, 885.

SAMUEL TREAT, DISTRICT JUDGE, E. D. MISSOURI.

Commission merchants—advances—bill of lading—insurance, 198.
 Constitutional law—taxation to aid private enterprise, 871.
 Depositions—certificates—amendments, 863.
 Insurance—mutual association policy—contract as to enforcement, 201.

Joinder of parties—corporations—jurisdiction—removal of cause, 152.
 Patent for process—infringement, 96.
 Receiver—liens on property, 861.
 Removal of cause—citizenship, 849.
 Resulting trust—oral agreement—parties, 849.

ARNOLD KREKEL, DISTRICT JUDGE, W. D. MISSOURI.

Attachments—statutes of Missouri—
 assignments—fraud on creditors, 70. Life insurance—policy for benefit of
 creditors—proof of death, 68.

ELMER S. DUNDY, DISTRICT JUDGE, NEBRASKA.**MOSES HALLETT, DISTRICT JUDGE, COLORADO.**

Mines and mining—location—end stakes—change of lines—aliens, 78.

NINTH CIRCUIT.**STEPHEN J. FIELD, ASSOCIATE JUSTICE OF THE SUPREME COURT.****LORENZO SAWYER, CIRCUIT JUDGE.**

Chinese immigration—act of May 6,
 1882—certificate of previous resi-
 dence, 490. Municipal bonds—Sacramento City—
 statute—waiver of constitutional
 right, 580.
 Customs duties—grain bags—re-en-
 try free of duty—power of secre-
 tary, 578. Navigable rivers—unsettled question
 of state and federal powers, 562.
 Fugitives from justice—*habeas corpus*
 —duty of custodian—production of
 prisoner—jurisdiction, 26. Patent—combination of separate de-
 vices—subcombination, 424.
 Jurisdiction of federal court—pend-
 ency of cause in state court, 340. Patent—reissue—decision of patent-
 office—equity pleading, 509.
 Removal of cause—application—
 amendment—“session” and
 “term,” 881.

OGDEN HOFFMAN, DISTRICT JUDGE, CALIFORNIA.

Chinese immigration—custom-house
 certificates—merchants—children,
 185. Perjury—procuring commission of—
 elements of crime—knowledge, 912.

GEORGE M. SABIN, DISTRICT JUDGE, NEVADA.

Jurisdiction—foreclosure of mechanic's lien—suit by assignee—averment as
 to citizenship—act of March 3, 1875, 1.

MATTHEW P. DEADY, DISTRICT JUDGE, OREGON.

Agent adversely interested to princi-
 pal—suit to reform contract, 15. Obstructing passage of mail—passen-
 ger on train, 42.
 Deed—consideration—seal, 291. Patent—revolving dip-net, 643.
 Equity practice—navigable waters—
 jurisdiction of circuit court, 347. Pilotage—offer by signal—signal for
 offer—“state” includes “terri-
 tory,” 207.
 Express facilities—contempt of in-
 junction, 20. Practice—special appearance—serv-
 ice on corporation—action for
 death, 254.
 Multiplicity of suits—state statute
 involving federal question—im-
 pairing obligation of contract—
 taxation—due process of law, 359. Salvage by pilot, 603.

CASES REPORTED.

	Page		Page
Adams v. Howard.....	317	Berry v. Sawyer.....	286
Adams, Mulville v.....	887	B. K. Washburn, The.....	788
Alabama, The.....	544	Blair v. St. Louis, H. & K. R. Co...	861
Albright v. Oyster.....	849	Blake v. Hawkins.....	204
Alexandria, City of, United States v.	609	Blowers v. One Wire Rope Cable...	444
Alexandria, City of, United States v.	614	Boston & Fairhaven Iron Works,	
Alicia A. Washburn, The.....	788	Child v.....	258
Aline, The.....	875	Boston & L. R. Corp., Nashua & L.	
Allen, In re.....	809	R. Corp. v.....	804
Allison v. Chapman.....	488	Boyd v. Gill.....	145
Alps, The.....	139	Bradley v. Dull.....	913
American Eagle, The.....	879	Bradley v. Hartford Steam-boiler I.	
American Printing Co., Rayer & Lin-		& Ins. Co.....	246
coln S. M. Co. v.....	428	Bradley v. Kroft.....	295
American R. Bridge Co., Cardwell v.	562	Brainard v. Evening Post Ass'n	422
Anderson, Judge v.....	885	Brassey v. New York & N. E. R. Co.	663
Arthur, Victor v.....	250	Brooklyn Ry. Supply Co., McAr-	
Ashland, The.....	336	thur v.....	263
Ashland, The.....	651	Brooks, Gloucester Isinglass & Glue	
Ashuelot Sav. Bank v. Frost.....	237	Co. v.....	426
Astrup v. Lewy.....	536	Brown v. Francis.....	678
Auffmordt, United States v.....	893	Brown v. Lee.....	630
Aultman v. Thompson.....	490	Brown, Mowat v.....	87
		Bruce v. Manchester & K. R. R....	342
Baker v. Loring.....	127	Buchanan v. Northern Pac. Ry. Co.	254
Baker Salvage Co. v. The Excelsior.	436	Burns v. The Spain.....	880
Baldwin, Frelinghuysen v.....	49	Butler, J. W., Paper Co., Chicago	
Baldwin, Martin v.....	340	Music Co. v.....	758
Balfour v. Sullivan.....	578		
Baltimore, C. & R. Steam-boat Co.,		Cahn v. Wong Town On.....	424
Scott v.....	56	Canada Cent. R. Co., Phelps v.....	801
Baltimore, C. & R. Steam-boat Co.,		Cardwell v. Amer. R. Br. Co.....	562
Odell v.....	56	Carroll, Stadler v.....	721
Baltimore, C. & R. Steam-boat Co.,		Carter v. City of New Orleans	659
Purcell v.....	56	C. D. Bryant, The.....	603
Baltimore & O. Tel. Co., Western U.		Centennial Mut. L. Ass'n, Eggleston	
Tel. Co. v.....	660	v.....	201
Bank of the Metropolis v. First Nat.		Central R. Co., Dinsmore v.....	153
Bank.....	301	Chapman, Allison v.....	488
Barlow v. Loomis.....	677	Charley A. Reed, The.....	111
Barney, Green v.....	420	Charlotte Vanderbilt, The.....	219
Bartlett v. His Imperial Majesty, etc.	346	Chas. E. Soper, The.....	844
Bauer, Heller v.....	96	Chesman, United States v.....	497
B. B. Saunders, The, (two cases,)...	118	Chicago Music Co. v. J. W. Butler	
Bell v. Noonan.....	225	Paper Co.....	758
Bell v. U. S. Stamping Co.....	312	Chicago, M. & St. P. Ry. Co. v. City	
Belle of Oregon, The.....	924	of Sabula.....	177
Bemis & Call Hardware & Tool Co.,		Chicago, M. & St. P. Ry. Co. v.	
Tower v.....	498	Stewart.....	5
Benedict v. St. Joseph & W. R. Co..	173	Chicago Tire & Spring Works Co. v.	
Berlin & Jones Envelope Co., Reay v.	311	Spaulding.....	412

v. 19—FED.

(xi)

	Page		Page
Child v. Boston & Fairhaven I. Works	258	Ella B., The	793
Chotard, Freidler v.	227	Elvine, The	528
Cincinnati S. Ry., Trustees of, v. Guenther	395	Empire, The	558
City of Baton Rouge, The	461	Estes v. Spain	714
City of Lincoln, The	460	Evans v. State Nat. Bank	676
City of Troy, The	111	Evans, United States v.	912
Cladin, Tuttle v.	599	Evening Post Ass'n, Brainard v.	422
Clarendon, Borough of, Torpedo Co. v.	231	Excellenzen Sibbern, The, Lewy v.	536
Clews, Nott v.	145	Excelsior, The, Baker Salvage Co. v.	436
C. N. Johnson, The	782	Exchange Nat. Bank v. Miller	372
Coghlan v. Stetson	727	Fairbanks v. Spaulding	416
Cole v. City of La Grange	871	Ferry v. Town of Westfield	155
Colgate v. Western U. Tel. Co.	828	Field v. Ireland	835
Colina, The	131	First Nat. Bank, Bank of the Me-tropolis v.	301
Collins v. Davidson	83	Fish-wheel Case, The	643
Col. Adams, The	795	Fisk, Fogg v.	235
Colorado Land & Mineral Co., Cræsus M., M. & S. Co. v.	78	Fitzpatrick, Hendryx v.	810
Cooke, In re	89	Flagler, Flagler Engraving Mach. Co. v., (two cases),	468
Corozal, The	635	Flagler Engraving Mach. Co. v. Flagler, (two cases),	468
Coughlin v. The Rheola	926	Fletcher v. New Orleans & N. E. R. Co.	731
Credit Lyonnais, The	123	Fogg v. Fisk	235
Cræsus M., M. & S. Co. v. Colo. L. & Mineral Co.	78	Francis, Brown v.	678
Croswell v. Mercantile Mut. Ins. Co.	24	Francis, Spink v.	670, 678
Curtis Park, The	797	Francis, Williams v.	670
Cutter v. Whittier	145	Frank C. Barker, The	332
Daniel Steinman, The	918	Frazier, Nicodemus v.	260
Dauntless, The	798	Fredericks, Davis v.	99
Davidson, Collins v.	83	Freidler v. Chotard	227
Davis v. Duncan	477	Frelinghuysen v. Baldwin	49
Davis v. Fredericks	99	Frost, Ashuelot Sav. Bank v.	237
Davis v. Smith	823	Fryer v. Maurer	756
Dennis, Perkins v.	145	Garden City, The	529
Dennis, J. W., The	799	Geiser, The	877
Desmond v. City of Jefferson	483	Giant Powder Co. v. Safety Nitro Powder Co.	509
Dillard v. Paton	619	Gibbs v. Hoefner	323
Dills, Hull v.	657	Giles, Scobel v.	224
Dinsmore v. Central R. Co.	153	Gill, Boyd v.	145
Donahue v. Roberts	863	Globe Nail Co. v. U. S. Horse Nail Co., (two cases),	819
Doty v. Jewett	337	Gloucester Isinglass & Glue Co. v. Brooks	426
Dow, Memphis & L. R. R. Co. v.	388	Gold & Stock Tel. Co. v. Pearce	419
Doyle v. Spaulding	744	Gove v. Judson	523
Dryfoos v. Wiese	315	Graham, Duke v.	647
Duke v. Graham	647	Green v. Barney	420
Dull, Bradley v.	913	Green, Matthews v.	649
Duncan v. Shaw	521	Gronn v. Woodruff	143
Duncan, Davis v.	477	Guenther, Trustees of the Cin. S. Ry. v.	395
Dundee Mort., T. I. Co. v. School-dist. No. 1	359	Halkyard, Smith v.	602
Durant, Hazard v., (two cases),	471	Hall v. City of New Orleans	870
East Tenn. V. & G. R. Co. v. R. R. Com. of Tenn.	679	Hall, Munson v.	320
Echo, The	453	Hampton v. Truckee Canal Co.	1
Eggleston v. Centennial Mut. L. Ass'n	201	Hartford, etc., Ins. Co., Bradley v.	246
Elgin Watch Co. v. Spaulding	411	Hartford, P. & F. R. Co., Mason v.	53
Elkins Manuf'g & Gas Co., Kirk v.	417		

	Page		Page
Hatch, Wallamet Iron Bridge Co. v.	347	Leahy v. Spaulding	417
Hawkins, Blake v.	204	Lee, Brown v.	630
Hazard v. Durant, (two cases,)	471	Leland, The	771
Headley, Roemer v.	205	Leo v. Union Pac. Ry. Co.	283
Heller v. Bauer	96	Leonard v. Whitwill	547
Hendryx v. Fitzpatrick	810	Leong Yick Dew, In re	490
Hicks v. Otto	749	Letchworth, In re	873
Himmer, Time Tel. Co. v.	322	Lewy, Astrup v.	536
Hoefner, Gibbs v.	323	Lewy v. The Excellenzen Sibbern	536
Holliday, Reed v.	325	Lloyd v. Miller	915
Home Mut. Ins. Co., Spare v.	14	Loomis, Barlow v.	677
Houge v. Woodruff	136	Loring, Baker v.	127
Howard, Adams v.	317	Louchheim, Pollok v.	465
Howland Coal & I. Works, Well-		Louisville & N. R. Co. v. R. R. Com.	
man v.	51	of Tenn.	679
Hull v. Dills	657	Louisville & Nashville R. Co., War-	
		ing v.	863
Illingworth v. Spaulding	744	Lowe, In re	589
Imogene M. Terry, The	463	Luckenback, The B.	847
Ireland, Field v.	835	Lung Chung v. Northern Pac. Ry.	
Iron-clad Manuf'g Co., Matthews v.	321	Co.	254
		Lyman v. Maypole	735
James P. Donaldson, The	264		
Jay Cooke & Co., In re	88	MacNaughton v. South. Pac. C. R.	
Jay Gould, The	765	Co.	881
Jefferson, City of, Desmond v.	483	Maggie Ellen, The	221
Jenks, Swift v.	641	Malvin v. Wert	721
Jennie B. Gilkey, The	127	Manchester & K. R. R., Bruce v.	342
Jersey City, First Nat. Bank of, Bank		Manhasset, The	430
of Metrop. v.	301	Marble, Vermont Farm. Mach. Co. v.	307
Jessup, In re	94	Marina, The	760
Jewett, Doty v.	337	Marlor v. Texas & P. Ry. Co.	867
Johnson, C. N., The	782	Martin v. Baldwin	340
Jones v. Vestry of Trinity Parish	59	Maryland, The	551
Jones, Nichols v.	855	Mason v. Hartford, P. & F. R. Co.	53
Joseph W. Gould, The	785	Matthews v. Green	649
Judge v. Anderson	885	Matthews v. Iron-clad Manuf'g Co.	321
Judson, Gove v.	523	Matthews v. Spangenberg	823
J. W. Butler Paper Co., Chicago		Maurer, Fryer v.	756
Music Co. v.	758	Mayor, etc., of New York, Mun-	
J. W. Dennis, The	799	son v.	313
		Maypole, Lyman v.	735
Kane, United States v.	42	McArthur v. Brooklyn Ry. Supply	
Kehlor, Kufeke v.	198	Co.	263
Keller, United States v.	633	McCord, Williams v.	643
Kellog v. Richardson	70	Memphis, C. & N. W. Ry. Co., Walserv.	152
Kennedy v. City of Sacramento	580	Memphis & L. R. R. Co. v. Dow	388
Kirby, Pentlarge v., (three cases,)	501	Memphis & Ohio R. Pkt. Co., Whit-	
Kirby Bung Manuf'g Co., Pentlarge		tenton Manuf'g Co. v.	273
v., (three cases,)	501	Mentz, Town of, Rich v.	725
Kirk v. Elkins Manuf'g & Gas Co.	417	Mercantile Mut. Ins. Co., Croswell v.	24
Kroft, Bradley v.	295	Mercantile Mut. Ins. Co., Red Wing	
Kropff v. Poth	200	Mills v.	115
Kufeke v. Kehlor	198	Merrell, In re	874
		Merriam, Searls v.	815
La Grange, City of, Cole v.	871	Merritt, Oelberman v.	408
La Grange, City of, Sanford v.	871	Middleton Paper Co. v. Rock R. Pa-	
Lahaina, The	923	per Co.	252
Lake Shore & M. S. Ry., Simpkins v.	802	Miller, Exchange Nat. Bank v.	372
Lane, United States v.	910	Miller, Lloyd v.	915
Lapp v. Van Norman	406	Mississippi Mills Co. v. Ranlett	191
Lawnsdale, West Portland Home-		Missouri River, F. S. & G. R. Co. v.	
stead Ass'n v.	291	United States	66

	Page		Page
Moody, Newman v.	858	Pentlarge v. Kirby Bung Manuf'g	
Moore v. North River Const. Co.	803	Co., (three cases,)	501
Moore, United States v.	39	Pentlarge v. Pentlarge	817
Morgan v. Rogers	596	Perkins v. Dennis	145
Mosher v. St. Louis, I. M. & S. Ry.		Phelps v. Canada Cent. R. Co.	801
Co.	849	Philadelphia & R. R. Co. v. Pollock	401
Mowat v. Brown	87	Pollock, Philadelphia & R. R. Co. v.	401
Muller v. Norton	719	Pollok v. Louchheim	465
Mulville v. Adams	887	Ponca, The	223
Munson v. Hall	320	Poole v. Thatcherdeft	49
Munson v. Mayor, etc., of New York	313	Poth, Kropff v.	200
Muskegon Nat. Bank v. N. W. Mut.		Pride of America, The	607
L. Ins. Co.	405	Prinz Georg, The	653
Nashua & L. R. Corp. v. Boston &		P. Smith, The	551
L. R. Corp.	804	Purcell v. Baltimore, C. & R. Steam-	
National Car-brake Shoe Co. v. Terre		boat Co	56
Haute Car, etc., Co.	514	Quaker City, The	141
National Tel. Co., Western U. Tel.		Querini Stamphalia, The	123
Co. v.	561	Railroad Com. of Tenn., East Tenn.,	
New Bedford, City of, Shaw Relief		V. & G. R. Co. v.	679
Valve Co. v.	753	Railroad Com. of Tenn., Louisville	
New Hampshire Land Co. v. Tilton.	73	& N. R. Co. v.	679
New Orleans, City of, Carter v.	659	Ranlett, Mississippi Mills Co. v.	191
New Orleans, City of, Hall v.	870	Ray v. One Block of Marble	525
New Orleans & N. E. R. Co.,		Rayer & Lincoln Seaming-Mach. Co.	
Fletcher v.	731	v. Amer. Pr. Co.	428
New York & N. E. R. Co., Brassey		Raynor, Reay v.	308
v.	663	Reay v. Berlin & Jones Envelope Co.	311
Newman v. Moody	858	Reay v. Raynor	308
Newman, Roemer v.	98	Red Wing Mills v. Mercantile Mut.	
Nichols v. Jones	855	Ins. Co.	115
Nicodemus v. Frazier	260	Reed v. Holliday	325
Noonan, Bell v.	225	Rheola, The	926
North Riv. Const. Co., Moore v.	803	Rheola, The, Coughlin v.	926
Northern Pac. Ry. Co., Buchanan v.	254	Rich v. Town of Mentz	725
Northern Pac. Ry. Co., Lung Chung		Richardson, Kellog v.	70
v.	254	Robb, In re	26
Northwestern Mut. L. Ins. Co., Mus-		Roberts, Donahue v.	863
kegon Nat. Bank v.	405	Rock River Paper Co., Middleton	
Norton, Muller v.	719	Paper Co. v.	252
Nott v. Clews	145	Rockaway, The	449
Odell v. Baltimore, C. & R. Steam-		Roemer v. Headley	205
boat Co.	56	Roemer v. Newman	98
Oelberman v. Merritt	408	Rogers, Morgan v.	596
Oluf, The	459	Rose v. Stephens & Condit Transp.	
One Block of Marble, Ray v.	525	Co	808
One Wire Rope Cable, Blowers v.	444	Rude, Westcott v.	830
O'Neill, United States v.	567	Russell, United States v.	591
Ontonagon, The	800	Russell Sage, The	792
Oregon Ry. & Nav. Co., Wells, Fargo		Rust, Texas & St. L. Ry. Co. v.	239
& Co. v.	20	Sabula, City of, Chicago, M. & St. P.	
Osseo, The	844	Ry. Co. v.	177
Otto, Hicks v.	749	Sacramento, City of, Kennedy v.	580
Oyster, Albright v.	849	Safety Nitro Powder Co., Giant	
Pacific Mut. L. Ins. Co., Sensender-		Powder Co. v.	509
fer v.	68	St. Joseph & W. R. Co., Benedict v.	173
Paton, Dillard v.	619	St. Lawrence, The	328
Pearce, Gold & Stock Tel. Co. v.	419	St. Louis, H. & K. R. Co. Blair v.	861
Peer of the Realm, The	216	St. Louis, I. M. & S. Ry. Co., Mo-	
Pegasus, The	46	sher v.	849
Pentlarge v. Kirby, (three cases,) ...	501		

	Page		Page
Bally, The.....	335	Stewart, Chicago, M. & St. P. Ry. Co. v.....	5
Sanford v. City of La Grange.....	871	Stowe, United States v.....	807
Santiago de Cuba, The, v. The Scots Greys.....	213	Sullivan, Balfour v.....	578
Santiago de Cuba, The, The Scots Greys v.....	213	Sultan of Turkey, Bartlett v.....	346
Sawyer, Berry v.....	286	Survivor, The.....	449
Schalscha v. Sutro.....	319	Sutro, Schalscha v.....	319
School-dist. No. 1, Dundee Mortg., T. I. Co. v.....	359	Swan, The.....	455
Schreyer, In re.....	732	Swift v. Jenks.....	641
Scobel v. Giles.....	224	Taft v. Steere.....	600
Scots Greys, The, v. The Santiago de Cuba.....	213	Terre Haute Car & Manuf'g Co., Nat. Car-brake Shoe Co. v.....	514
Scots Greys, The, The Santiago de Cuba v.....	213	Texas & P. Ry. Co., Marlor v.....	867
Scott v. Baltimore, C. & R. Steam-boat Co.....	56	Texas & St. L. Ry. Co. v. Rust.....	239
Searls v. Merriam.....	815	Thatcherdeft, Poole v.....	49
Sensenderfer v. Pac. Mut. L. Ins. Co.....	68	Thompson, Aultman v.....	490
Sharp v. Whiteside.....	150	Tilton, New Hampshire Land Co. v.....	73
Sharp v. Whiteside.....	156	Time Tel. Co. v. Himmer.....	322
Sharp, Whiteside v.....	150	Titania, The, (two cases,).....	101
Sharp, Whiteside v.....	156	Torpedo Co. v. Borough of Clarendon.....	231
Shaw, Duncan v.....	521	Tower v. Bemis & Call Hardware & Tool Co.....	498
Shaw Relief Valve Co. v. City of New Bedford.....	753	Town of Westfield, Ferry v.....	155
Simpkins v. Lake Shore & M. S. Ry.....	802	Trinity Parish, Vestry of, Jones v.....	59
Smith v. Halkyard.....	602	Truckee Canal Co., Hampton v.....	1
Smith v. Standard L. M. Co.....	825	Tung Yeong, In re.....	184
Smith v. Standard L. M. Co.....	826	Tuttle v. Claflin.....	599
Smith, Davis v.....	823	Two Hundred and Ninety-two Thousand Three Hundred Dollars, White v.....	848
Smith, United States Dairy Co. v.....	97	Ullock, The.....	207
Smith, P., The.....	551	Union Mut. L. Ins. Co. v. Stevens.....	671
Snow, Winne v.....	507	Union Pac. Ry. Co., Leo v.....	283
South. Pac. C. R. Co., MacNaughton v.....	881	United States v. Auffmordt.....	893
Southfield, The.....	841	United States v. Chesman.....	497
Spain, Estes v.....	714	United States v. City of Alexandria.....	609
Spain, The, Burns v.....	880	United States v. City of Alexandria.....	614
Spangenberg, Matthews v.....	823	United States v. Evans.....	912
Spare v. Home Mut. Ins. Co.....	14	United States v. Kane.....	42
Spaulding, Chicago Tire & Spring Works Co. v.....	412	United States v. Keller.....	633
Spaulding, Doyle v.....	744	United States v. Lane.....	910
Spaulding, Elgin Watch Co. v.....	411	United States v. Moore.....	39
Spaulding, Fairbanks v.....	416	United States v. O'Neill.....	567
Spaulding, Illingworth v.....	744	United States v. Russell.....	591
Spaulding, Leahy v.....	417	United States v. Stowe.....	807
Spaulding, Wilson v.....	304	United States v. White.....	723
Spaulding, Wilson v.....	413	United States, Missouri River, F. S. & G. R. Co. v.....	66
Spink v. Francis.....	670, 678	United States ex rel. Spink.....	631
Spink, United States ex rel.....	631	United States ex rel. Williams.....	631
Stadler v. Carroll.....	721	United States Dairy Co. v. Smith.....	97
Standard L. Mach. Co., Smith v.....	825	United States Horse Nail Co., Globe Nail Co. v., (two cases,).....	819
Standard L. M. Co., Smith v.....	826	United States Stamping Co., Bell v.....	312
State Nat. Bank, Evans v.....	676	Vaderland, The.....	527
Steere, Taft v.....	600	Van Norman, Lapp v.....	406
Stephens & Condit Transp. Co., Rose v.....	808	Vermont Farm. Mach. Co. v. Marble.....	307
Stetson, Coghlan v.....	727	Vestry of Trinity Parish, Jones v.....	59
Stevens, Union Mut. L. Ins. Co. v.....	671	Victor v. Arthur.....	250
Stevenson v. Woodhull Bros.....	575		

	Page		Page
Wallamet Iron Bridge Co. v. Hatch.	347	Whiteside v. Sharp.....	150
Walser v. Memphis, C. & N. W. Ry. Co.....	152	Whiteside v. Sharp.....	156
Varing v. Louisville & N. R. Co.....	863	Whiteside, Sharp v.....	150
Washburn, B. K., The.....	788	Whiteside, Sharp v.....	156
Washburn & Moen Manuf'g Co. v. Wilson.....	233	Whittenton Manuf'g Co. v. Memphis & O. R. Pkt. Co.....	273
Wellman v. Howland Coal & Iron Works.....	51	Whittier, Cutter v.....	145
Wells, Fargo & Co. v. Oregon Ry. & Nav. Co.....	20	Whitwill, Leonard v.....	547
Wert, Malvin v.....	721	Wiese, Dryfoos v.....	315
West Portland Homestead Ass'n v. Lawnsdale.....	291	Williams v. Francis.....	670
Westcott v. Rude.....	830	Williams v. McCord.....	644
Western U. Tel. Co. v. B. & O. Tel. Co.	660	Williams, United States ex rel.....	631
Western U. Tel. Co. v. Nat. Tel. Co.	561	Wilson v. Spaulding.....	304
Western U. Tel. Co., Colgate v.....	828	Wilson v. Spaulding.....	413
Westfield, Town of, Ferry v.....	155	Wilson, Washburn & Moen Manuf'g Co. v.....	233
White v. Two Hundred and Ninety- two Thousand Three Hundred Dollars.....	848	Winne v. Snow.....	507
White, United States v.....	723	Wong Town On, Cahn v.....	424
		Woodhull Bros., Stevenson v.....	575
		Woodruff, Gronn v.....	143
		Woodruff, Houge v.....	136
		Worley, Ex parte.....	586
		Worthington and Davis, The.....	836

CASES REPORTED.

27.

ARRANGED UNDER THEIR RESPECTIVE CIRCUITS AND DISTRICTS.

FIRST CIRCUIT.

CIRCUIT COURT, D. MASSACHUSETTS.

American Printing Co., Rayer & Lincoln S. M. Co. v.	428
Baker v. Loring.	127
Barney, Green v.	420
Bemis & Call Hardware & Tool Co., Tower v.	498
Boston & Fairhaven Iron Works, Child v.	258
Boston & L. R. Corp., Nashua & L. R. Corp. v.	804
Brooks, Gloucester Isinglass & Glue Co. v.	426
Child v. Boston & Fairhaven I. Works.	258
Davis v. Smith.	823
Durant, Hazard v., (two cases,)	471
Fitzpatrick, Hendryx v.	810
Flagler, Flagler Engraving Mach. Co. v., (two cases,)	468
Flagler Engraving Mach. Co. v. Flagler, (two cases,)	468
Globe Nail Co. v. U. S. Horse Nail Co., (two cases,)	819
Gloucester Isinglass & Glue Co. v. Brooks.	426
Green v. Barney.	420
Hartford, P. & F. R. Co., Mason v.	53
Hazard v. Durant, (two cases,)	471
Hendryx v. Fitzpatrick.	810
Jennie B. Gilkey, The.	127
Loring, Baker v.	127
Mason v. Hartford, P. & F. R. Co., Nashua & L. R. Corp. v. Boston & L. R. Corp.	804
New Bedford, City of, Shaw Relief Valve Co. v.	753
Rayer & Lincoln Seaming-Mach Co. v. Amer. Pr. Co.	428
Shaw Relief Valve Co. v. City of New Bedford.	753
Smith, Davis v.	823

v.19 FED.— b

Page

Tower v. Bemis & Call Hardware & Tool Co.	498
United States Horse Nail Co., Globe Nail Co. v., (two cases,)	819

Page

CIRCUIT COURT, D. NEW HAMPSHIRE.

Ashuelot Sav. Bank v. Frost.	237
Bruce v. Manchester & K. R. R.	342
Frost, Ashuelot Sav. Bank v.	237
Manchester & K. R. R., Bruce v.	342
New Hampshire Land Co. v. Tilton.	73
Tilton, New Hampshire Land Co. v.	73

CIRCUIT COURT, D. RHODE ISLAND.

Halkyard, Smith v.	602
Morgan v. Rogers.	596
Rogers, Morgan v.	596
Smith v. Halkyard.	602
Steere, Taft v.	600
Taft v. Steere.	600

SECOND CIRCUIT.

CIRCUIT COURT, D. CONNECTICUT.

Brainard v. Evening Post Ass'n	422
Brassey v. New York & N. E. R. Co.	663
Evening Post Ass'n, Brainard v.	422
New York & N. E. R. Co., Brassey v.	663
Pegasus, The.	46

CIRCUIT COURT, E. D. NEW YORK.

Lake Shore & M. S. Ry., Simpkins v.	802
Pentlarge v. Pentlarge.	817
Simpkins v. Lake Shore & M. S. Ry.	802

DISTRICT COURT, E. D. NEW YORK.

Aline, The.	875
------------------	-----

(xvii)

[illegible]

	Page
Rheola, The, Coughlin v.....	926
Rose v. Stephens & Condit Transp. Co.....	808
Schalscha v. Sutro.....	319
Searls v. Merriam.....	815
Smith v. Standard L. M. Co.....	826
Smith v. Standard L. M. Co.....	826
Smith, United States Dairy Co. v....	97
Spangenberg, Matthews v.....	823
Standard L. M. Co., Smith v.....	825
Standard L. M. Co., Smith v.....	826
Stephens & Condit Transp. Co., Rose v.....	808
Stetson, Ooghlan v.....	727
Sultan of Turkey, Bartlett v.....	346
Sutro, Schalscha v.....	319
Texas & P. Ry. Co., Marlbor v.....	867
Time Tel. Co. v. Himmer.....	322
Tuttle v. Glavin.....	699
Union Pac. Ry. Co., Leo v.....	283
United States Dairy Co. v. Smith....	97
United States Stamping Co., Bell v.	312
Vietor v. Arthur.....	250
Washburn & Moen Manuf'g Co. v. Wilson.....	233
Western U. Tel. Co. v. B. & O. Tel. Co.	660
Western U. Tel. Co. v. Nat. Tel. Co.	561
Western U. Tel. Co., Colgate v.....	828
Whittier, Cutter v.....	145
Wiese, Dryfoos v.....	315
Wilson, Washburn & Moen Manuf'g Co. v.....	233

DISTRICT COURT, S. D. NEW YORK.

Alicia A. Washburn, The.....	788
Alpe, The.....	139
Astrup v. Lewy.....	536
Auffmordt, United States v.....	893
B. B. Saunders, The, (two cases,)...	118
B. K. Washburn, The.....	788
Blowers v. One Wire Rope Cable...	444
Charley A. Reed, The.....	111
Charlotte Vanderbilt, The.....	219
City of Troy, The.....	111
Col. Adams, The.....	795
Credit Lyonnais, The.....	123
Duncan v. Shaw.....	521
Echo, The.....	453
Elvine, The.....	528
Excellenzen Sibbern, The, Lewy v....	536
Garden City, The.....	529
Gove v. Judson.....	523
Gronn v. Woodruff.....	143
Houge v. Woodruff.....	136
Jessup, In re.....	94
Judson, Gove v.....	523
Kirby, Pentlarge v., (three cases,)...	501
Kirby Bung Manuf'g Co., Pentlarge v., (three cases,).....	501
Leonard v. Whitwill.....	547
Lewy v. The Excellenzen Sibbern...	536
Lewy, Astrup v.....	536

Maryland, The.....	551
Mercantile Mut. Ins. Co., Red Wing Mills v.....	115
One Block of Marble, Ray v.....	525
One Wire Rope Cable, Blowers v....	444
Pentlarge v. Kirby, (three cases,)...	501
Pentlarge v. Kirby Bung Manuf'g Co., (three cases,).....	501
Quaker City, The.....	141
Querini Stamphalia, The.....	123
Ray v. One Block of Marble.....	525
Red Wing Mills v. Mercantile Mut. Ins. Co.....	115
Rockaway, The.....	449
Saunders, B. B., The.....	118
Schreyer, In re.....	732
Shaw, Duncan v.....	521
Smith, P., The.....	551
Snow, Winne v.....	507
Survivor, The.....	449
Swan, The.....	455
Titania, The, (two cases,).....	101
United States v. Auffmordt.....	893
Vaderland, The.....	527
Washburn, B. K., The.....	788
Whitwill, Leonard v.....	547
Winne v. Snow.....	507
Woodruff, Gronn v.....	143
Woodruff, Houge v.....	136

CIRCUIT COURT, D. VERMONT.

Barlow v. Loomis.....	677
Loomis, Barlow v.....	677
Marble, Vermont Farm. Mach. Co. v.	307
Vermont Farm. Mach. Co. v. Marble.	307

THIRD CIRCUIT.

CIRCUIT COURT, D. NEW JERSEY.

Allison v. Chapman.....	488
Central R. Co., Dinsmore v.....	153
Chapman, Allison v.....	488
Dinsmore v. Central R. Co.....	153
Doyle v. Spaulding.....	744
Headley, Roemer v.....	205
Illingworth v. Spaulding.....	744
Kropff v. Poth.....	200
Newman, Roemer v.....	98
Poth, Kropff v.....	200
Roemer v. Headley.....	205
Roemer v. Newman.....	98
Spaulding, Doyle v.....	744
Spaulding, Illingworth v.....	744

DISTRICT COURT, D. NEW JERSEY.

Frank C. Barker, The.....	332
Imogene M. Terry, The.....	463

	Page		Page
Marina, The.....	760	Nicodemus v. Frazier.....	260
CIRCUIT COURT, E. D. PENNSYLVANIA.		Odell v. Baltimore, C. & R. Steam-boat Co.....	56
Bradley v. Hartford Steam-boller I. & Ins. Co.....	246	Purcell v. Baltimore, C. & R. Steam-boat Co.....	56
Elkins Manuf'g & Gas Co., Kirk v..	417	Scott v. Baltimore, C. & R. Steam-boat Co.....	56
Green, Matthews v.....	649	DISTRICT COURT, D. MARYLAND.	
Hartford, etc., Ins. Co., Bradley v..	246	Colina, The.....	131
Kirk v. Elkins Manuf'g & Gas Co..	417	CIRCUIT COURT, E. D. NORTH CAROLINA.	
Matthews v. Green.....	649	Blake v. Hawkins.....	204
Philadelphia & R. R. Co. v. Pollock	401	Hawkins, Blake v.....	204
Pollock, Philadelphia & R. R. Co. v.	401	CIRCUIT COURT, W. D. NORTH CAROLINA.	
Santiago de Cuba, The, v. The Scots Greys.....	213	Jones v. Vestry of Trinity Parish...	59
Santiago de Cuba, The, The Scots Greys v.....	213	Trinity Parish, Vestry of, Jones v..	59
Scots Greys, The, v. The Santiago de Cuba.....	213	DISTRICT COURT, W. D. NORTH CAROLINA.	
Scots Greys, The, The Santiago de Cuba v.....	213	Worley, Ex parte.....	586
DISTRICT COURT, E. D. PENNSYLVANIA.		CIRCUIT COURT, E. D. VIRGINIA.	
Cooke, In re.....	89	Alexandria, City of, United States v. 609	
Jay Cooke & Co., In re.....	88	Alexandria, City of, United States v. 614	
Sally, The.....	335	United States v. City of Alexandria. 609	
CIRCUIT COURT, W. D. PENNSYLVANIA.		United States v. City of Alexandria. 614	
Berry v. Sawyer.....	286	DISTRICT COURT, E. D. VIRGINIA.	
Bradley v. Dull.....	913	Baker Salvage Co. v. The Excelsior. 436	
Clarendon, Borough of, Torpedo Co. v.....	231	Excelsior, The, Baker Salvage Co. v. 436	
Dull, Bradley v.....	913	Manhasset, The.....	430
Holliday, Reed v.....	325	CIRCUIT COURT, D. WEST VIRGINIA.	
Lloyd v. Miller.....	915	Keller, United States v.....	633
Miller, Lloyd v.....	915	United States v. Keller.....	633
Reed v. Holliday.....	325	FIFTH CIRCUIT.	
Sawyer, Berry v.....	286	CIRCUIT COURT, N. D. ALABAMA.	
Torpedo Co. v. Borough of Clarendon.....	231	Jones, Nichols v.....	855
DISTRICT COURT, W. D. PENNSYLVANIA.		Moody, Newman v.....	858
Joseph W. Gould, The.....	785	Newman v. Moody.....	858
St. Lawrence, The.....	328	Nichols v. Jones.....	855
FOURTH CIRCUIT.		CIRCUIT COURT, S. D. ALABAMA.	
CIRCUIT COURT, D. MARYLAND.		Louisville & N. R. Co., Waring v... 863	
Baltimore, C. & R. Steam-boat Co., Odell v.....	56	Waring v. Louisville & N. R. Co.... 863	
Baltimore, C. & R. Steam-boat Co., Purcell v.....	56		
Baltimore, C. & R. Steam-boat Co., Scott v.....	56		
Frazier, Nicodemus v.....	260		

	Page
DISTRICT COURT, S. D. ALABAMA.	
Alabama, The	544

CIRCUIT COURT, E. D. LOUISIANA.	
Ashland, The.....	386
Ashland, The.....	651
Brown v. Francis.....	678
Carter v. City of New Orleans	659
City of Baton Rouge, The.....	461
City of Lincoln, The.....	460
Evans v. State Nat. Bank.....	676
Fletcher v. New Orleans & N. E. R. Co.....	731
Francis, Brown v.....	678
Francis, Spink v.....	670, 678
Francis, Williams v.....	670
Hall v. City of New Orleans.....	870
Mississippi Mills Co. v. Ranlett.....	191
New Orleans, City of, Carter v.....	659
New Orleans, City of, Hall v.....	870
New Orleans & N. E. R. Co., Fletcher v.....	731
Oluf, The.....	459
Peer of the Realm, The	216
Ranlett, Mississippi Mills Co. v.....	191
Spink v. Francis.....	670, 678
Spink, United States ex rel.....	631
State Nat. Bank, Evans v.....	676
United States ex rel. Spink.....	631
United States ex rel. Williams.....	631
Williams v. Francis.....	670
Williams, United States ex rel.....	631

DISTRICT COURT, E. D. LOUISIANA.	
Corozal, The.....	655
Prinz Georg, The.....	653

CIRCUIT COURT, W. D. LOUISIANA.	
Chotard, Freidler v	227
Freidler v. Chotard.....	227

DISTRICT COURT, N. D. MISSISSIPPI.	
Brown v. Lee.....	630
Duke v. Graham.....	647
Graham, Duke v.....	647
Lee, Brown v.....	630

DISTRICT COURT, N. D. MISSISSIPPI, W. D.	
Estes v. Spain.....	714
Spain, Estes v	714

CIRCUIT COURT, S. D. MISSISSIPPI.	
Davis v. Duncan.....	477
Duncan, Davis v.....	477

CIRCUIT COURT, N. D. TEXAS.	
Malvin v. Wert.....	721
Muller v. Norton.....	719
Norton, Muller v.....	719
Wert, Malvin v.....	721

CIRCUIT COURT, S. D. TEXAS.	
Carroll, Stadler v.....	721
Stadler v. Carroll.....	721

CIRCUIT COURT, W. D. TEXAS.	
Desmond v. City of Jefferson.....	483
Jefferson, City of, Desmond v.....	483
Stevenson v. Woodhull Bros.....	575
Woodhull Bros., Stevenson v.....	575

DISTRICT COURT, W. D. TEXAS.	
Russell, United States v.....	591
United States v. Russell.....	591

SIXTH CIRCUIT.

CIRCUIT COURT, D. KENTUCKY.	
Howland Coal & I. Works, Wellman v.....	51
Wellman v. Howland Coal & Iron Works.....	51

DISTRICT COURT, E. D. MICHIGAN.	
James P. Donaldson, The.....	264
Empire, The	558
Jay Gould, The.....	765
Johnson, C. N., The.....	782
Worthington and Davis, The.....	836

CIRCUIT COURT, S. D. OHIO, W. D.	
Exchange Nat. Bank v. Miller.....	372
Miller, Exchange Nat. Bank v.....	372

CIRCUIT COURT, E. D. TENNESSEE.	
Cincinnati S. Ry., Trustees of, v. Guenther.....	395
Guenther, Trustees of the Cin. S. Ry. v.....	395

CIRCUIT COURT, E. D. TENNESSEE, S. D.	
Sharp v. Whiteside.....	150
Sharp v. Whiteside.....	156
Sharp, Whiteside v.....	150

	Page
Sharp, Whiteside v.....	156
Whiteside v. Sharp.....	150
Whiteside v. Sharp.....	156
Whiteside, Sharp v.....	150
Whiteside, Sharp v.....	156

CIRCUIT COURT, M. D. TENNESSEE.

East Tenn., V. & G. R. Co. v. R. R. Com. of Tenn.....	679
Louisville & N. R. Co. v. R. R. Com. of Tenn.....	679
Railroad Com. of Tenn., East Tenn., V. & G. R. Co. v.....	679
Railroad Com. of Tenn., Louisville & N. R. Co. v.....	679

CIRCUIT COURT, W. D. TENNESSEE.

Dillard v. Paton.....	619
Memphis & Ohio R. Pkt. Co., Whittenton Manuf'g Co. v.....	273
Paton, Dillard v.....	619
Whittenton Manuf'g Co. v. Memphis & O. R. Pkt. Co.	273

SEVENTH CIRCUIT.

CIRCUIT COURT, N. D. ILLINOIS.

Butler, J. W., Paper Co., Chicago Music Co. v.....	758
Chicago Music Co. v. J. W. Butler Paper Co.....	758
Chicago Tire & Spring Works Co. v. Spaulding.....	412
Elgin Watch Co. v. Spaulding.....	411
Fairbanks v. Spaulding.....	416
Leahy v. Spaulding.....	417
Louchheim, Pollok v.....	465
Lyman v. Maypole.....	735
Maypole, Lyman v.....	735
Pollok v. Louchheim.....	465
Spaulding, Chicago Tire & Spring Works Co. v.....	412
Spaulding, Elgin Watch Co. v.....	411
Spaulding, Fairbanks v.....	416
Spaulding, Leahy v.....	417
Spaulding, Wilson v.....	304
Spaulding, Wilson v.....	413
Wilson v. Spaulding.....	304
Wilson v. Spaulding.....	413

DISTRICT COURT, N. D. ILLINOIS.

American Eagle, The.....	879
Leland, The.....	771
Moore, United States v.....	39
Stevens, Union Mut. L. Ins. Co. v..	671

Union Mut. L. Ins. Co. v. Stevens..	671
United States v. Moore.....	39

CIRCUIT COURT, D. INDIANA.

Dills, Hull v.....	657
Hull v. Dills.....	657
National Car-brake Shoe Co. v. Terre Haute Car, etc., Co.....	514
Rude, Westcott v.....	830
Terre Haute Car & Manuf'g Co., Nat. Car-brake Shoe Co. v.....	514
Westcott v. Rude.....	830

DISTRICT COURT, D. INDIANA.

Lowe, In re.....	589
------------------	-----

CIRCUIT COURT, E. D. WISCONSIN.

Lane, United States v.....	910
O'Neill, United States v.....	567
United States v. Lane.....	910
United States v. O'Neill.....	567

CIRCUIT COURT, W. D. WISCONSIN.

Bradley v. Kroft.....	295
Ferry v. Town of Westfield.....	155
Kroft, Bradley v.....	295
Middleton Paper Co. v. Rock R. Paper Co.....	252
Rock River Paper Co., Middleton Paper Co. v.....	252
Westfield, Town of, Ferry v.....	155

EIGHTH CIRCUIT.

CIRCUIT COURT, E. D. ARKANSAS.

Rust, Texas & St. L. Ry. Co. v.....	239
Texas & St. L. Ry. Co. v. Rust.....	239

CIRCUIT COURT, D. COLORADO.

Colorado Land & Mineral Co., Cresus M., M. & S. Co. v.....	78
Cresus M., M. & S. Co. v. Colo. L. & Mineral Co.....	78

CIRCUIT COURT, N. D. IOWA, C. D.

Bell v. Noonan.....	225
Noonan, Bell v.....	225

CIRCUIT COURT, N. D. IOWA, E. D.

Chicago, M. & St. P. Ry. Co. v. City of Sabula.....	177
---	-----

	Page
Sabula, City of, Chicago, M. & St. P. Ry. Co. v.....	177

CIRCUIT COURT, D. KANSAS.

Benedict v. St. Joseph & W. R. Co..	173
St. Joseph & W. R. Co., Benedict v.	173

CIRCUIT COURT, D. MINNESOTA.

Anderson, Judge v.....	885
Aultman v. Thompson.....	490
Brown, Mowat v.....	87
Chicago, M. & St. P. Ry. Co. v. Stewart.....	5
Collins v. Davidson.....	83
Crowell v. Mercantile Mut. Ins. Co.	24
Davidson, Collins v.....	83
Judge v. Anderson.....	885
Lapp v. Van Norman.....	406
Mercantile Mut. Ins. Co., Crowell v.	24
Mowat v. Brown.....	87
Poole v. Thatcherdeft.....	49
Stewart, Chicago, M. & St. P. Ry. Co. v.....	5
Thatcherdeft, Poole v.....	49
Thompson, Aultman v.....	490
Van Norman, Lapp v.....	406

DISTRICT COURT, D. MINNESOTA.

Stowe, United States v.....	807
United States v. Stowe.....	807

CIRCUIT COURT, C. D. MISSOURI.

Bauer, Heller v.....	96
Heller v. Bauer.....	96

CIRCUIT COURT, E. D. MISSOURI.

Albright v. Oyster.....	849
Blair v. St. Louis, H. & K. R. Co..	861
Centennial Mut. L. Ass'n, Eggleston v.....	201
Chesman, United States v.....	497
Cole v. City of La Grange.....	871
Donahue v. Roberts.....	863
Eggleston v. Centennial Mut. L. Ass'n.....	201
Kehlor, Kufeke v.....	198
Kufeke v. Kehlor.....	198
La Grange, City of, Cole v.....	871
La Grange, City of, Sanford v.....	871
Memphis, C. & N. W. Ry. Co., Walserv.	152
Mosher v. St. Louis, I. M. & S. Ry. Co.....	849
Oyster, Albright v.....	849
Roberts, Donahue v.....	863
St. Louis, H. & K. R. Co., Blair v..	861

	Page
St. Louis, I. M. & S. Ry. Co., Mosher v.....	849
Sanford v. City of La Grange.....	871
United States v. Chesman.....	497
Walser v. Memphis, C. & N. W. Ry. Co.....	152

CIRCUIT COURT, W. D. MISSOURI, E. D.

Kellog v. Richardson.....	70
Pacific Mut. L. Ins. Co., Sensenderfer v.....	68
Richardson, Kellog v.....	70
Sensenderfer v. Pac. Mut. L. Ins. Co.	68

CIRCUIT COURT, W. D. MISSOURI, W. D.

Missouri River, F. S. & G. R. Co. v. United States.....	66
United States, Missouri River, F. S. & G. R. Co. v.....	66

NINTH CIRCUIT.

CIRCUIT COURT, D. CALIFORNIA.

American R. Bridge Co., Cardwell v.	562
Baldwin, Martin v.....	340
Balfour v. Sullivan.....	578
Cahn v. Wong Town On.....	424
Cardwell v. Amer. R. Br. Co.....	562
Giant Powder Co. v. Safety Nitro Powder Co.....	509
Kennedy v. City of Sacramento.....	580
Leong Yick Dew, In re.....	490
MacNaughton v. South. Pac. C. R. Co.....	881
Martin v. Baldwin.....	340
Robb, In re.....	26
Sacramento, City of, Kennedy v....	580
Safety Nitro Powder Co., Giant Powder Co. v.....	509
South. Pac. C. R. Co., MacNaughton v.....	881
Sullivan, Balfour v.....	578
Wong Town On, Cahn v.....	424

DISTRICT COURT, D. CALIFORNIA.

Evans, United States v.....	912
Tung Yeong, In re.....	184
United States v. Evans.....	912

CIRCUIT COURT, D. NEVADA.

Hampton v. Truckee Canal Co.....	1
Truckee Canal Co., Hampton v.....	1

CIRCUIT COURT, D. OREGON.	Page	DISTRICT COURT, D. OREGON.	Page
Dundee Mort., T. I. Co. v. School-		Buchanan v. Northern Pac. Ry. Co.	254
dist. No. 1.....	359	Bryant, C. D., The.....	603
h-wheel Case, The.....	643	Kane, United States v.....	42
Hatch, Wallamet Iron Bridge Co. v.	347	Lawnsdale, West Portland Home-	
Home Mut. Ins. Co., Spare v.....	14	stead Ass'n v.....	291
McCord, Williams v.....	643	Lung Chung v. Northern Pac. Ry.	
Oregon Ry. & Nav. Co., Wells, Fargo		Co.....	254
& Co. v.....	20	Northern Pacific Ry. Co., Buchan-	
School-dist. No. 1, Dundee Mortg.,		an v.....	254
T. J. Co. v.....	359	Northern Pacific Ry. Co., Lung	
Spare v. Home Mut. Ins. Co.....	14	Chung v.....	254
Wallamet Iron Bridge Co. v. Hatch.	347	Ullock, The.....	207
Wells, Fargo & Co. v. Oregon Ry. &		United States v. Kane.....	42
Nav. Co.....	20	West Portland Homestead Ass'n v.	
Williams v. McCord.....	643	Lawnsdale.....	291

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CASES

ARGUED AND DETERMINED

IN THE

United States Circuit and District Courts.

HAMPTON, Ex'r, etc., v. TRUCKEE CANAL CO.

(Circuit Court, D. Nevada. November 24, 1883.)

JURISDICTION—FORECLOSURE OF MECHANICS' LIENS—SUIT BY ASSIGNEE—AVERMENT AS TO CITIZENSHIP—ACT OF MARCH 3, 1875.

Where the assignee of a mechanic's lien seeks to enforce and foreclose such liens in a circuit court of the United States, it must affirmatively and clearly appear from the bill filed that the court had jurisdiction as to all of the original lien claimants, and where no averment as to the citizenship of some of such claimants is made in an amended bill, it will be presumed that they are citizens of the state where the suit is brought, and the bill will be dismissed for want of jurisdiction.

Suit in Equity to foreclose certain mechanics' liens. The opinion states the facts.

W. E. F. Deal, for complainant.

C. S. Varian, R. H. Lindsey, and R. M. Clarke, for defendant.

Before SAWYER and SABIN, JJ.

SABIN, J. This suit was brought in this court by C. P. Hubbell, since deceased, a citizen of the state of California, against the defendant, a Nevada corporation, to foreclose certain liens, usually called mechanics' liens, set forth in the bill of complaint. The liens sought to be foreclosed and enforced against defendant are 122 in number, aggregating \$115,059.66 in amount. They are classified as contractors', subcontractors', material-men's, and laborers' liens. Complainant, Hubbell, derived title to these liens through various assignments, direct and intermediate, to himself. Of these liens, 112 were assigned by the original lienholders to J. C. Hampton, and by him assigned to Hubbell; three were assigned to J. C. Hampton & Co., and by

v.19,no.1—1

said firm to Hubbell; two to S. W. Lee, and by him to Hubbell; and five were assigned by the original lienholders directly to Hubbell.

The original bill of complaint was silent as to the citizenship of all of the original lienholders, and also as to the citizenship of J. C. Hampton, J. C. Hampton & Co., and S. W. Lee, intermediate assignees of 117 of these liens, and the immediate assignors of complainant. Objection having been raised as to the sufficiency of the bill on this point, complainant filed an amended bill, June 5, 1882, alleging that 113 of the original owners of said liens named in the amended bill were Chinamen, and subjects of the emperor of China at the date of the filing of both the original and amended bill of complainant. The amended bill, however, was wholly silent as to the citizenship of the other nine original lien-owners, and also as to the citizenship of J. C. Hampton, J. C. Hampton & Co., and S. W. Lee, intermediate assignees of 117 of the liens sought to be foreclosed. The demands of the nine lienholders whose citizenship is not set forth aggregate the sum of \$4,890.52, in amounts varying from \$2,584.66 to \$33.

This omission in the amended bill of any averment as to the citizenship of these nine original lien claimants may be considered as an admission that they were citizens of Nevada at the time of the commencement of this action, since, had their citizenship been such as to bring them within the statute giving this court jurisdiction, it certainly would have been set forth in the amended bill prepared and filed expressly to obviate any supposed jurisdictional defect in the original bill. If, however, this presumption is not in fact true, still the bill is fatally defective on this point. The jurisdiction of the court as to all parties must affirmatively and clearly appear by the pleadings, and this not by way of description or recital, but by positive averment.

The rulings of the supreme court upon this point have been uniform, and without exception. In *Brown v. Keene*, 8 Pet. 112, the court says: "The decisions of this court require that the averment of jurisdiction shall be positive that the declaration shall state expressly the fact on which jurisdiction depends. It is not sufficient that jurisdiction may be inferred argumentatively from its averments." In *Ex parte Smith*, 94 U. S. 455, the court says: "No presumptions arise in favor of the jurisdiction of the federal courts."

The statute of March 3, 1875, controlling the jurisdiction of the court in this matter, reads as follows:

"Nor shall any circuit or district court have cognizance of any suit, founded on contract, in favor of an assignee, unless a suit might have been prosecuted in such court to recover thereon if no assignment had been made, except in cases of promissory notes, negotiable by the law-merchant and bills of exchange."

In this case it does not appear by the original or amended bill that any one of these nine original lien-owners, whose citizenship is not

set forth in the amended bill, could have prosecuted an action in this court, upon any of those liens, "if no assignment had been made." But such fact must appear, or the court has not jurisdiction. Section 11 of the judiciary act of 1789 does not materially differ, upon the point here involved, from the act of 1875, *supra*, and the rulings of the supreme court upon section 11 of the act of 1789 are applicable in this case. *Brown v. Keene*, 8 Pet. 112; *Jackson v. Ashton*, Id. 148; *Montalet v. Murray*, 4 Cranch, 46; *Corbin v. County of Black Hawk*, 105 U. S. 659; *Sere v. Pitot*, 6 Cranch, 332; *Bradley v. Rhine's Adm'rs*, 8 Wall. 393; *Mollan v. Torrance*, 9 Wheat. 537; *Morgan's Ex'r v. Gray*, 19 Wall. 81. We think there is no conflict, upon the point here involved, in the rulings of any of the national courts.

It was suggested, upon argument, that the citizenship of these nine original lienholders was immaterial, since complainant owned all of the 122 liens, and hence none of the other lien claimants could be prejudiced; and, further, that the amount claimed by them is embraced in the lien filed by Linn Chung & Co., as original contractors, for \$50,000, and is also embraced in the lien filed by Ah Wan, as a subcontractor, for the same amount. The merit of the suggestion is not clear; but were it so, it could scarcely prevail against the positive provision of the statute. While the national courts may be invoked, in proper cases, to give effect to and enforce statutory liens and remedies provided by a state, yet in such proceedings they are guided by the state statute, and follow, as nearly as possible, the course indicated therein. Should the court proceed to examine this case upon the merits, it would be as necessary for it to investigate and determine how much, if anything, was due upon each of these nine liens, as it would to investigate and determine how much might be due upon any or all of the other 113 liens. The liens cannot be singled out, or segregated, and some of them considered and others not considered. Some of the liens might be valid under the state statute, and others be fatally defective, for non-compliance with the statute in perfecting them. It might appear that the lien of Linn Chung & Co., and that of Ah Wan, for \$50,000 each, were defective and could not be enforced, and that all of the other liens were valid and binding upon the defendant, and complainant entitled to judgment thereon. The liens must each be examined, and their validity under the statute determined, as well as the amount due, and the rank of each declared. St. Nev. 1875, c. 64, § 11. And this is evidently the theory on which the bill of complaint was framed. If it was immaterial to complainant whether or not these nine liens be adjudicated upon, why were they set forth in the bill, and judgment invoked upon them as well as upon the other 113 liens, and why did complainant purchase them if not beneficial to him in some way? And, if beneficial, he is entitled to such benefit.

It is further insisted by complainant "that the liens in this case

are, in no sense of the word, contracts," and hence are not within the act of congress. While it may be true that a lien *per se* is not a contract, yet all liens of the nature set forth in the bill in this action arise and are based upon contract, express or implied. The lien itself is merely an instrumentality, a special remedy given, by which the contract may be enforced. The assignment of a mere lien would be idle—would confer no right of action upon the assignee thereof—if such assignment did not also transfer the debt secured by the lien. A debt is a sum of money due upon contract, express or implied, or established by judgment. The debt transferred is the substantial thing; the lien is an incident thereto,—a statutory remedy which the assignee may pursue, or he may waive it and pursue his common-law remedy, to recover the debt. The lien itself may expire by limitation, if suit be not commenced to enforce it within six months after the same has been filed for record. St. Nev. 1875, c. 64, § 8. But the debt would not be extinguished by the expiration of the lien, and it could be enforced by proper remedy. The statute above cited cannot bear the construction sought to be put upon it. Section 5 of the act makes it obligatory upon the lien-claimant that he state in his claim the "terms, time given, and conditions of his contract;" and the entire act is based upon the supposition of a contract, express or implied, between the parties. The words "contractor," "subcontractor," "debt," "creditor," etc., are of constant recurrence in the act. And it is not clear how a state can authorize or empower one person to charge an arbitrary lien against the property of another person, no privity, or contract, express or implied, existing between such persons. Without considering this objection further, it will be sufficient to observe that this action is certainly brought to enforce the terms of a contract fully set forth in the bill of complaint. As it does not appear from the amended bill that any of these nine original lienholders, whose citizenship is not set forth, could have maintained an action in this court to foreclose or enforce any of those liens, it follows that their assignee could not do so. On this point there is no conflict in the decisions.

We do not deem it necessary to decide whether or not this action could be maintained by complainant, as the assignee of J. C. Hampton, J. C. Hampton & Co., and S. W. Lee, intermediate assignees of a portion of the liens, they being presumably citizens of Nevada, and defendant being a Nevada corporation. The decisions on this point seem to be somewhat conflicting. *Bradley v. Rhine's Adm'rs*, 8 Wall. 396; *Mollan v. Torrance*, 9 Wheat. 537; *Morgan's Ex'r v. Gray*, 19 Wall. 81. *Contra*, see *Wilson v. Fisher's Ex'rs*, Bald. 133; *Dundas v. Bowler*, 3 McLean, 204; *Milledollar v. Bell*, 2 Wall. Jr. 334. But upon the case as presented in the original and amended bills, we think this court has no jurisdiction in this case. We call attention to the fifth section of the act of March 3, 1875, and to the ruling of the supreme court thereon, in *Williams v. Nottawa*, 104 U. S. 209. It is a

matter of regret that the decision of the court on this question of jurisdiction was not had before the case had gone to the extent to which it has proceeded, it being now submitted for judgment upon the testimony and proofs taken. But we cannot examine the case upon the merits. It must, therefore, be dismissed from this court for want of jurisdiction, without costs, and without prejudice to complainant.

Let decree be entered accordingly, and without prejudice.

CHICAGO M. & ST. P. RY. CO. v. STEWART.

(Circuit Court, D. Minnesota. December, 1888.)

1. AWARD—SPECIFIC PERFORMANCE.

An agreement for the conveyance of land at a price to be fixed by an arbitrator named in the agreement, will not be specifically enforced unless the award is made within a reasonable time.

2. SAME—REASONABLE TIME.

In such a case a delay of six months in making the award, when the value of the land is rapidly increasing, is unreasonable.

3. SAME—ENTIRE TRACT TO BE APPRAISED.

Specific performance will not be decreed of an agreement to convey a tract of land by warranty deed, with covenants against incumbrances, at a price to be appraised by an arbitrator, unless the award of the arbitrator appraises the entire tract without reference to easements and other incumbrances thereon.

Bill in equity brought to obtain decree for the specific performance of a written agreement for the sale by defendant to complainant of certain land. The agreement is dated April 21, 1879, and provides that the defendant—

“In consideration of one dollar to him in hand paid, the receipt of which is hereby acknowledged, and other considerations hereinafter named, has bargained and sold unto the said second party, and upon payment of the further consideration therefor as hereinafter provided doth hereby covenant and agree to convey to the said party of the second part, by a good and sufficient warranty deed, free and clear from all incumbrances, on demand of the party of the second part, all that piece or parcel of land situate in said Hennepin county and state of Minnesota described as follows.”

Here follows a particular description of the land by metes and bounds, and the remainder of the agreement is as follows:

“And said parties do mutually agree to submit to D. R. Barber, Esq., of said Minneapolis, the question of the value of said piece or parcel of land, and the compensation to be paid therefor by said second party to said first party, and that his decision shall be final. And upon the payment of such sum as shall be so fixed and determined by said Barber, the party of the first part will at once execute his warranty deed of the same as aforesaid, free and clear of all incumbrances except a certain lease to Wiggins & Thompson; the party of the second part to take the same subject to such lease, and to receive any

and all rents hereafter accruing under said lease. The award of said Barber is to be made in writing and a copy thereof to be delivered to each of said parties."

On the first day of October, 1879, the said arbitrator made his award, by which he fixed the value of said land at the date of said agreement, and the compensation to be paid therefor, at the sum of \$3,350. The respondent resists the claim of the complainant upon various grounds, among which are the following: (1) That the arbitrator, after his appointment, refused to accept the same, and declined to act, continuing his refusal for about four months, but afterwards, and at the expiration of about six months, he decided to act, and did so against the objection and protest of defendant, who in the mean time had revoked his authority; (2) that the arbitrator, in making his award, did not include, but on the contrary omitted, a part of the land included in the agreement.

McNair & Gilfillan, for complainant.

Geo. B. Young, for defendant.

MCCRARY, J. We will first consider the question whether the powers of the arbitrator had ceased prior to the time when he undertook to act. The agreement is silent as to the time within which the award was to be made. In such a case the arbitrator must act within a reasonable time. What is a reasonable time must be determined in each case upon its own peculiar facts and circumstances. If the property to be sold is situated in or near a growing and prosperous city, and in a place where the value of real estate may be expected to increase rapidly, it would be fair to presume that the parties contemplated promptness. A delay in fixing the price for a period of five or six months, under such circumstances, would be unreasonable, because the value of the property within that time would be very materially changed. Much would depend, in such a case, upon the question whether the agreement contemplates the fixing of the price according to the value at the date of the contract or at the date of the award. If the former, then the seller would certainly be entitled to a prompt appraisalment, and a delay of five or six months would, as to him, be unreasonable, because it would require him to sell at a price which might and probably would be much below the value of the land at the time of the conveyance and at the time of the payment of the purchase money.

The contract in the present case is silent as to the question whether the value at date of contract or at date of award shall constitute the price to be paid for the land; but the arbitrator evidently considered it his duty to ascertain the value at the former period, and to fix the price accordingly, as he expressly states in his award that he fixes the value of the property at the time when the agreement was entered into, which was the twenty-first day of April, 1879, while the award is dated October 1, 1879. The delay was for more than five months, and the arbitrator acted in the end against the pro-

test of the defendant. The property is situated very near to the cities of Minneapolis and St. Paul, both of which have grown with marvelous rapidity within the past 10 years, and at the time of the agreement it was known that the land in question was advancing in value. It is scarcely to be presumed that defendant intended to bind himself to sell his land in October for its appraised value in the previous April, and if not, he must have understood that the arbitrator was to act at once, or at least without unnecessary delay. That such was his understanding is apparent from the fact which appears in evidence that he urged the arbitrator to accept the duty and proceed to act soon after his appointment, which the latter declined to do. After waiting some four months for action by the arbitrator, the defendant concluded not to consummate the sale, and accordingly notified the arbitrator that he objected to his acting after so long a delay. If the arbitrator was right in assuming that the land was to be appraised according to its value at the date of the contract, we think defendant had a right to object to the delay. If the arbitrator was wrong in that, then his award must be set aside on that ground. The evidence sufficiently shows that the land increased in value between April and October, 1879.

Nothing appears on the face of the agreement or in the evidence to show that the parties to the contract contemplated any unnecessary delay in making the award as to the value of the land, and it is plain that no great delay was necessary. We do not, of course, mean to say that the arbitrator was bound to act immediately. He was at liberty to take a reasonable time in which to determine as to his acceptance of the trust, and thereafter a further reasonable time in which to investigate the question of value and make his award. But it is manifest that no great length of time was needed in which to determine the question submitted to the arbitrator in this case. Under the circumstances of the case, we do not think the delay of over five months was contemplated by the parties when they entered into the contract, nor do we think it reasonable. We should, therefore, in the exercise of the discretion which belongs to courts of equity, decline to decree a specific performance of the award, even if this were the only objection to its validity.

It is, however, further insisted that the arbitrator excluded from consideration, in making his appraisal, the quantity of land included in certain streets, or supposed streets, being a part of the land to be conveyed, and of which complainant now asks a conveyance by warranty deed. Whether there were any streets or highways constituting easements upon the land was not a question for the arbitrator to determine. The contract called for a deed of general warranty against all adverse claims, except a lease mentioned therein, and it was provided that the arbitrator should appraise the entire tract. The arbitrator was not authorized to go into an inquiry as to the effect upon the value of the land of the supposed public ease-

ments for street purposes, for the conveyance with covenants of warranty, as provided for by the contract, would have bound defendant to remove or vacate the streets, if any lawfully existed, or to pay to complainant the damages resulting to it in consequence thereof. If the award fixed the price subject to an easement, and the contract be specifically performed by the execution of a warranty deed as therein provided, and now demanded by complainant, then the defendant will be called upon to convey more than he is paid for. He would convey free of all easements, and, if any are found to exist, would be bound by his covenants to remove them. He would be paid only for the land subject to the easement.

Upon consideration of the proof we find that it clearly appears that the arbitrator took into account at least one street in fixing the price of the land, and reduced the price by the sum of \$150, on account of the same. In his own testimony he distinctly says: "If I had known certain that that road did not come out, the award would have been \$3,500, instead of \$3,350." And again: "If I had known certain that no road would cross there, \$3,500 was the net sum." And still further: "The award would have been \$3,500 instead of \$3,350 for the tract, as the papers show that I had seen, if I had known that there wasn't any road there to be taken off. That I say."

It is clear that the duty of the arbitrator was to appraise the whole tract without inquiry as to the incumbrances or easements. These were to be removed by the grantor. It is also clear that in deducting \$150 from the value of the tract on account of easements, he departed from or varied the contract. In order to enforce a contract by specific performance, the court must be enabled to specifically perform every part of it. We cannot decree a specific performance with a variation. 1 Sugd. Vend. 221; *Jordan v. Sawkins*, 4 Brown, Ch. 477; *Nurse v. Seymour*, 13 Beav. 254; *Carnochan v. Christie*, 11 Wheat. 446. The award is also bad for the reason that it does not cover the entire matter submitted, to-wit, the value of the whole tract without reference to easement.

It is well settled that a failure to include in the appraisement any part of the property is fatal to the award. *Morse*, Arb. 361; *Emery v. Wase*, 5 Ves. 846; S. C. on appeal, 8 Ves. 505; *Nickels v. Hancock*, 7 De Gex, M. & G. 300, 318. It matters not that the portion of the property which was omitted from the appraisement was small in comparison with that which was appraised. It is enough if it was a substantial and material portion of the property, and whether in the present case it was worth only \$150, or more or less than that sum, is immaterial. Nor can the award be now amended by adding to the appraisement the value of the property omitted. The parties agreed to be bound, not by a price to be fixed by any court, but by the judgment of the arbitrator named, upon the entire matter submitted. Should the court now attempt to add anything to the award it would violate the agreement, instead of enforcing it specifically. *Nickels v.*

Hancock, supra; Wakefield v. Llanelly Ry. & Dock Co. 68 Eng. Ch. 11; *Skipworth v. Skipworth*, 9 Beav. 135. The fact that the arbitrator omitted from the appraisal a part of the property, may be shown by evidence *aliunde* the award. *Bean v. Farnam*, 6 Pick. 269; *Hale v. Huse*, 10 Gray, 99.

The other questions discussed by counsel need not be considered. We deem it proper, however, to say that the proof does not, in our judgment, sustain the charge of defendant that the arbitrator was guilty of improper conduct or of partiality. His errors were simply errors of judgment, but they were nevertheless such as to preclude us from decreeing a specific performance of the contract and award. It is therefore ordered that the bill be dismissed.

NELSON, J., concurs.

Specific Enforcement of Awards and Contracts to Arbitrate.

A party to an award has several remedies at his disposal in case the person against whom the award is made refuses to abide by or to perform it. If both parties are in court, the award may be made an order of court, and performance may be compelled by the usual means resorted to by a court to compel obedience to its orders. If the parties are not in court, an action for damages will lie upon the award. In this note it is proposed to discuss the equitable remedy of specific enforcement, and its application to awards and arbitration contracts.

1. **AWARDS—GENERAL RULE.** A party is entitled to come into equity to compel the specific performance of an award whenever he cannot obtain, by proceeding at law, all that was intended to be given him by the award. Inadequacy of the remedy at law is the basis of the jurisdiction in equity.¹ This basis is broad enough to warrant the specific enforcement of awards relating to personalty, as well as of those relating to realty; for at law a party can only get damages for the breach of an award, which may be a very inadequate remedy even where the award is of personalty; *e. g.*, where a rare picture, or shares of stock in a private company, or a patent are awarded. Damages in such case would be inadequate, because impossible of ascertainment. What jury can estimate the value of a rare picture, or of a patent, or of private stock? Here, therefore, as in an award of real property, is it especially appropriate to apply the equitable remedy of specific enforcement.

Illustrations. A partner can, as against his copartner, enforce the specific performance of an award that the partnership stock on hand and accounts be equally divided.² Especially will specific performance be decreed after one party has partly performed the award. Thus, where the award was that A. pay B. £900, and seal a release to B., B. to assign several securities he had from A., and A. sold lands to raise the £900, expecting B. to receive it, as he intended he would, and then tendered him the amount, together with the release, the lord chancellor decreed specific performance by B., even though the award was extrajudicial, and not strictly good in law.³ So, an award relative to the partition of lands will be enforced.⁴ A bill in equity

¹ *Jones v. Blalock*, 31 Ala. 180.

² *Kirksey v. Fike*, 27 Ala. 383.

³ *Norton v. Mascall*, 2 Vern. 24. See, also, *Cook v. Vick*, 2 How. (Miss.) 882;

Viele v. T. & B. Ry. Co. 21 Barb. 381;

Hall v. Hardy, 3 P. Wms. 187.

⁴ *Whitney v. Stone*, 23 Cal. 275.

also lies to compel the execution of a deed of land ascertained by an award of arbitrators appointed to settle the boundary line between the lands of the parties;¹ and, generally, equity may compel the specific performance of awards concerning real estate, or for the purchase and sale thereof, even though it involves the enforcement of an award to pay money;² and in any proper case specific performance of an award will be decreed, although it be by parol;³ and although it award costs, which it is beyond the authority of arbitrators to do;⁴ and the fact that the submission contains a clause by which each party binds himself to the other in a sum certain, as a penalty, in case he refuse to abide by and perform the award, does not deprive a court of equity of the power to decree a specific performance of the award, even though the party refusing to perform offers to pay the penalty agreed upon;⁵ and the court will enjoin proceedings at law until the award can be specifically enforced.⁶ Nor is the fact that the arbitrators have received incompetent evidence an objection to their award being enforced.⁷ Neither is mere inadequacy of the price awarded to be paid for land a valid objection to enforcing the award, the inadequacy not amounting to conclusive proof of fraud.⁸ Fraud may also give a court of equity jurisdiction to enforce an award. Thus, where an award provided that, in the event of the non-payment of a certain sum of money, judgment should be rendered against the defendants in a suit then pending for its recovery, and by the connivance of defendants, and a third party, who assumed to act as plaintiff's assignee, the plaintiff was nonsuited without his knowledge or consent, so that the specific remedy provided by the award was defeated, held, that these facts brought the case within equitable cognizance, and that the direct payment of the money might be ordered by the court.⁹ The party seeking specific enforcement must show a readiness to perform all the award on his part.¹⁰

Exceptions. In the following instances specific enforcement of the award was refused: The parties to a submission bound themselves to perform the award which certain arbitrators should "make and publish in writing under their hands," concerning a boundary line in dispute. The arbitrators executed a paper as an award, read it to the parties, and delivered copies to them, with an oral statement of the actual decision, and that it was uncertain whether the award expressed it, but that, if it did not, it should be afterwards amended when the mistake should be ascertained. The chairman afterwards learned that the line actually agreed upon was not correctly stated, and he accordingly amended the original award, which he had retained, but which was not again presented to the other arbitrators for signature, nor republished. Held, that equity would not enforce either the amended or original award.¹¹ Where it appeared that the arbitrators were deceived, and the award was made clandestinely by part of the arbitrators, without hearing each party, the court set aside and refused to enforce the award.¹² Where arbitrators to determine the value of real estate omitted to take into consideration the value of a water power, and appraised it at much less than the real value, specific performance was refused.¹³ So, also, in *Parker v. Whitney*,¹⁴ wherein the price was fixed considerably below the real value of the property. Specific performance of an award for the payment of money merely, will not be compelled.¹⁵ And where an award was that A. should pay B. a certain number of dollars "in currency" and an additional sum "in gold," specific enforcement

¹ *Caldwell v. Dickinson*, 13 Gray, 365.

² *M. & O. R. Co. v. Scruggs*, 50 Miss. 284.

³ *Marsh v. Packer*, 20 Vt. 198.

⁴ *Caldwell v. Dickinson*, *supra*.

⁵ *Whitney v. Stone*, 23 Cal. 275.

⁶ *Jones v. Blalock*, *supra*.

⁷ *Viele v. T. & B. Ry. Co.*, *supra*.

⁸ *Id.*

⁹ *Story v. N. & W. R. Co.* 24 Conn. 94.

¹⁰ *McNeill v. Magee*, 5 Mason, 245.

¹¹ *Caldwell v. Dickinson*, 13 Gray, 365.

¹² *Ives v. Medcalf*, 1 Atk. 64.

¹³ *Buy v. Eberhardt*, 3 Mich. 524.

¹⁴ *Turn. & R.* 366.

¹⁵ *Wood v. Shepard*, 2 Pat. & H. (Va.)

was refused as to the portion directed to be paid "in gold."¹ Laches may lead a court of equity to refuse specific enforcement of an award. Thus a bill for a reconveyance of an estate pursuant to an agreement and subsequent award, the bill being brought as against purchasers after a considerable lapse of time, and the original vendee being dead and insolvent.² An agreement to sell at a price to be fixed by arbitration will not be enforced, where some of the parties to it are married women, one of whom had not executed it.³

2. CONTRACTS TO ARBITRATE—GENERAL RULE. Contracts to arbitrate are not specifically enforceable. The reasons upon which this rule rests are several, and seemingly good ones. At common law (however it may be by statute) arbitrators cannot compel the attendance of witnesses or administer an oath. They cannot compel the production of documents, books of account, and papers, or insist upon a discovery of facts from the parties under oath. One reason, therefore, of the refusal of equity to specifically enforce contracts to arbitrate is this: Equity will not compel a party to submit the decision of his rights to a tribunal which confessedly does not possess full, adequate, and complete means within itself to investigate the merits of the case and to administer justice. Another reason is that equity will not make a vain decree, incapable of enforcement. Suppose it decrees specific enforcement. How can it compel the parties to name the arbitrators? How can it compel them to agree upon the arbitrators? The court has no authority to select arbitrators for the parties. This subject is elaborately discussed by Mr. Justice STORY in *Tobey v. Bristol Co.*,⁴ who concludes that "the very impracticability of compelling the parties to name arbitrators, or upon their default for the court to appoint them, constitutes, and must forever constitute, a complete bar to any attempt on the part of a court of equity to compel the specific performance of any agreement to refer to arbitration. It is essentially, in its very nature and character, an agreement which must rest in the good faith and honor of the parties, and, like an agreement to paint a picture, or to carve a statue, or to write a book, or to invent patterns for prints, must be left to the conscience of the parties, or to such remedy in damages for the breach thereof as the law has provided." Another reason why courts of equity refuse specifically to enforce an agreement to arbitrate is because so to do would bring such courts in conflict with that policy of the common law which permits parties in all cases to revoke a submission to arbitration.⁵ Finally, perhaps the best reason for refusing specific enforcement in such cases is that so to do ousts the courts of jurisdiction, and tends to refer the decision of difficult legal questions to inexperienced and incompetent persons.

Illustrations. Among the cases which illustrate the refusal of the courts to compel an arbitration are the following: A statute authorized county commissioners to submit certain claims of A. to arbitration. They ordered a reference of part of the claims. Held, that A. could not present a schedule of names of persons who would be acceptable as arbitrators, and compel, by decree in equity, the selection of some of them by the commissioners, and a reference of all the claims to them.⁶ A testator, in his will, provided that any disputes regarding it should be decided by certain arbitrators, and that any party who should refuse to submit to arbitration should forfeit his rights under the will. Held, that such provision was *in terrorem* merely, and that no such forfeiture could be incurred by contesting any disputable matter in relation to it in a court of justice.⁷ A. agreed, in writing, with B. that if B. would buy certain shares in a corporation held by C., the company should employ him at a certain yearly salary, and that, if the company should fail or

¹ *Howe v. Nickerson*, 14 Allen, 400.

² *McNeill v. Magee*, 5 Mason, 244.

³ *Emery v. Wise*, 5 Ves. Jr. 546.

⁴ *Story*, 826.

⁵ *Greason v. Keteltas*, 17 N. Y. 491.

⁶ *Tobey v. Bristol Co.* 3 Story, 800.

⁷ *Coutee v. Dawson*, 2 Bland, (Md.) 264.

refuse to give him employment, A. would purchase the shares of him at a fair price; that, if the parties did not agree as to what was a fair price, the same should be determined by arbitrators, whose decision should be binding. Held that, even if the agreement was not void as against public policy, specific performance of it would not be compelled.¹ Under a mortgage of real estate to secure a bond containing this stipulation: "That should either party be dissatisfied with the fulfilling of the above bond, it shall be submitted to certain persons, (named,) and their decision shall be final,"—the mortgagee may enter foreclosure for a breach of the mortgage without resorting to the opinion of the arbitrators named.² Further, to the effect that a mere agreement to refer to arbitration, where no reference has taken place, cannot take away the jurisdiction of any court, see *Mitchell v. Harris*³ and *Street v. Rigby*.⁴

Insurance Policies. It is not infrequently provided in policies of insurance that any dispute arising under the policy shall be referred to arbitrators. Such agreements to arbitrate, it has been decided, do not oust the courts of their jurisdiction.⁵ So, where the underwriters refused to pay the loss of the assured, his right of action was held immediately to accrue, although there was a clause in the policy that payment was not to be made until 90 days after proof and adjustment of the loss, and that, in case of dispute, the same might be settled by arbitrators.⁶ The action may be sustained without any offer to refer;⁷ although, if there be a reference depending, or made and determined, it might have been a bar.⁸ But in *Scott v. Avery*⁹ it was decided that, although an agreement which ousts the courts of their jurisdiction is illegal and void, yet an agreement in a policy of insurance as to arbitration was not of that description, since it did not deprive the plaintiff of his right to sue, but only rendered it a condition precedent that the amount to be recovered should be first ascertained, either by the committee or arbitrators. In *Goldstone v. Osborne*¹⁰ it was held that the insured might maintain an action on such a policy, notwithstanding the condition, when it appeared that the insurers denied the general right of the insured to recover, and did not merely question the amount of damage. So he may, if the insurance company waive the right to a submission to arbitration, as by taking possession and repairing the thing insured.¹¹

Valuations—Renewal of Leases. It is not uncommon to insert in leases stipulations for a renewal upon a rent to be a percentage of a valuation by appraisers or arbitrators. The parties to such a lease do not waive the jurisdiction of the ordinary tribunals.¹² But in these cases the courts will not compel the parties to name arbitrators.¹³ It is not meant to say, however, that the courts will not enforce contracts to renew leases; on the contrary, many cases decide that the courts will compel a renewal of such contracts. Thus, where A. filed a bill in equity alleging that he had demised certain premises to B., with the agreement that near the end of the lease A. and B. were each to appoint an assessor, and the assessors a third, who should unanimously assess the value of the improvements and the yearly

¹ *Noyes v. Marsh*, 123 Mass. 286.

² *Hill v. More*, 40 Me. 515.

³ 2 Ves. Jr. 129.

⁴ 6 Ves. Jr. 814.

⁵ *Allegre v. Maryland Ins. Co.* 6 Har. & J. 408; *Robinson v. George's Ins. Co.* 17 Me. 131; *Kill v. Hollister*, 1 Wils. 129; *Amesbury v. Bowditch Ins. Co.* 6 Gray, 596.

⁶ *Allegre v. Maryland Ins. Co.*, supra.

⁷ *Robinson v. George's Ins. Co.* 17 Me. 131.

⁸ *Kill v. Hollister*, 1 Wils. 129.

⁹ 8 W., H. & G. 497.

¹⁰ 2 Car. & P. 550.

¹¹ *Cobb v. N. E. M. Ins. Co.* 6 Gray, 193.

¹² *Gray v. Wilson*, 4 Watts, 39.

¹³ *Johnson v. Conger*, 14 Abb. Pr. 195; *Kelso v. Kelly*, 1 Daly, 419; *Biddle v. Ramsey*, 52 Mo. 153; *Hopkins v. Gilman*, 22 Wis. 476; *Greason v. Keteltas*, 17 N. Y. 491; *Gourlay v. Duke of Somerset*, 19 Ves. Jr. 429; *Agar v. Macklew*, 2 Sim. & Stu. 418; *Strohmeir v. Zeppenfeld*, 3 Mo. App. 429; *Chichester v. McIntire*, 4 Bligh, (N. S.) 78.

rental, and that A. should then have the privilege of buying the improvements, or should grant a renewal of the lease at the rental so fixed, and with the old covenants, and that B. had always appointed partial assessors, so that no unanimous decision could be obtained, and had occupied the premises for a number of years since the expiration of the original lease without paying any rent, held, that the bill was proper, and that equity would entertain the suit on the grounds of fraud, account, the prevention of a multiplicity of suits, and because a remedy at law would be neither plain, adequate, nor complete.¹ In New York it is decided that the court will fix the rent, or direct a renewal at the former rent,² or order a reference to ascertain what the amount of rent should be.³ In England, in one case, the court refused to substitute the master for the arbitrators, holding that that would be to bind the parties contrary to their agreement.⁴ In another case, the question arose whether a reference to settle a lease to be made by defendant to plaintiff should be to the master, or to G. under an agreement that certain matters in the lease should be judged by G., or, in case of his death, by some other and competent person to be mutually agreed upon by the parties. It was held that the lease must be settled by the master, no steps having previously been taken to secure G.'s approval.⁵ And where the concurrence of one of the arbitrators was secured by the influence of the tenant's wife, and the award was especially favorable to the tenant, the latter was denied specific enforcement.⁶

Valuation in Contracts of Sale. Nor will courts of equity decree specific enforcement of contracts of sale upon a valuation to be made by arbitrators.⁷ But where standing timber was sold, and by the contract the quantity was to be determined by referees named, after an examination and measurement of the timber one of the referees fell sick, and the others made an estimate and report, held, that the sale of the timber was the subject of the contract, and that, to prevent a failure as to the principal matter, equity would furnish means of ascertaining the quantity, but would not compel specific execution of the contract.⁸

Partnership Contracts to Arbitrate. A. and B., partners, agreed that A. should withdraw, and that, if afterwards B. should desire to retire, A. should have the privilege of purchasing the good-will, stock, etc., to be valued "in the usual way" by two valuers, one to be named by A. and another by B., or by an umpire. B. refused to allow his valuer to proceed. Held, that there was no contract that a court of equity would enforce.⁹ Nor is such an agreement a defense to a suit between partners.¹⁰ But where two partners agreed that upon dissolution one should purchase the share of the other, at a price to be fixed by two arbitrators appointed by each partner, the court held the valuation not of the substance of the agreement, and that it would substitute itself for the arbitrators in order to carry the agreement into effect.¹¹

Contracts for Work. In contracts with railway and other companies it is usual to stipulate that a reference to the engineer or to some other officer shall be made a condition precedent to recovery in case of dispute under the contract. In such case neither party can sustain an action on the contract

¹ Biddle v. Ramsey, 52 Mo. 153. See, also, Strohmeir v. Zeppenfeld, 23 Mo. App. 429.

² Johnson v. Conger, 14 Abb. Pr. 195.

³ Kelso v. Kelly, 1 Daly, 419.

⁴ Agar v. Macklew, 2 Sim. & Stu. 413.

⁵ Gourlay v. Duke of Somerset, 19 Ves. Jr. 429.

⁶ Chichester v. McIntire, 4 Bligh, (N. S.) 78.

⁷ Milners v. Gery, 14 Ves. Jr. 400; Blundell v. Brettargh, 17 Ves. Jr. 231; Griffith v. Frederick Co. Bank, 6 Gill & J. 424; Richardson v. Smith, L. R. 5 Ch. 648; Morse v. Merest, 6 Mad. 25; Smith v. Peters, L. R. 20 Eq. 511.

⁸ Backus' Appeal, 58 Pa. St. 186.

⁹ Vickers v. Vickers, L. R. 4 Eq. 521.

¹⁰ Wellington v. McIntosh, 2 Atk. 569; Tattersal v. Groot, 2 B. & P. 131.

¹¹ Dinham v. Bradford, L. R. 5 Ch. 519.

without performance, or an offer to perform.¹ In such a case an engineer's award or finding may be conclusive on a sub-contractor.² But where an agreement was made between a land-owner, through whose land a railway was about to be laid, and the company, whereby it was agreed that an estimate should be made by the company's engineer as to the damages, which should be submitted to A., the land-owner's agent, "for approval," "the amount, when agreed upon or determined," to be paid to the land-owner in discharge of all obligations as to the road. A. died before the engineer's estimate was sent in. Held, that submission to A. for approval was of the essence of the contract, and that inasmuch as by A.'s death the contract could not be performed in the manner agreed, the court refused specific enforcement.³ And the courts have refused to appoint arbitrators to value works, erections, buildings, or the damage caused thereby.⁴

Exceptions. Although a court of equity will not in general decree specific performance of an agreement to refer to arbitration, or, on the death of an arbitrator, substitute the master for the arbitrator, yet the party who refuses to supply the deficiency by naming a new arbitrator may be denied relief from a court of equity except upon the terms of his doing equity, which may consist in his consenting to the accounts being taken by the master.⁵ And although equity will not decree specific performance of a contract to arbitrate, yet where a question of damages arises it is not error for the court, by consent of parties, to permit the amount to be ascertained by arbitrators and to decree the amount thus found.⁶

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¹See *Monongahela Nav. Co. v. Fenlon*, 4 Watts. & S. 205.

²*Faunce v. Burke*, 4 Harris, 469.

³*Firth v. Midland Ry. Co.* L. R. 20 Eq. 100.

⁴*Haggart v. Morgan*, 4 Sandf. 198;

Haggart v. Morgan, 1 Seld. 422; *Gibbons v. Edwards*, 2 Dru. & War. 80.

⁵*Chislyn v. Dalby*, 2 Younge & C. Exch. 170.

⁶*Conner v. Drake*, 1 Ohio St. 166.

SPARE v. HOME MUT. INS. CO.

(Circuit Court, D. Oregon. January 21, 1884.)

1. AGENT ADVERSELY INTERESTED TO PRINCIPAL.

The law will not allow a person to act as agent when he has an interest adverse to his principal; and therefore an agent of an insurance company to receive and transmit applications for insurance, when making an application therefor on his own property, directly or indirectly, for his own benefit, is acting for himself, and cannot be considered the agent of the insurance company.

2. SUIT TO REFORM A CONTRACT.

The evidence necessary to support a bill to reform a contract must show certainly in what the mistake consists, and that it was mutual.

3. CASE IN JUDGMENT.

The owners of a warehouse applied to an insurance company, of which they were agents, to receive and transmit applications for insurance for a policy on the same, as the property of their judgment creditor, and the company, knowing nothing to the contrary, issued the policy accordingly, and upon the destruction of the property by fire refused to pay the insurance, on the ground that the assured had no insurable interest therein, the assured having failed in an action on the policy to recover the insurance, on the ground that it did not appear but that his debt could be otherwise made out of the remaining property of his debtors,—8 Sawy. §18, [S. C. 15 FED. REP. 707,]—brought a

suit in equity to reform the policy, alleging that by mistake it was issued in the name of the creditor, as owner, when it should have been issued in the name of the debtor and for his benefit, in case of loss, *held*, that the evidence did not support the allegation of mistake, but, on the contrary, showed that the company was induced to issue the policy by the false representation of the owners and applicant, on account of which deception it was entitled to rescind the contract or treat it as null.

Suit to Correct a Mistake in a Policy of Insurance.

W. Scott Bebee and W. Cullen Gaston, for plaintiff.

Cyrus A. Dolph, for defendant.

DEADY, J. This suit was commenced on April 28, 1883. It is brought by the plaintiff, a citizen of Oregon, against the defendant, a corporation formed under the law of California and doing business in this state, to reform and enforce a policy of insurance against fire, issued by the defendant on a warehouse in Cottage Grove, Oregon, for a period of one year from July 26, 1881, in the sum of \$900, by correcting an alleged mistake therein, whereby said property appears to have been insured as the property of the plaintiff, when in fact it was agreed and understood that it should be insured as the property of Aaron and Ben Lurch, whose property it was and is, for the benefit of the plaintiff. The answer of the defendant denies the allegations of the bill, as to the alleged mistake, and avers that Lurch Bros. applied to it, as the agents of the defendant, to have the property insured as that of the plaintiff, and that it never was otherwise informed until after the loss and readjustment, when it refused to pay the same and offered to return the premium of \$18.90, which was refused. The answer also contains a plea of limitation to the effect that the suit is barred by the stipulation in the policy, which provides that no suit shall be maintained thereon unless commenced within 12 months after the loss occurs. On August 13th this cause was before this court on a demurrer to the bill, when it was held that the stipulation in the policy limiting the right to sue thereon to the 12 months next after the loss did not commence to operate until the expiration of the 60 days thereby given to the insurer in which to make payment. 17 FED. REP. 568.

But now it is contended by the defendant that because it gave notice of its intention not to pay and the reason therefor, before the expiration of the 60 days, that the plaintiff was at liberty to commence his suit at once, and therefore the period of 12 months commenced to run from that time and expired more than a month before the commencement of this suit, namely, March 23, 1883. This is a plausible proposition, but I do not think it a sound one. The stipulation for a delay of 60 days after notice and proof of loss within which to make payment, being intended for the benefit of the defendant, doubtless it might waive it. And by giving notice on March 23d that it would not pay the loss, for the reason stated, it evidently did so. Thereafter the plaintiff may have been at liberty to sue without further delay. But I doubt if the defendant could by this means

compel the plaintiff to commence sooner than he otherwise would be required, or that the limitation of 12 months would thereby commence to run, as against the plaintiff, before the previous period of 60 days had expired.

The defendant also contends now, upon the proof, that the suit is barred, even allowing that the 12 months did not commence to run until after the expiration of the 60 days, because it appears that the notice and proof of loss were made as early after the fire as February 16th. The evidence in the case consists of the testimony of the plaintiffs, Aaron and Ben Lurch, the defendant's Oregon manager, Mr. George L. Story, and its traveling agent, D. B. Bush, and sundry exhibits, consisting of prior policies of insurance on this property and letters and documents relating thereto. From these proofs and the pleadings it satisfactorily appears that the property was destroyed by fire on February 14, 1882, and the loss adjusted by the defendant within a few days, and not exceeding a week, thereafter, at \$900, and that on March 23d the defendant gave notice to the plaintiff that it declined to pay the loss because it had ascertained at and since the adjustment that the plaintiff had no interest in the property. Aaron and Ben Lurch both testify that they gave notice of the loss on the next day thereafter, and that within a week, the agent, Bush, was at Cottage Grove and adjusted the same. Bush swears that he was there and made the adjustment on February 16th, and as he speaks positively, and from written *memoranda*, this is probably the fact. The plaintiff does not appear to have had anything to do with the business personally, and knows nothing about it, except the offer to refund the premium in Lurch's store when he and they declined it—he saying that he had nothing to do with it.

But taking the statement most favorable to the plaintiff on this point, and assuming that a full week elapsed before the adjustment, which necessarily included notice and proof of loss, or waiver of the same by defendant, the period of 60 days commenced to run from and after February 21st, and expired on April 22d. Within the next 12 months this suit should have been commenced, whereas it was delayed until six days thereafter. The plaintiff claims, however, that the 60 days did not commence to run until Bush returned to Cottage Grove and notified the plaintiff on March 23d that the defendant would not pay the loss. But according to the language of the policy the 60 days is to be counted from the giving of notice and proof of loss, which was either made or waived before the adjustment, and not the refusal of payment. Indeed, this 60 days is manifestly given to the defendant for the very purpose of ascertaining and determining whether, admitting the loss or the sufficiency of the notice and proof thereof, it is bound to or will pay the claim of the assured. Nor is there any ground to claim that the matter was kept open from the first to the second visit of Bush to Cottage Grove for further proof in any particular. The proof of loss and ownership was made on the

first visit, and it was explicit and satisfactory. The plaintiff swore that he had no interest in the property, and the Lurch Bros. claimed to own it, which claim was supported by the county record of deeds. So it is quite plain that this suit is barred by lapse of time. It was commenced just six days too late. But if this were otherwise, the plaintiff is not entitled to the relief sought. I have examined the circumstances of the case as disclosed by the evidence, and they do not lead to the conclusion that there was any mistake made in the wording of this policy as alleged, but the contrary.

Briefly, it appears that in 1878 the Lurch Bros. were doing business at Cottage Grove as commission merchants when they failed, claiming to owe the plaintiff, who is a person of comparative wealth, living in the same place, nearly \$5,000, with interest at 1 per centum per month, for which he obtained or had a judgment against them on December 9, 1878. Upon this he sold and purchased their store, but retained them as clerks and managers of the business for a year or two, when they succeeded in making a settlement with their creditors, and took the store back again, still owing him, as they allege, about \$2,000, which was the value of the stock when returned to them. Aaron Lurch says that after the failure he told the plaintiff that, as he was a creditor of theirs, he would have this property insured for his benefit, without stating how or in what manner he expected to accomplish it, and the plaintiff says he assented to the suggestion, but it does not appear that he ever gave the matter any further attention, or that the Lurches were under any legal obligation to him to do so. On July 26, 1879, Aaron Lurch had the property insured in the Connecticut Fire Insurance Company, for one year from that date, for the sum of \$900, as the property of the plaintiff, the application therefor, which was made by him in person, being in his handwriting, and signed by him, "A. H. Spare." In 1880, and before July 24th, the Lurch Bros. became the agents of the defendant at Cottage Grove to solicit and receive applications for fire insurance, and on that day they, as such agents, wrote to the manager of the defendant, at Portland, inclosing the said Connecticut policy on this property, as the property of the plaintiff, and asked to have it renewed in the Home Mutual; and that they might be allowed the proper commission therefor, which was done; and on July 14, 1881, on their written application, the policy was renewed with the defendant for another year. This was all the communication there ever was, until after the fire, between the defendant and any of these parties on this subject; and all the knowledge which the defendant or its manager or agents had, as to the ownership of this property, prior to the loss, was derived from, and in accordance with, the information thus obtained.

Upon this state of facts it is preposterous to claim that the plaintiff or his agents, the Lurches, ever intended or thought of insuring

v.19,no.1—2

this property as the property of the latter, for the benefit of the former, or otherwise than it was done. It was insured for three years in succession, at the request of the Lurches, as the property of the plaintiff, and exactly as Aaron Lurch described it in the first application made and written by him in 1879. What was the reason or purpose of this misrepresentation it is not material now to inquire. The Lurches may have honestly intended to insure this property for the benefit of the plaintiff, but were mistaken as to the proper method of so doing. But in that case, the plaintiff must abide the result of their action, just as he would if they had refused or neglected to insure it at all. He had no control over them in this respect,—they were not under any legal obligation to insure the property for him,—and in fact were acting for themselves. But on the evidence, the whole case of the plaintiff is so vague, improbable, and contradictory that it is difficult to assign any reasonable and correct motive for their action. But counsel for the plaintiff insist that the Lurches in procuring this policy to issue were acting as the agents of the defendant, and, therefore, their mistake, if any, is the mistake of the defendant, of which it cannot now take advantage. When the alleged understanding between the plaintiff and the Lurches about this insurance was first had, and when it was first effected, the latter were not the agents of the defendants for any purpose, and what followed thereafter was in strict conformity with what had been done. But it is not worth while to refine on this point. The Lurches were evidently acting for themselves in this matter. They were not under any legal obligation to have this property insured for the benefit of the plaintiff, and if they voluntarily did so, it was in fact for their own benefit rather than his. In such case, if the property was destroyed by fire, they would so far pay their debt with the insurance, and the plaintiff would get nothing but what he was otherwise entitled to, and they might be otherwise able to pay.

Before commencing this suit this plaintiff brought an action at law in this court, on this policy, as it is, claiming an insurable interest in the property, as a judgment creditor of the Lurches, and, on a demurrer to the complaint, the court held that he had such an interest, but he could not recover unless it also appeared that the debtor had not other property sufficient to satisfy the judgment. 8 Sawy. 618; [S. C. 15 FED. REP. 707.] The plaintiff did not amend his complaint so as to make this allegation, as he certainly would if he could; and the only inference is that he suffered no loss by the fire and was not benefited by the insurance. But another sufficient answer to this claim is that the Lurches could not act as the agents of the defendants in this matter of the insurance of their own property for either the direct or indirect benefit of themselves. The law has too much regard for the infirmity of human nature to allow a person to be subject to the temptation of acting as an agent in a matter in

which he has an interest adverse to his principal. The law, dealing with the average integrity and disinterestedness, wisely assumes that no man can faithfully serve two masters, whose interests are in conflict. Story, Ag. §§ 9, 10, 210, 211; 4 Kent, 438.

Assuming, then, that the Lurches were acting for themselves and not the defendant, because as a matter of fact it appears they were so acting, and because, as a matter of law, they could not act otherwise, what possible ground is there for the claim that this policy does not truly state the contract of the parties? None whatever. The Lurches applied in writing to have this property insured as that of the plaintiff, and the defendant knowing nothing to the contrary, accepted the application and issued the policy accordingly. The minds of the parties met on this proposition and no other. But it was essentially false; and as soon as the defendant ascertained that the Lurches had misrepresented the matter and attempted to procure an insurance on their own property, substantially for their own benefit, in the name of Spare, it refused to be bound by the contract, as it had a right to, both under the general law and the express stipulation of the policy, and offered to return the premium.

A party seeking to have a mistake in a written instrument corrected must show exactly in what the mistake consists. It must be a mutual mistake whereby both parties have, in fact, done what neither intended. And the evidence must be sufficient to prove this satisfactorily—to a moral certainty. *Brugger v. State Ins. Co.* 5 Sawy. 310. There was no mutual mistake here. There was, indeed, in the proper sense of the term, no mistake at all. The defendant was deceived by the deliberate misrepresentation of the Lurches as to the ownership of this property, whereby, according to the testimony of its manager, it was misled to accept a greater moral hazard than it was aware of or otherwise might have done. For this reason the defendant had a right to rescind the contract or treat it as null, independent of the clause in the policy making it void on that account.

There is still another point made by the plaintiff, and that is a subsequent waiver of the misrepresentation by the defendant. The Lurches testify that during the year 1881, and after this policy was issued, Bush was at Cottage Grove, and in conversation with them learned that the warehouse was not the property of Spare, but of the Lurches, whereupon he called their attention to the irregularity, but said, as they were the agents of the defendant, it might stand so until the next year, when it must be corrected. The time, circumstances, and details of this alleged conversation are very vaguely and conflictingly stated by the Lurches, while the whole story is flatly and explicitly contradicted by Bush, who also swears positively that he was was not at Cottage Grove from March 11, 1881, to February 16, 1882. Without stopping to consider the legal effect of such a conversation or understanding, or the power or authority of Bush to thus validate a void contract, it is sufficient to say that the burden

of proof is on the plaintiff to establish the fact, and that in my judgment it is not proven that the conversation ever occurred.

There must be a decree dismissing the bill for want of equity, and for costs for the defendant.

WELLS, FARGO & Co. v. OREGON RY. & NAV. CO.

(Circuit Court, D. Oregon. January 25, 1884.)

1. EXPRESS FACILITIES.

Whether an express company doing business over a line of railway or steamboats is entitled to the services of the pursers and conductors thereon, as its messengers, depends on circumstances; but when one express company doing business over any such line of transportation is allowed such service, the same thereby becomes an express facility, as to all other express companies doing business thereon, and cannot lawfully be withheld from them.

2. INJUNCTION TO BE OBEYED.

When a party to an injunction doubts its extent or significance, he ought not to disobey or disregard it, with a view of testing it in this particular, but he should apply to the court for a modification or construction of it.

3. PUNISHMENT FOR CONTEMPT.

In a proceeding for contempt between the parties to a suit for disobedience to an injunction, causing a pecuniary loss or injury to the party instituting the proceeding, the court, in imposing punishment upon the wrong-doer, may do so for the benefit of the party injured.

Proceeding for Contempt in the Violation of an Injunction.

M. W. Fechheimer, for plaintiff.

Rufus Mallory and *Byron C. Bellinger*, for defendant.

DEADY, J. On December 11, 1882, plaintiff commenced a suit in this court to compel the defendant to allow and furnish it express facilities on its lines of transportation; and on March 19th, after a hearing on the bill, an injunction was allowed requiring the defendant to furnish the plaintiff such facilities on and over its lines of railway and steam navigation as it then was and had been doing before the commencement of the suit and upon the same terms. On November 20, 1883, the plaintiff filed a petition in the cause, verified by the oath of its superintendent, Mr. Dudley Evans, asking that the manager of the defendant, Mr. C. H. Prescott, and certain of its pursers and conductors, be ordered to show cause why they should not be punished as for contempt, for not obeying said injunction as therein alleged. The petition and affidavits in support of it show that at and before the allowance of said injunction and since, the defendant was and is the owner and operator of two certain steamboats, then and now plying on the Columbia river, between Portland and Astoria and way ports, and also a certain steam-ship plying between Portland and San Francisco, as well as the lessee and operator of a certain narrow gauge railway running from White Station to

Sheridan and Airlie, in Oregon; that until October 1, 1883, the defendant allowed the plaintiff to have the services of pursers and conductors on said vessels and road, to take charge of its treasure-box and letter-bag, and deliver and receive all matter transported therein, as its agents and messengers along the routes traveled by them, for which it has and is willing to pay a reasonable compensation and indemnify the defendant against any loss by reason of the carriage of such express matter; and that since said date the defendant had refused to allow or furnish the plaintiff these facilities, contrary to the injunction herein, and notwithstanding it is furnishing the same to the Northern Pacific Express Company, a corporation, the stock of which is largely owned by the persons who control the defendant.

The order was made as asked for, and on December 4th the manager of the defendant answered for it and himself, admitting the facts alleged in the petition, and stating that he did not understand that the defendant was required by the injunction to allow its pursers and conductors to act as the agents and messengers of the plaintiff; that acting upon this impression and the advice of counsel that such services were not included in the injunction, and were not express facilities anyhow, he had directed the pursers and conductors of the defendant not to act as the agents and messengers of the plaintiff; and that the respondent did not intend to violate or disobey the injunction of the court. Only two of the pursers and conductors—C. A. Gould, of the narrow gauge, and John B. Maynard, of the steamship Columbia—appear to have been served with the order to show cause, and they answered jointly, saying that the injunction was not served on them, and they were not aware of its terms, and did not suppose that it required them to act as agents of the plaintiff, but that in refusing to do so they did not intend to disobey the injunction, and were simply acting in obedience to the orders of their superior.

The scope and meaning of the phrase "express facilities" does not admit of absolute definition. Its force and effect must often depend on circumstances, of which local usage, the conduct, and convenience of the parties may be important considerations. For instance, take the service which the plaintiff claims at the hands of the purser of the steamship. It consists simply of receiving the plaintiff's treasure-box and letter-bag in his office, on the vessel, and putting it in the safe and keeping it there until the arrival of the vessel at Portland or San Francisco, as the case may be, and there delivering the same, on board, to the agent of the plaintiff. Thereby the defendant incurs neither expense nor risk, and the plaintiff saves the hire and transportation of a special agent between these ports. The inconvenience to the defendant is nothing, while the inconvenience to the plaintiff is very considerable. It is an arrangement which commends itself at once, as reasonable and well calculated to promote the conduct of the business in which the parties are engaged,

namely, the transportation and delivery of parcels with certainty and celerity on the one hand, and the furnishing the means and conveniences for so doing on the other.

And it is not apparent on what ground the defendant can reasonably refuse this facility, unless it desires to impede rather than promote the plaintiff's business, which is contrary to its duty and obligations as a common-carrier. While the plaintiff was the only company doing business on the defendant's routes, it was furnished this facility as a matter of course. It was mutually profitable. Under the circumstances, the defendant could furnish it much cheaper than the plaintiff could supply it. That it was the proper and convenient thing to do, seems then not to have been questioned. But when a rival corporation enters this field to compete with the plaintiff in the express business, the defendant withdraws this facility from the latter, and extends it to the former. The only reasonable explanation of this conduct is that the defendant intends to favor the one company, which is in fact itself or its near ally in interest, and hinder the other in the conduct of its business. The same may be said of the services of the conductors on the narrow gauge road. Presumably the business thereon is so light that it is a burdensome expense to send a special messenger over the road with the express matter, while the duties of the conductor are so inconsiderable that he can attend to it as well as not.

The injunction requires the defendant to furnish the plaintiff with the express facilities that it was allowed at and before the filing of the bill; and this facility, as we have seen, was one of them. If, however, the defendant or its manager thought that this was such a facility or convenience as it ought not, under the circumstances, to be required to furnish, and would not if the court's attention was specially called to the matter, he should have applied for a modification of the injunction in this respect, and not have undertaken to disregard it, with a view of testing the matter or otherwise. The merit or propriety of the injunction is not open to consideration in this proceeding. It is the duty of all the parties to obey the injunction until it is set aside or modified. *Craig v. Fisher*, 2 Sawy. 345. As it is, the respondents are clearly guilty of a violation of the injunction, and are liable to be punished as for a contempt, regardless of the question whether this service is one which the defendant ought to furnish the plaintiff as an "express facility" or not. But even if the defendant had never furnished the plaintiff with this facility, and even if it is not, under the circumstances or otherwise, an absolute express facility, yet the defendant has by its conduct, so far made it one that it is bound, both by the terms of the injunction and its duty and obligation as a common carrier, to furnish it to the plaintiff. Having voluntarily furnished the Northern Pacific with this convenience in the transaction of its business, it cannot refuse it to Wells, Fargo & Co. In giving this convenience to the one com-

pany doing an express business over its lines of transportation, the defendant, as to all other companies doing such business thereon, has thereby made it an absolute express facility, to which all are equally entitled. As was said in *Wells v. O. & C. Ry. Co.* 18 FED. REP. 672.

"The defendant is bound to furnish the express company with reasonable facilities for the conduct of its business, and if there is more than one company doing business over its road it must furnish equal facilities to all. To deal fairly and justly in this respect, and according to its obligation, the defendant must serve the express companies equally, and neither directly nor indirectly favor the one nor hinder the other. Whatever terms or favors it extends to one, it must extend to the other, because that other becomes thereby entitled to them. No discrimination can be allowed; but equality of service, conditions and compensation is the fundamental rule governing the business or transaction."

This case is also referred to generally as authority in the premises. The two cases are in principle, if not in instance, exactly alike. Disobedience to an injunction is a contempt of court which may be punished by fine or imprisonment. *Atlantic G. P. Co. v. Dittmar P. M. Co.* 9 FED. REP. 316; section 725, Rev. St. Either the corporation committing the contempt may be punished, or the agent through whom it acts. *U. S. v. Memphis & L. R. R. Co.* 6 FED. REP. 237.

The purser and conductor are discharged. It does not appear that they were ever served with the injunction or made aware of its terms in this respect. The defendant corporation and its manager are adjudged to be guilty of a contempt, as alleged in the petition herein, by the violation of the provisional injunction heretofore issued in this case in pursuance of the order of this court made and entered on March 19, 1883. But as this is a proceeding between the parties to the suit, having a remedial purpose rather than a punitive one, the matter will now be referred to the master to ascertain what loss, expense, or injury the plaintiff has sustained by reason of the misconduct of the defendant, with a view of enabling the court to impose, by way of punishment, a corresponding penalty on the defendant for the benefit of the plaintiff; and as to any further proceeding the matter is continued until the coming in of the master's report. *Craig v. Fisher, supra*; *Fischer v. Hayes*, 6 FED. REP. 63; *Macaulay v. White S. M. Co.* 9 FED. REP. 698; *In re Mullee*, 7 Blatchf. 23.

CROSWELL v. MERCANTILE MUT. INS. CO.

(Circuit Court, D. Minnesota. January, 1884.)

MARINE INSURANCE—DESCRIPTION OF VESSEL.

Where an insurance certificate, issued under a policy of marine insurance, described the goods as "shipped on board of the Great Western Steam-ship Company," *held* that shipment upon a vessel not owned by the company, but chartered by it and placed upon its line as one of its vessels, satisfied the terms of the contract.

Stipulation is filed waiving a jury. On March 8, 1879, the plaintiff shipped a quantity of flour, by through bill of lading, from Minneapolis to Bristol, England. He applied to an insurance agent in Minneapolis, who gave him a certificate insuring him to the extent of \$1,100. The certificate is in the following form:

"\$1,100, Gold. *"Insurance Certificate,* No. 63,203.

"OFFICE OF THE MERCANTILE MUTUAL INSURANCE COMPANY,

"NEW YORK, March 8, 1879.

"This is to certify that on the eighth day of March, 1879, this company insured under policy No. 135,723, dated ——— 187—, and made for H. J. G. Crosswell, ——— dollars in gold, on three hundred and twenty (320) sacks of flour, valued at eleven hundred dollars, shipped on board of the Great Western Steam-ship Company, at and from Minneapolis to Bristol, England; and it is hereby understood and agreed that in case of loss, such loss is payable to the order of Chamberlain, Pole & Co. on surrender of this certificate.

"This certificate represents and takes the place of the policy, and conveys all the rights of the original policy-holder (for the purpose of collecting any loss or claim) as fully as if the property was covered by a special policy direct to the holder of this certificate, and free from any liability for unpaid premiums.

"C. J. PESPARD, Secretary.

A. W. MONTGOMY, JR., President."

Indorsed on the side:

"Not valid without the counter-signature of agent.

"S. S. EATON.

"NOTICE. To conform with the revenue laws of Great Britain, in order to collect a claim under this certificate, it must be stamped within sixty days after its receipt in the united kingdom."

The Mercantile Mutual Insurance Company had issued a running policy to S. S. Eaton, of St. Paul, and given him blank certificates to fill up when a risk was taken. He was its agent, with full authority to act. The running or open policy to Eaton, on account of whom it may concern, is dated March 16, 1878, and did not restrict insurance on merchandise to or from any particular ports, nor prohibit the insurance upon any particular vessel or vessels. The flour was shipped on the steamer Bernina, rated "A No. 1," which had been recently chartered by M. Whitwill & Son, promoters and owners of the

Great Western Steam-ship Line, and was lost, with all on board, on the outward trip. Suit is brought to recover amount of insurance.

Warner & Stevens, for plaintiff.

Young & Lightner, for defendant.

NELSON, J. This action is brought on a marine insurance policy to recover for loss of flour shipped from Minneapolis to Bristol, England. The insurance was effected on a running policy to the defendant's agent in St. Paul, and the blank certificate of the amount of the insurance issued by the company, and indorsed by the persons therein named, was filled up by an insurance agent in Minneapolis, to whom the shipper applied. The certificate declares the goods are "shipped on board of the Great Western Steam-ship Company," without naming any particular vessel, and the special policy which forms a part of the certificate adds, "or by whatever other name, or names, the said vessel * * * is or shall be named or called." No name of the vessel on board of which the freight was laden being named in the policy, the question arises, which, in my opinion, is decisive of the case, does the contract confine the risk to a shipment on board vessels owned by or constituting the Great Western Steam-ship Company's line at the date of the policy? The shipment was made on board the steam-ship *Bernina*, chartered by the steam-ship company and placed in the line as one of its vessels. This was its first voyage. The shipper, when notified that the flour was laden on this vessel, an extra one of the line, reported the fact to Ames, the insurance agent who had filled up and given the certificate, and was told by him in substance that it would make no difference about the insurance if the vessel was the equal of others in the line. It may well be urged, under all the circumstances, that Ames, who was intrusted with the blank certificates, and authorized to fill them up and take risks, represented the insurance company, and that *his* assent binds it; but in the view entertained it is not necessary to so decide. The name of the vessel and the voyage should be correctly given, according to the terms of the policy, and, ordinarily, when the shipper resides at the port of shipment, or can consult the officers of the insurance company it is done; so that, before concluding the contract, it may have all the *data* with which to fix the rate of premium. In this case the shipper resided far away from the seaport, and by this contract he was enabled to insure his flour on the presentation of a through bill of lading, it being impossible to designate and name in the policy the particular vessel. No deceit has been practiced, and there can be no prejudice to the insurance company unless this vessel was so unseaworthy, or of a class rated less than the vessels owned by or running in the Great Western Steam-ship Company's line prior to this voyage.

It is claimed that the premium is greater upon chartered vessels not belonging to a regular line, and testimony has been introduced apparently sustaining this position. I think, however, when we look

at the policy and the manner in which the insurance was taken, the name of the vessel has little to do with the risk, and I do not see the mischief supposed to result in this case. It is true the rate of premium depends upon the character of the vessel, the port of destination, the season of the year, and circumstances tending to increase or diminish the hazards, but I do not think the circumstances in this case, that the vessel had been chartered and recently brought into the line, was calculated to increase the risk. If she was fully equal to the other vessels in the class, and had efficient officers and a competent crew, the degree of hazard is not greater. The evidence is complete and conclusive on these points. But the language of the certificate does not limit the shipment on vessels at that time comprising the line. For anything appearing to the contrary, the company could sell out all its vessels and purchase or charter new ones, and operate them, and the shipment on a vessel of the line thus constructed would satisfy the terms of the policy. The only restriction is that the flour must be laden on some vessel of the line of the Great Western Steam-ship Company. This is a reasonable construction of the contract, and the testimony of the officers of this and other insurance companies about the increase of hazard upon chartered vessels, cannot affect its terms and conditions.

Judgment for plaintiff for amount claimed in proof of loss, with interest and costs.

In re ROBB.

(Circuit Court, D. California. January 19, 1884.)

1. FUGITIVES FROM JUSTICE ARRESTED AND RETURNED UNDER LAWS OF THE UNITED STATES.

The governor of a state, in issuing a warrant for the arrest of a fugitive from justice, the officer who makes the arrest, and the party commissioned to receive the fugitive and deliver him to the authorities of the state in which the offense is charged to have been committed, in pursuance of the provisions of sections 5278 and 5279 of the Revised Statutes, act under the authority of the laws of the United States, and *pro hac vice* are officers or agents of the United States.

2. WRIT OF HABEAS CORPUS—JURISDICTION.

Where a petition for a writ of *habeas corpus* presented to a state judge or court by a party in the custody of one claiming, in good faith, to be authorized to deliver him to the authorities of another state, as a fugitive from justice, in pursuance of the provisions of said sections, shows upon its face that the petitioner is so held in custody under such claim made in good faith, the state judge or court has no jurisdiction to issue the writ. The jurisdiction in such case is exclusively in the courts of the United States.

3. SAME—DUTY OF CUSTODIAN.

Where a writ of *habeas corpus* has been issued by a state judge or court, and been served on the party having the custody of such alleged fugitive, it is the duty of such custodian to make full return to the writ as to the authority under which he holds the prisoner, and to exhibit to the court the original papers evidencing his authority, and respectfully decline to produce the body of the prisoner; and if it appears from said return, or said petition and return, that

the prisoner is claimed to be held in good faith, in pursuance of the provisions of said statute, the judge or court issuing the writ has no jurisdiction or authority to proceed further, and no jurisdiction or authority to compel the production of the body of the prisoner, or to commit the party holding him for contempt in thus respectfully declining to produce the prisoner.

4. SAME—EFFECT OF PRODUCTION OF PRISONER.

The effect of the production of the prisoner would be to place him in the physical control of the court, and to deprive the agent of all power to execute the superior commands of the laws of the United States, to which he owes obedience.

Application for a Writ of *Habeas Corpus*. The opinion states the facts. Before SAWYER and SABIN, JJ.

Alfred Clarke, for the petitioner.

J. D. Sullivan, Dist. Atty. for the city and county of San Francisco, for sheriff.

W. M. Fitzmaurice, of counsel.

SAWYER, J. W. L. Robb filed his petition in the circuit court for a writ of *habeas corpus*, in which he states:

"That he is unlawfully imprisoned, detained, confined, and restrained of his liberty by P. Connolly, sheriff of the city and county of San Francisco, at the city and county of San Francisco, in the state of California; that the said imprisonment, detention, confinement, and restraint are illegal; and that the illegality thereof consists in this, to-wit, that petitioner is the duly appointed agent of the state of Oregon to convey to said state Charles H. Bayley, a fugitive from justice from said state, who is in the custody of this petitioner under a warrant issued by the governor of California, a copy of which warrant is hereto annexed and made a part of this petition; that on the twenty-first day of November, 1883, this petitioner was served with a writ of *habeas corpus* from the superior court of the city and county of San Francisco, commanding him to produce in said court said Charles H. Bayley; that petitioner respectfully informed said court by his return that he held said Bayley under the authority of the United States, and refused to produce said Bayley, and said superior court committed petitioner therefor for an alleged contempt of its authority. Wherefore, petitioner is in custody for an act done in executing a law of the United States, and for refusing to do an act contrary to a law of the United States."

The warrant annexed to the petition and made a part thereof is the same, a copy of which, with the return thereon, is hereinafter set out in the commitment as a part of the judgment for contempt.

A writ of *habeas corpus* having been issued according to the prayer and duly served, P. Connolly, sheriff, on January 11, 1884, made return as follows:

"Now comes P. Connolly and makes this his return to the within writ, and shows that he holds the within named W. L. Robb under a commitment, a copy of which is hereto annexed and made a part hereof.

"P. CONNOLLY,

"Sheriff City and County of San Francisco.

"By M. F. CUMMINGS, Under Sheriff.

"Dated January, 11, A. D. 1884."

The following is a copy of the commitment annexed to the return:

"In the superior court of the city and county of San Francisco, state of California, Department No. 1, Wednesday, November the 21st, A. D. 1883.

Present, Hon. T. K. Wilson, judge. In the matter of the application of Charles H. Bayley for a writ of *habeas corpus*.

"The application of Charles H. Bayley for a writ of *habeas corpus* coming on regularly to be heard, and it appearing to my satisfaction that a writ of *habeas corpus* was duly and regularly issued, directed to and served upon one W. L. Robb, commanding him, the said W. L. Robb, to have and produce before me, the undersigned, one of the judges of the superior court of the city and county of San Francisco, at the court-room of Department No. 1 of said court, at the hour of half past one o'clock P. M. of said day, the body of Charles H. Bayley, and at the time and place last aforesaid.

"The said W. L. Robb appearing by his counsel and submitting his return to said writ, *from which it appears that the said W. L. Robb holds the said Charles H. Bayley under the authority of the United States under and by virtue of the following warrant:*

"*'State of California, executive department. [Vignette.] The people of the state of California, to any sheriff, constable, marshal, or policeman of this state, greeting:*

"Whereas, it has been represented to me by the governor of the state of Oregon that C. H. Bayley stands charged with the crime of embezzlement, committed in the county of Clatsop, in said state, and that he has fled from the justice of that state, and has taken refuge in the state of California; and the said governor of the state of Oregon having, in pursuance of the constitution and laws of the United States, demanded of me that I shall cause the said C. H. Bayley to be arrested and delivered to W. L. Robb, who is authorized to receive him into his custody and convey him back to the state of Oregon; and, whereas, the said representation and demand is accompanied by a certified copy of the information filed in the office of the justice of the peace of the precinct of Astoria, Clatsop county, state of Oregon, whereby the said C. H. Bayley stands charged with said crime and with having fled from said state and taken refuge in the state of California, which is certified by the governor of the state of Oregon to be authentic; you are, therefore, required to arrest and secure the said C. H. Bayley wherever he may be found within this state, and to deliver him into the custody of the said W. L. Robb, to be taken back to the state from which he fled, pursuant to the said requisition, he, the said W. L. Robb, defraying all costs and expenses incurred in the arrest and securing of said fugitive. You will make return to this department of the manner in which this warrant has been executed.

"In witness whereof I have hereunto set my hand and caused the great seal of the state to be affixed this the twentieth day of November, in the year of our Lord one thousand eight hundred and eighty-three.

"[Seal]

GEORGE STONEMAN,

"Governor of the State of California.

"By the governor:

"THOS. L. THOMPSON, Secretary of State."

"SAN FRANCISCO, CAL.

"I hereby certify that I have this day arrested the within-named C. H. Bayley, and delivered him to W. L. Robb, as herein demanded.

"November 20, 1883.

P. CROWLEY, Chief of Police."

"And the said W. L. Robb has in his custody and possession the body of the said Charles H. Bayley, and is able to and can produce the said Charles H. Bayley before me at the time and place specified in and in accordance with the directions contained in said writ; and it further appearing that the said W. L. Robb willfully neglects and refuses to obey said writ of *habeas corpus* or to have or produce the said Charles H. Bayley before the undersigned as above mentioned, and that no good or sufficient cause has been shown or ex-

ists for said refusal, it is therefore ordered and adjudged that the said W. L. Robb is guilty of contempt of this court, in refusing to obey said writ of *habeas corpus*, and refusing to have and produce the body of Charles H. Bayley before me at the time and place specified in said writ; and further ordered that the sheriff of the city and county of San Francisco do forthwith arrest the said W. L. Robb, and confine him in the county jail of the city and county aforesaid until he, the said W. L. Robb, obeys said writ and produces the body of the said Charles H. Bayley before me, or until he be legally discharged.

"Given under my hand this twenty-first day of November, 1883.

"T. K. WILSON,

"Judge of Superior Court of the City and County of San Francisco, Cal."

At the hearing, a copy of the record of proceedings in the superior court, in which the judgment and commitment for contempt were had, was put in evidence, and it was agreed by counsel that this was the authority under which petitioner, Robb, is restrained of his liberty.

The record shows:

(1) A petition to T. K. Wilson, judge of the superior court of the city and county of San Francisco, for a writ of *habeas corpus* by Charles H. Bayley, in which he alleges:

"That he is unlawfully imprisoned, detained, confined, and restrained of his liberty by W. L. Robb, at the old city hall, in the city and county of San Francisco, in the state of California. That the said imprisonment, detention, confinement, and restraint are illegal; and that the illegality thereof consists in this, to-wit, that petitioner *is held under a warrant of arrest, a copy of which is hereto annexed and made a part hereof*. That said warrant is issued without authority of law and against the law in this, that no copy of an indictment found, or affidavit made, before a magistrate, charging petitioner with any crime, has been produced to the governor of California."

The warrant of arrest issued by the governor of California, annexed to and made a part of the petition, is the same warrant hereinbefore set out as a part of the judgment and commitment for contempt, and the return of P. Crowley, chief of police, indorsed thereon, and need not be repeated.

(2) A writ of *habeas corpus*, in the usual form, addressed to W. L. Robb, requiring him to produce the body of said Bayley, etc.

(3) The return to the writ made by said Robb, petitioner herein, which is as follows:

"In the superior court of the city and county of San Francisco, state of California. *Ex parte* Charles H. Bayley. *Habeas corpus*.

"Now comes W. L. Robb, and makes this his return to the annexed writ, and shows that he holds the within-named prisoner under the authority of the United States, as will more fully appear on inspection of the warrant of the governor of California and a commission from the governor of Oregon, a copy of which is hereto annexed and made a part hereof, and the originals produced. Respondent respectfully refuses to produce said C. H. Bayley, on the ground that under the laws of the United States he ought not to produce said prisoner, because the honorable superior court has no power or authority to proceed further in the premises.

W. L. ROBB.

"Subscribed and sworn to before me this twenty-first day of November, 1883.

J. F. CARPENTER, Deputy County Clerk."

The warrant of the governor of California, annexed to said return and made a part thereof, is the same hereinbefore set out as a part of the judgment and commitment for contempt, and the return of P. Crowley, chief of police, indorsed thereon. The commission of the governor of Oregon, also annexed to said return and made a part thereof, is as follows:

"State of Oregon. [Vignette.] Executive department. To all to whom these presents shall come:

"Know ye, that I have authorized and empowered, and by these presents do authorize and empower, Walter L. Robb to take and receive from the proper authorities of the state of California one C. H. Bayley, fugitive from justice, and convey him to the state of Oregon, there to be dealt with according to law.

"In witness whereof, I have hereunto set my hand and affixed the great seal of the state, at the city of Salem, this fifteenth day of November, in the year of our Lord one thousand eight hundred and eighty-three.

"[Seal] (Signed)

Z. Z. MOODY,

"Governor of the State of Oregon.

"By the governor:

"R. P. EARTHART, Secretary of State."

The original of said commission of the governor of Oregon under the seal of the state of Oregon, and the original of the said warrant of the governor of California under the seal of the state of California, were also produced and exhibited to the court at the time of making said return.

The constitution of the United States provides that "a person charged in any state with treason, felony, or other crime, who shall flee from justice and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime." Article 4, § 2.

The last clause of section 8 of article 1 confers upon congress power "to make all laws which shall be necessary and proper for carrying into execution * * * all * * * powers vested by this constitution in the government of the United States." And article 11 provides that "this constitution and the laws of the United States which shall be made in pursuance thereof * * * shall be the supreme law of the land; and judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding." Thus, any laws passed by congress under those constitutional provisions for the arrest of fugitives from justice found in any state, and their delivery to the state from which they fled, are a part of the supreme law of the land, to which all state laws upon the subject must be subordinate. This power, like the power conferred in the same section to return fugitives from labor, the power to regulate foreign and interstate commerce, to declare war, raise armies, provide for a navy, make peace, etc., it was thought ought not to be reposed in the states. State jealousies, and

diverse state interests and policies, might prevent the return of fugitives from justice and labor, and to guard against inconvenience in these matters, the power was conferred upon the general government over these subjects, and it is supreme. So, also, the constitution provided for courts to administer the laws of the United States. In pursuance of the provisions cited relating to the return of fugitives from justice and labor, congress, in 1793, passed an act for the return of both classes of fugitives. 1 St. 302. Sections 1 and 2 of that act, relating to fugitives from justice, have been carried into the Revised Statutes of the United States, and constitute sections 5278 and 5279, which, so far as applicable to this case, read as follows:

"Sec. 5278. Whenever the executive authority of any state or territory demands any person, as a fugitive from justice, of the executive authority of any state or territory to which such person has fled, and produces a copy of an indictment found, or an affidavit made before a magistrate of any state or territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the state or territory from whence the person so charged has fled, it shall be the duty of the executive authority of the state or territory to which such person has fled to cause him to be arrested and secured, and to cause notice to be given to the executive authority making such demand, or to the agent of such authority appointed to receive the fugitive, and to cause the fugitive to be delivered to such agent when he shall appear.

"Sec. 5279. Any agent so appointed who receives the fugitive into his custody *shall be empowered to transport him to the state or territory from which he has fled.* And every person who, by force, sets at liberty or rescues the fugitive from such agent, while so transporting him, shall be fined not more than five hundred dollars, or imprisoned not more than one year."

When the governor of a state, acting under this statute, upon the demand of the authorities of another state, issues his warrant for the arrest of a party charged with a crime, and that party is arrested by any proper officer, and delivered over to the party empowered by the state in which the offense was committed, to be carried to that state and delivered to its proper authorities, we have no doubt that the governor issuing the warrant, the officer executing it, and the party to whom he is delivered, are acting by virtue and under the authority of the act of congress, and no other, and *pro hac vice* are officers or agents of the United States. *Ex parte Smith*, 3 McLean, 129; *Prigg's Case*, 16 Pet. 539. From the time of arrest till he is delivered to the authorities of the state demanding his surrender, the party is in the custody of the law,—and that law a law of the United States, and the supreme law of the land. In this case Bayley had been arrested upon a warrant issued by the governor of California, on a demand by the governor of Oregon, and delivered into the custody of the petitioner, Robb, who was duly commissioned and authorized by the governor of Oregon to receive him and convey him to Oregon, which duty he was engaged in performing, in pursuance of the provisions of the act of congress, when he was served with the writ of

habeas corpus from the superior court, to which he made the return hereinbefore set out, stating that he held Bayley for the purpose of conveying him to Oregon, under and in pursuance of the laws of the United States, by virtue of the commission from the governor of Oregon, and the warrant of arrest of the governor of California, and arrest under it, annexing thereto copies of said documents, and exhibiting the originals, and respectfully declined to produce the body of Bayley on the expressed ground that, it appearing to the court that Bayley was in custody under the laws of the United States, the court had no jurisdiction to proceed further, or to require him to produce the body of said prisoner.

The court took a different view on this point, adjudged petitioner to be guilty of contempt in declining to produce the body of Bayley, and to be imprisoned until he should comply with the commands of the writ in this particular. If the court, after being informed of the cause of restraint, had jurisdiction and authority to proceed further, and compel the production of the body of Bayley, notwithstanding the facts shown, then the judgment for contempt is lawful, and petitioner must be remanded; but if it had no authority to proceed and compel the production of the body of Bayley, then it had no power to punish petitioner for contempt, and he could not be in contempt in not producing him, and the authority of the court to proceed is the question to be determined. As we understand the decisions, this very question has been distinctly determined by the supreme court of the United States, under circumstances that compelled the most deliberate and mature consideration, in the cases of *Ableman v. Booth* and *U. S. v. Booth*, 21 How. 507. In the first case, Booth had been arrested for an offense against the laws of the United States, and held to answer by a court commissioner, and committed to the custody of the marshal of the district. A justice of the supreme court of Wisconsin discharged Booth from custody on *habeas corpus*, on the ground that the act under which Booth was held was unconstitutional and void, and his action was affirmed by the state supreme court. Booth was then indicted and tried, and convicted in the United States district court for the district of Wisconsin, and sentenced to imprisonment, whereupon the same justice of the supreme court of the state discharged him again on *habeas corpus*, on the same grounds as before; which action was also affirmed by the supreme court of the state. This action of the justice of the supreme court, and of the supreme court of the state, was reversed by the supreme court of the United States, upon the ground that the court and justice were wholly without jurisdiction to consider these matters. So earnest was the supreme court of Wisconsin in its determination to maintain its authority that it even disobeyed the writ of the United States supreme court, commanding it to send up its record, and peremptorily ordered its clerk not to send a transcript of the record, which order was obeyed;

and the cases were heard upon copies of the records, permitted by the supreme court to be filed, upon affidavits stating the facts.

In discussing the powers of the state and national courts, the court, speaking by its chief justice, says:

"If the judicial power exercised in this instance has been reserved to the states, no offense against the laws of the United States can be punished by their own courts without the permission and according to the judgment of the courts of the state in which the party happened to be imprisoned; for if the supreme court of Wisconsin possessed the power it has exercised in relation to offenses against the act of congress in question, it necessarily follows that they must have the same judicial authority in relation to any other law of the United States; and, consequently, their supervising and controlling power would embrace the whole criminal code of the United States, and extend to offenses against our revenue laws, or any other law intended to guard the different departments of the general government from fraud or violence. And it would embrace all crimes, from the highest to the lowest, including felonies, which are punished with death, as well as misdemeanors, which are punished by imprisonment. And moreover, if the power is possessed by the supreme court of the state of Wisconsin, it must belong equally to every other state in the Union, when the prisoner is within its territorial limits; and it is very certain that the state courts would not always agree in opinion; and it would often happen that an act which was admitted to be an offense, and justly punished, in one state, would be regarded as innocent, and indeed as praiseworthy, in another.

"It would seem to be hardly necessary to do more than state the result to which these decisions of the state courts must inevitably lead. It is, of itself, a sufficient and conclusive answer; for no one will suppose that a government which has now lasted nearly seventy years, enforcing its laws by its *own tribunals*, and preserving the union of the states, could have lasted a single year, or fulfilled the high trusts committed to it, if offenses against its laws could not have been punished without the consent of the state in which the culprit was found.

"The judges of the supreme court of Wisconsin do not distinctly state from what source they suppose they have derived this judicial power. There can be no such thing as judicial authority, unless it is conferred by a government or sovereignty; and if the judges and courts of Wisconsin possess the jurisdiction they claim, they must derive it either from the United States or the state. It certainly has not been conferred on them by the United States; and it is equally clear it was not in the power of the state to confer it, even if it had attempted to do so; for no state can authorize one of its judges, or courts, to exercise judicial power by *habeas corpus*, or otherwise, within the jurisdiction of another and independent government. And although the state of Wisconsin is sovereign within its territorial limits to a certain extent, yet that sovereignty is limited and restricted by the constitution of the United States. And the powers of the general government and of the state, although both exist and are exercised within the same territorial limits, are yet separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. And the sphere of action appropriated to the United States is far beyond the reach of the judicial process issued by a state judge or a state court, as if the line of division was traced by landmarks and monuments visible to the eye. And the state of Wisconsin had no more power to authorize these proceedings of its judges and courts than it would have had if the prisoner had been confined in Michigan, or in any other state of the Union, for an offense against the laws of the state in which he was imprisoned." 21 How. 514.

Again:

"Questions of this kind must always depend upon the constitution and laws of the United States, and not of a state. The constitution was not formed merely to guard the states against danger from foreign nations, but mainly to secure union and harmony at home; for if this object could be attained, there would be but little danger from abroad, and to accomplish this purpose it was felt by the statesmen who framed the constitution, and by the people who adopted it, that it was necessary that many of the rights of sovereignty, which the states then possessed, should be ceded to the general government, and that, in the sphere of action assigned to it, it should be supreme and strong enough to execute its *own laws by its own tribunals*, without interruption from a state or from state authorities. And it was evident that anything short of this would be inadequate to the main objects for which the government was established; and that local interest, local passions or prejudices, incited and fostered by individuals for sinister purposes, would lead to acts of aggression and injustice, by one state upon the rights of another, which would ultimately terminate in violence and force, unless there was a common arbiter between them, armed with power enough to protect and guard the rights of all, by appropriate laws, to be carried into execution peacefully by its judicial tribunals." 21 How. 516, 517.

After showing the relation of the state and national courts to each other, and to the laws of the United States passed within the scope of the powers of the national government, the court, in language so clear and precise that it can not well be misunderstood, lays down the rule directly applicable to this case, as follows:

"We do not question the authority of the state court, or judge, who is authorized by the laws of the state to issue the writ of *habeas corpus*, to issue it in any case where the party is imprisoned within its territorial limits, *provided it does not appear, when the application is made, that the person imprisoned is in custody under authority of the United States*. The court, or judge, has a right to inquire, in this mode of proceeding, for what cause, and and by what authority, the prisoner is confined within the territorial limits of the state sovereignty. And it is the duty of the marshal, or *other person* having the custody of the prisoner, to make known to the judge or court, by a proper return, the authority by which he holds him in custody. This right to inquire by process of *habeas corpus*, and the duty of the officer to make a return, grows, necessarily, out of the complex character of our government, and the existence of two distinct and separate sovereignties within the same territorial space, each of them restricted in its powers, and each, within its sphere of action, prescribed by the constitution of the United States, independent of the other. *But, after the return is made, and the state judge or court judicially apprised that the party is in custody under the authority of the United States, they can proceed no further. They then know that the prisoner is within the dominion and jurisdiction of another government, and that neither the writ of habeas corpus, nor any other process issued under state authority, can pass over the line of division between the two sovereignties. He is then within the dominion and exclusive jurisdiction of the United States. If he has committed an offense against their laws, their tribunals alone can punish him. If he is wrongfully imprisoned, their judicial tribunals can release him and afford him redress. And although, as we have said, it is the duty of the marshal, or other person holding him, to make known, by a proper return, the authority under which he detains him, it is at the same time imperatively his duty to obey the process of the United States, to hold the prisoner in custody under it, and to refuse obedience to*

the mandate or process of any other government. And, consequently, it is his duty not to take the prisoner, nor suffer him to be taken, before a state judge or court upon a habeas corpus issued under state authority. No state judge or court after they are judicially informed that the party is imprisoned under the authority of the United States, has any right to interfere with him, or to require him to be brought before them. And if the authority of a state, in the form of judicial process, or otherwise, should attempt to control the marshal, or other authorized officer or agent of the United States, in any respect, in the custody of his prisoner, it would be his duty to resist it, and to call to his aid any force that might be necessary to maintain the authority of law against illegal interference. No judicial process, whatever form it may assume, can have any lawful authority outside of the limits of the jurisdiction of the court or judge by whom it is issued; and an attempt to enforce it beyond these boundaries is nothing less than lawless violence."
21 How. 523.

This decision was fully affirmed nearly 25 years afterwards, in *Tarble's Case*, 13 Wall. 397. Tarble had enlisted in the United States army, deserted, and been arrested, and he was restrained of his liberty on that ground, by Lieut. Stone, in charge of the station. A writ of *habeas corpus* having been issued by a state commissioner having jurisdiction to issue such writs, and served, Lieut. Stone made return that the petitioner had enlisted, deserted, and been captured, and he claimed to hold him rightfully as a soldier under the laws of the United States. It was replied that he was a minor under 18 years of age; that he had been inveigled into enlisting without the consent of his father, and that the enlistment was void, on this and other grounds set out, and it was claimed that the petitioner was unlawfully restrained of his liberty. The commissioner took testimony, heard the case, and discharged him. The proceedings of the commissioner were affirmed by the supreme court of Wisconsin. The judgment of the state supreme court was subsequently reversed by the supreme court of the United States, after an elaborate review of the questions involved, not on the ground that the state commissioner and court erred on the facts, or the unlawfulness of the imprisonment, but upon the ground that they had no right, or jurisdiction, to examine or determine the question as to the lawfulness of the imprisonment at all, after the fact was brought to the attention of the court issuing the writ that the officer, in good faith, claimed to hold him under authority of the laws of the United States—that upon these facts appearing the jurisdiction was ousted. Said the court upon this question:

"State judges and state courts, authorized by laws of their states to issue writs of *habeas corpus*, have, undoubtedly, a right to issue the writ in any case where a party is alleged to be illegally confined within their limits, *unless it appear upon his application that he is confined under the authority, or claim and color of the authority, of the United States, by an officer of that government. If such fact appear upon the application, the writ should be refused. If it do not appear, the judge or court issuing the writ has a right to inquire into the cause of imprisonment, and ascertain by what authority the person is held within the limits of the state; and it is the duty of the*

marshal, or other officer having the custody of the prisoner, to give, by a proper return, information in this respect. His return should be sufficient, in its detail of facts, to show distinctly that the imprisonment is under the authority, or claim and color of the authority, of the United States, and to exclude the suspicion of imposition or oppression on his part. And the process, or orders, under which the prisoner is held should be produced with the return, and submitted to inspection, in order that the court or judge issuing the writ may see that the prisoner is held by the officer in good faith, under the authority, or claim and color of the authority, of the United States, and not under the mere pretense of having such authority."

An attempt was made, upon other authorities cited, to distinguish the case from Booth's cases, and to limit the application of the doctrines established by them; but the court emphatically repudiated any such limitation, as appears by the following explicit language:

"Some attempt has been made in adjudications, to which our attention has been called, to limit the decision of this court in Ableman v. Booth, and the United States v. Booth, to cases where a prisoner is held in custody under undisputed lawful authority of the United States, as distinguished from his imprisonment under claim and color of such authority. But it is evident that the decision does not admit of any such limitation. It would have been unnecessary to enforce, by any extended reasoning, such as the chief justice uses, the position that when it appeared to the judge or officer issuing the writ that the prisoner was held under undisputed lawful authority, he should proceed no further. No federal judge, even, could, in such case, release the party from imprisonment, except upon bail when that was allowable. The detention being by admitted lawful authority, no judge could set the prisoner at liberty, except in that way, at any stage of the proceeding. All that is meant by the language used is that the state judge or state court should proceed no further when it appears, from the application of the party, or the return made, that the prisoner is held by an officer of the United States under what, in truth, purports to be the authority of the United States; that is, an authority, the validity of which is to be determined by the constitution and laws of the United States. If a party thus held be illegally imprisoned, it is for the courts or judicial officers of the United States, and those courts or officers alone, to grant him release."

The court concludes:

"It follows, from the views we have expressed, that the court commissioner of Dane county was without jurisdiction to issue the writ of habeas corpus for the discharge of the prisoner in this case, it appearing, upon the application presented to him for the writ, that the prisoner was held by an officer of the United States under claim and color of the authority of the United States, as an enlisted soldier mustered into the military service of the national government; and the same information was imparted to the commissioner by the return of the officer. The commissioner was, both by the application for the writ and the return to it, apprised that the prisoner was within the dominion and jurisdiction of another government, and that no writ of habeas corpus issued by him could pass over the line which divided the two sovereignties. The conclusion we have reached renders it unnecessary to consider how far the declaration of the prisoner as to his age, in the oath of enlistment, is to be deemed conclusive evidence on that point on the return to the writ."

Now, the case of the petitioner in this proceeding, except that the officer or agent of the United States having Bayley in charge is

neither a judge, commissioner, nor military officer, acting under the judiciary or military laws of the United States, but a person expressly authorized to act by other statutes of the United States, is precisely in the condition of *Tarble's Case*. The petition of Bayley on its face showed that he *was claimed*, at least, to be held in custody in pursuance of the laws of the United States. It was so explicitly stated in the petition, and a copy of the warrant showing the authority was annexed to and made a part of the petition for the writ; and this being so, if the doctrine asserted in the *Booth* and *Tarble Cases* is correct—and whether correct or not it is controlling in this court—then, in the language of the court in *Tarble's Case*, already quoted, the judge who issued the writ to the petitioner “*was without jurisdiction to issue the writ of habeas corpus for the discharge of the prisoner in this case, it appearing, upon the application presented to him for the writ, that the prisoner was held by an officer or agent of the United States, under claim and color of authority of the United States,*” as a fugitive from justice, to be delivered over to the authorities of the state of Oregon. But if it were necessary to go further, the petitioner did exactly what the supreme court of the United States said he was bound to do under such circumstances, and made return to the writ showing his authority, giving copies of his commission from the governor of Oregon, and warrant from the governor of California, and return of the chief of police, and exhibited the originals under the seals of the respective states, his authority thus appearing upon the representations of both the petitioner and the party restraining him of his liberty, and this state of facts satisfactorily appeared to the court, for the court itself so adjudged in its judgment for contempt. And the petitioner further did exactly what the supreme court of the United States said he must do—respectfully declined to produce the body of the prisoner. Fortunately, he did not have occasion to go further, as the court said he must do, if necessary, and resist by all the force at his command any attempt to compel a production of his body, other than to defend himself in the courts in response to the writ of *habeas corpus* issued to and served upon him, and in the proceedings for contempt now under consideration.

Now, if it was lawful for petitioner to decline to produce the body of Bayley upon the facts disclosed to the court upon the face of the petition itself, or upon the face of the petition and the return made to the writ; if it was lawful to resist by force, with all the power at his command, any attempt to compel him to produce the body of the prisoner; if, upon the facts of the case appearing, as they did appear, the judge had no jurisdiction to proceed further or examine at all into the regularity of the proceeding under which Bayley was held,—then there certainly was no jurisdiction or lawful authority to force a production of Bayley through proceedings for contempt. The two propositions are incompatible, and their co-existence legally im-

possible. There is strong reason for maintaining this position. If a judge of a state court—another sovereignty as distinct from the national sovereignty as if it ruled over a different territory—can, under the circumstances indicated, compel the production of a prisoner held under the laws of the United States,—the supreme law of the land,—he has the physical power to discharge him when produced, however lawless the discharge may be, as was done, in fact, in the *Booth* and *Tarble Cases*. The production of the body in court, by means of which the court has the physical power to assume control, is equivalent to a surrender of a prisoner. And if one person can be discharged by a state officer, so can all, and it would be impossible for the United States, in some contingencies, to discharge the duty imposed upon them by the national constitution relating to fugitives from justice, as well as to fugitives from labor, or to execute the laws of congress passed to give effect to those constitutional rights of the several states, as between themselves. It would be as difficult to perform their duties as the supreme court in *Booth's Cases* said it would be to execute the criminal laws of the United States under similar conditions.

By producing the body as required by the writ, the petitioner necessarily places his prisoner within the control of the court issuing it, and deprives himself of all power to perform the requirements of his commission, enjoined by the superior authority of the laws of the United States. He cannot, and he does not, owe a divided duty to two distinct sovereignties. He cannot serve two masters. He cannot produce his prisoner, which is equivalent to his surrender, in obedience to the commands of the writ of *habeas corpus*, and at the same time retain power to obey the mandate of the laws of the United States and deliver him to the authorities of the state of Oregon. He must obey one command or the other, and the command to be obeyed is the one which is superior or supreme in its authority. But whether these reasons and others given are sound or not, the rule as to the jurisdiction of the state courts, under the circumstances indicated, appears to us to be clearly established by the highest tribunal in the land, and are not open even to question here, and cannot be disregarded by us.

We are of opinion, under the authoritative decisions cited, that the judge of the superior court on the petition of Bayley, as presented, had no jurisdiction to issue the writ, and certainly, upon the petition and the return made to the writ by Robb, that neither the judge nor the court over which he presides had jurisdiction or authority to proceed further, or to compel the production of the body of Bayley, or to punish him for contempt for respectfully declining to produce the body under the circumstances of the case, in pursuance of the commands of the writ.

We should not have thought it necessary to go into the case so fully, or to have done anything beyond referring to the *Booth* and

Tarble Cases, but we found ourselves in the delicate, embarrassing, and very unpleasant position of reaching a conclusion different from that attained by the supreme court of the state in this case, for whose judgment we entertain the very highest respect. That tribunal held, on a writ of *habeas corpus* heretofore issued on petition of Robb, that the superior court had jurisdiction and authority to compel petitioner, by imprisonment for contempt, to produce the body of his prisoner, Bayley, and remanded him to suffer the punishment adjudged by that court. *In re Robb*, 1 Pac. Rep. 881. Had there been no decisions of the supreme court of the United States settling the question, as we conceive there are, we certainly should have hesitated long before declining to follow this ruling of the supreme court of the state. But where that court differs from the supreme court of the United States as to rights depending upon the statutes of the United States, over which the latter court has final jurisdiction, and we must follow one or the other, as we must do in this case, our duty is to yield obedience to the latter. As no reference is made to the *Booth* and *Tarble Cases* in the opinion of the supreme court of the state, those cases may not have attracted the attention of the court.

The prisoner is entitled to be discharged from imprisonment, and it is so ordered.

UNITED STATES v. MOORE.-

(District Court, N. D. Illinois. November 20, 1883.)

SENDING MATTER CONCERNING LOTTERIES THROUGH THE MAILS—DECOY LETTERS.

The offense of sending letters or circulars concerning lotteries through the mails is complete under section 3894 of the Revised Statutes, although the circulars in question are sent in reply to letters written by a detective, under a fictitious name, for no other purpose than to obtain evidence of the commission of the offense.

Indictment under Section 3894, Rev. St.

J. B. Leake, U. S. Dist. Atty., for the prosecution.

A. S. Trude, for defendant.

BLODGETT, J., (charging jury.) The law under which this indictment is found provides that no letter or circular concerning lotteries shall be carried in the mails. The statute, as originally passed by congress, provided that no letter or circular concerning *illegal* lotteries should be so carried. At that time a great many of the states in the Union had prohibited lotteries within their jurisdiction, while in others they were permitted; and difficulty arose in the administration of this statute by reason of the contention that in some states lotteries were still legal, and therefore not within the scope of this act. In 1876, congress, by an amendment of the statute, struck out the word *illegal*, so that the statute, as amended, now reads, that no letter or

circular concerning lotteries shall be carried in the mails, thereby making all matter concerning lotteries unmailable matter. The supreme court of the United States has stated, in two different opinions, that the intention of congress, in passing the statute in question, was to prohibit the sending of matter concerning lotteries through the mails, because of the immoral tendencies of lotteries, it being contrary to public policy to carry, as mail matter, anything concerning them, inasmuch as they tended to demoralize the public mind. *Stone v. Mississippi*, 101 U. S. 821; *Ex parte Jackson*, 96 U. S. 736. By the same decisions the constitutionality of this statute is sustained.

I understood the learned counsel for the defense to state, in his opening addressed to you, that he conceded it was useless to deny that the defendant was engaged in the lottery business, but he insisted that the defendant had not used the mails, and challenged the government to prove that the defendant had used the mails for the purpose of carrying on the business. This narrows the issues in this case down to the simple question, does the proof in this case satisfy you that the defendant deposited, or caused to be deposited, in the mails the matter concerning lotteries charged in this indictment?

The charges in the indictment, which the government has attempted to prove, specify three distinct offenses: The first is that the defendant mailed at the post-office in Chicago a letter directed to Jim C. Holmes, Virden, Illinois, containing certain circulars and lottery tickets; the second is that the defendant mailed at the Chicago post-office a letter containing certain circulars and lottery tickets directed to R. W. Williams, box 302, Collinsville, Illinois; and the third offense charged is the mailing of a letter at the Chicago post-office containing similar inclosures directed to Sam Moorey, at Shiloh, Illinois. It is admitted by the witnesses for the government that the names of Holmes, Williams, and Moorey are fictitious names, and that the letters which it is charged the defendant mailed, containing these circulars and tickets, were in answer to letters written by Mr. McAfee and Mr. Mooney, respectively, using the fictitious names of Holmes, Williams, and Moorey, addressed to the defendant, B. Frank Moore, 127 La Salle street, Chicago, inclosing money, and requesting that he invest it for them, respectively, in pursuance of an advertisement of certain lotteries, which had been cut from a newspaper, and in which they also requested a reply by mail.

It is claimed, on the part of the government, that the proof tends to show that these letters mailed in Chicago, addressed to Holmes, Williams, and Moorey, were mailed by the defendant in response, or answer, to the Holmes, Williams, and Moorey letters, written by McAfee and Mooney. This court in several cases has had occasion to pass upon the question as to whether the detection of crime, by means of decoy letters, is allowable under the law, and has uniformly charged the jury that it is an allowable method of detecting crime, stating in

two cases, which I have in mind, that it is hardly possible to detect crimes against the postal laws in any other way.

Allusion was made, by the counsel for defendant, to certain comments made by a learned brother on the bench, Judge TREAT, of St. Louis, in some case in which McAfee appeared before him as a witness. I do not know what peculiar facts appeared in that case which gave occasion for the comments said to have been made by my learned brother as to the conduct of this witness, but must presume that it was a case which justified what he then said, but there is nothing in this case, in my estimation,—and I say it to you with due regard as to the responsibility of the court,—that discredits the testimony of Mr. McAfee. His testimony stands before you like that of any other witness. The question for you to determine is whether you will believe McAfee under oath, taking into consideration the explanation which he has given in reference to his methods of work. It certainly ought not to discredit any witness before a jury to have it brought out that he, as an individual member of society, has volunteered to detect crime without appointment or without any official position. Nor ought it to discredit a witness, perhaps, any more because he is the agent of some organization and is employed to carry out its objects for the suppression of vice. If it is a part of the purpose of that organization to suppress lotteries, you must say whether an individual, acting towards the ends of that organization, as its agent, is to be discredited, while using methods allowable under the law. If the defendant received the letters, copies or which are in evidence, purporting to come from Holmes, Williams, and Moorey, he could have answered them without violating the law. He must be presumed to know what the law is in regard to sending matter concerning a lottery through the mails; and sending such matter in response to a letter from a fictitious person is just as clear a violation of the law as if sent to a real person described by the name to which the letter was addressed. The name of the person to whom the inhibited matter is addressed is no part of the offense, but the question is, did the defendant send through the mails a letter or circular concerning lotteries; and you have no concern with the good faith of the person who incited or induced, by a decoy letter, the sending of such matter any more than you have with the good faith of a person who sends marked money through the mails in order to detect one who is stealing from the mail. When defendant received the letters in question he was under no obligation to so answer them as to violate the law.

It is for you to determine whether the proof on the part of the government shows that, in response to these registered letters, confessedly written by McAfee and Mooney, addressed to the defendant at his place of business in this city, certain letters were received containing these lottery circulars and tickets. There can be no doubt, on an inspection of these circulars and tickets, that they concern or

refer to lotteries; they will speak for themselves, and you will have them in the jury-room, so that you may see just what they are.

The testimony on the part of the government shows without dispute that, some time in January, 1882, the defendant gave an order in writing to the assistant postmaster of this city, authorizing the delivery of his registered mail matter to a Mr. Halsey, and the testimony on the part of the government shows without dispute that his registered mail, since that time, has been delivered to Mr. Halsey, and that the three letters in question, postmarked at Virden, Collinsville, and Shiloh, Illinois, were delivered to Halsey, and receipted for by him. The question of fact for you to pass on is, "Does this connect the defendant with the sending of these circulars and tickets?" Are you satisfied, beyond a reasonable doubt, that these letters written by McAfee and Mooney, from Virden, Collinsville, and Shiloh, were registered letters, and were delivered in due course of mail to defendant's agent here in this city, and that, in response to those letters, these letters containing circulars and tickets were mailed, either by the defendant himself, or by his direction, and sent through the mail as addressed? That is the question. Does the fact that these registered letters from Holmes, Williams, and Moorey, which came into the hands of the agent, Halsey, and were responded to in the manner exhibited by the proof, satisfy you, beyond a reasonable doubt, that defendant sent through the mail the lottery tickets and circulars in evidence? If so, you should find the defendant guilty; but if you are not satisfied by the testimony of the government, beyond a reasonable doubt, that the defendant did send these circulars, then he should have the benefit of that doubt, and you should render your verdict accordingly.

See *Bates v. U. S.* 10 FED. REP. 92, and note, 97.

UNITED STATES *v.* KANE.

(*District Court, D. Oregon.* January 26, 1884.)

1. OBSTRUCTING THE PASSAGE OF THE MAIL.

The defendant and others, discharged railway laborers, to the number of 150, assembled at Pendleton, Oregon, and by threats of violence prevented the daily train of the Oregon Railway & Navigation Company, including the mail car with the United States mail therein, from proceeding to Portland, because the conductor would not permit them to ride thereon to Portland free of charge, on the ground that they had no money and the company having "passed them up," ought to "pass them down;" and for the same reason and by the same means prevented the conductor from detaching said mail car from said train and sending it to Portland with the United States mail therein. *Held* that, whether the company was under any legal obligation to carry the defendant to Portland free of charge or not, he had no right to prevent the conductor from sending the mail car on to Portland, as he did; and that the conduct of the defendant and his associates being unlawful and necessarily causing the passage of the mail to be obstructed, the law imputes to him an intention, whatever the primary purpose of his conduct was, to cause such obstruction, and, therefore, he is guilty of obstructing and retarding the passage of the mail, contrary to section 3995 of the Revised Statutes.

2. PASSENGER ON TRAIN.

A person who is entitled to travel on a railway car may go upon the same peacefully, and remain therein until he arrives at his destination; and if the conductor undertakes to put him off, on the ground that he is not entitled to travel thereon, he may resist force with force; but if the conductor stops the train on his account, and undertakes to detach the mail car therefrom and send it on with the mail, he has no right to prevent him from so doing, and if he does his act is unlawful.

Information for Violation of Section 3995, Rev. St.

James F. Watson, for the United States.

George Kane, in propria persona.

DEADY, J. This is an information charging the defendant with a violation of section 3995 of the Revised Statutes, which provides that "any person who shall knowingly and willfully obstruct or retard the passage of the mail, or any carriage, horse, driver, or carrier, carrying the same, shall, for every such offense, be punishable by a fine of not more than \$100." The defendant pleads "not guilty," and submits the case to the judgment of the court on the facts stated in the deposition of the witnesses, including his own, examined before the commissioner who committed him to answer the charge, and which, by the stipulation signed by the district attorney and the defendant, is to have the effect herein of a special verdict. From this it appears that on January 10, 1884, there were at Pendleton, Oregon, about 150 discharged railway laborers, including the defendant, who had lately been employed by contractors in the construction of a railway in that vicinity, and wanted to come to Portland on the regular train of the Oregon Railway Navigation Company, then running between Pendleton and Portland, and carrying, among other things, the United States mail, without paying their passage, on the ground that they were without money, and the company ought to pass them down as it had passed them up, which the conductor of the train refused to permit; that the defendant, acting as spokesman for himself and the crowd, told the conductor that the train should not move without them, and that if he undertook to pull out and leave them behind, there would be trouble, and he would be hurt; that thereby the train with the United States mail in the postal car was detained at Pendleton until the next day, January 11th, when the conductor concluded and undertook to cut off the postal car containing the United States mail, then being carried thereon from Pendleton to Portland, and proceed with it to the latter place, as it was his duty to do, but the defendant forbade him to do so, and told him there would be trouble if he attempted to uncouple the car; and when the conductor, notwithstanding the threat, undertook to have the pin removed, and the mail car detached from the rest of the train for the purpose of proceeding with it to Portland, the defendant, backed by several of his associates, prevented the brakeman from taking out the pin, by putting his foot upon it, and threatening violence if the attempt was persisted in; but also, according to his own statement,

saying that the conductor might take "his mail, but if the train goes we are going with it," whereby the passage of said mail, mail carriage, and carrier, was further obstructed and retarded until the arrival on the ground of a detachment of United States soldiers, and the arrest of the defendant by the deputy United States marshal.

In the case of *U. S. v. Kirby*, 7 Wall. 482, the defendant was charged with arresting the carrier of the mail, and detaining the steam-boat on which it was being carried for that purpose. The defendant, in his plea to the indictment, alleged that he made such arrest as sheriff, upon a lawful warrant charging the carrier with murder, and without any intent or purpose to obstruct the mail or the passage of the steamer. Upon a demurrer to this plea, the judges in the court below were divided in opinion as to whether the conduct of the defendant constituted, under the circumstances, an obstruction of the mail within the meaning of the act of congress, and certified the question to the supreme court. The court answered the question in the negative, saying, "that the act of congress which punishes the retarding or obstruction of the mail or of its carrier, does not apply to a case of a temporary detention of the mail caused by the arrest of the carrier upon an indictment for murder." In the course of his opinion, Mr. Justice FIELD says, substantially, that the statute only applies to persons who do some act with a knowledge that it will retard the passage of the mail and do it with that intention, but adds: "When the acts which create the obstruction are in themselves unlawful, the intention to obstruct will be imputed to their author, although the attainment of other ends may have been his primary object."

That the conduct of the defendant and his associates had the effect to obstruct and retard the passage of the mail is self-evident; and that this effect was knowingly caused by them, although it was not the primary object of their action, is also plain enough. They directly and purposely obstructed the passage of the mail, not as an end, it is true, but as a means of coercing the conductor to carry them on his train to Portland. I suppose the passage of the mail is seldom obstructed, except by robbers, otherwise than as a means of attaining some other end. In all such cases the question to be decided is whether the act causing the obstruction is in itself lawful? If it is, the obstruction necessarily caused thereby is not a crime. It can hardly be pretended, upon the facts stated, that these men who stopped this train had any legal right to travel thereon without payment of their fare or the consent of the conductor. No contract, understanding, or usage is alleged or shown, under or by virtue of which they could claim such a privilege with a shadow of right. Because, as they allege, the company "passed them up," they claimed it ought to "pass them down." There is an old adage that "one good turn deserves another," but this application of it would make the doing of good works dangerous to the doer. How long would it be before they

would stop an ascending train on the ground that they ought to be "passed up again" because they had been "passed down." The act of detaining the train, including the mail car, was unlawful, and therefore the intention to retard the passage of the mail by such act is imputed to the defendant and his associates. In other words, the law holds them responsible for the necessary consequences of their unlawful conduct, without reference to the motive or purpose which actually induced it. But even supposing that they had, at the time, a legal right to transportation on this train free of charge, or had even paid for their passage to Portland thereon, the act was unlawful.

Under such circumstances it may be admitted that the defendant would have a right peacefully to board the passenger car and to remain there until he reached his destination. If the conductor disputed his right and sought to put him off, he might lawfully resist force with force; and if the conductor chose to detain the train at any point until he got off, and the passage of the mail was thereby retarded, the responsibility therefor would lie at the door of the company, and not the defendant. But in my judgment, the defendant, even under those circumstances, would not be justified in preventing the conductor from detaching the mail car from the train and sending it on to its place of destination; and this is what the defendant and his associates did on January 11th. The railway company, it should be remembered, was under an obligation to carry the mail without delay as well as the defendant. And however derelict it may have been in the performance of the latter obligation, the defendant was not thereby authorized to prevent the company from doing what it could to keep its contract to carry the mail for the purpose of thereby coercing a performance of its supposed obligation to him. In the case of a mail-carrier, or a person on board a mail carriage, charged with the commission of a crime, it may be absolutely necessary to temporarily obstruct the passage of the mail to secure the arrest of such carrier or person. But the arrest of these persons, under the circumstances, is a lawful act, and the temporary inconvenience caused thereby is submitted to rather than that persons guilty of serious crimes should escape punishment. One public convenience yields something to another. But it is not only unlawful, but riotous, to prevent, as the defendant and his associates did, the passage of a locomotive drawing a mail car with the United States mail therein for the mere purpose of constraining the person charged with the conduct thereof to do or refrain from doing some act collateral thereto, and which he may even be under a legal obligation to do or omit. If the railway company was under any legal obligation to carry these men to Portland, and refused or failed to do so, the law gave them the same remedy for this breach of contract that it does other people. But it did not give them any right to coerce the company by preventing it from carrying the mails according to con-

tract until it should acquiesce in their demand, to the great hindrance, inconvenience, vexation, and possible loss of the public. The transmission of the mail from place to place throughout the civilized world with certainty and celerity is one of the greatest and most useful labors of modern society. And it cannot be admitted for a moment that a great overland link in this endless chain of communication and intelligence can be broken for days to allow a mob of discharged railway laborers to coerce a railway company into giving them a free ride of 200 or more miles.

In contemplation of law, upon the facts stated, the defendant is guilty as charged in the information. The maximum punishment for this offense is only \$100 fine. Why so serious a matter as this may be, is so limited in punishment, as compared with other crimes of no greater moral turpitude or inconvenience to the public, it is impossible to say. But taking this measure of punishment for my guide, and considering that the defendant has practically declined to make any contest in the premises, he is sentenced to pay a fine of \$25 and to stand committed to the jail of this county until the same is paid or he is by law discharged therefrom.

THE PEGASUS.¹

(*Circuit Court, D. Connecticut. January 7, 1884.*)

COLLISION—WHEN LOSS RESULTING FROM, SHOULD BE DIVIDED.

Even gross fault committed by one of two vessels approaching each other from opposite directions does not excuse the other from observing every proper precaution to prevent a collision; and when, if such precaution had been observed, the collision would have been avoided, the loss should be divided.

See *The Maria Martin*, 12 Wall. 31.

The following are the findings of fact on this appeal:

(1) About half past 10 o'clock in the evening of July 21, 1882, the steam-tug Whipple, having in tow the barge Allandale, both owned by the libellant, lashed to her starboard side, left Jersey City, bound for pier 8, East river. The tug and tow had all their regulation lights properly set and brightly burning. The night was dark, but the lights were easily visible for a distance of over a mile, but her green and red lights were obscured to the view of any vessel bearing on the starboard of the tug, by the barge. The tide was running flood. (2) As the tug and tow passed abreast of pier 1, North river, about 100 yards off in the river, their officers saw the colored lights of the Pegasus, an iron steam-boat then off Castle William, about a mile distant. At that time the Whipple was on a course about south, and the Pegasus was on a course about north, or meeting respectively head and head. Thereupon the tug and the Pegasus both commenced to swing to the eastward in the East river, upon courses converging towards each other, the tug to reach pier 8, and the steamer,

¹See S. C. 15 FED. REP. 221.

as was her uniform custom when there was a flood tide, to make a sheer on a north-east course to facilitate her landing on the south side of her pier. (3) At this time the Whipple lost the green light of the Pegasus and saw only her port light, but blew two whistles to inform the Pegasus that she wanted to go on her starboard side, and, without getting any reply, continued under a starboard wheel without giving any further signal. The Pegasus continued on her north-easterly sheer until she was about a fourth of a mile from her landing place, when she starboarded her helm and swung to the westward, as she usually did, in order to make her customary landing. She did not see the tug or barge until too late to avoid a collision. (4) The collision occurred at a point about 300 yards south-west of the upper bath-house on the battery. The barge was seriously injured by the blow of the Pegasus. (5) The Pegasus was going at the speed of about 12 miles an hour until she starboarded her helm, when she slowed down to four or five miles an hour. The speed of the tug was about three miles an hour all the time. (6) The Pegasus did not hear the signal of the tug, nor did she see the lights of the tug at any time until the collision. (7) The captain of the tug knew the course the Pegasus was accustomed to take in order to make her landing, but assumed that as he had signaled her that he was going on her starboard side, she would conform her movements accordingly.

As conclusions of law, I find:

(1) That both vessels were in fault,—the tug for going to starboard and keeping on that course when she lost the green light of the Pegasus, without any signal from the Pegasus assenting to that course; and the Pegasus for failing to see the lights of the tug and not adopting necessary precautions accordingly. (2) That the damages should be divided between the parties.

Beebe, Wilcox & Hobbs, for libellant.

MacFarlane & Adams, for claimant.

WALLACE, J. The proofs in this case fully sustain the conclusions of the court below, as expressed in the opinion of the district judge, except as to his finding that there was no fault or negligence on the part of those in charge of the Pegasus in not seeing the tug and barge until too late to avoid a collision. The learned district judge states in his opinion that he cannot find why the two vertical white lights on the flag-staff of the tug and barge were not visible to the steamer, although they were burning brightly. The reason why the the red and green lights on the tug were not seen, is obviously, as he finds, because they were hidden by the barge from the time the tug swung under her starboard wheel for the East river, thus bringing the barge between her and the Pegasus. The two vertical white lights were suspended on the flag-staff of the tug, one about a foot above the other, and the lower light was 21 feet above the water. It is possible that these lights may have been somewhat obscured from the Pegasus by the pilot-house of the barge at times while the vessels were approaching each other, but in the constantly shifting positions of the vessels they could not have been hidden continually; and those in charge of the Pegasus do not rely upon any such theory, but insist that there were no lights on the tug, and that none were to be seen when the vessels collided. These lights ought to have been

seen during the time the Pegasus was on her north-east course, which covered three quarters of a mile; and in the absence of any fact to explain why they were not seen, there can be no other rational conclusion except that it was owing to some relaxation of vigilance on the part of the Pegasus. Precisely where this negligence should be located is not important; it suffices that there was failure to see them when they were plainly visible to those in charge of the steamer, if they had used due diligence.

Agreeing with the district judge that the tug was in fault, and that the conduct of her captain was grossly negligent in keeping under his starboard wheel when the green light of the Pegasus had been closed upon him for so long a distance, and in attempting to keep his course when his signals had not been answered, and when he had reason to know that the Pegasus was making for her usual landing, nevertheless the collision was not attributable solely to the tug. As the district judge states in his opinion: "It is manifest that if the Pegasus had seen or ought to have seen the lights of the tug and barge, her management was negligent, and she was in fault." In such a case the damages must be apportioned between the offending vessels. Even gross fault committed by one of two vessels approaching each other from opposite directions does not excuse the other from observing every proper precaution to prevent a collision; and when, if such precaution had been observed the collision would have been avoided, the loss should be divided. *The Maria Martin*, 12 Wall. 31.

A decree is accordingly ordered dividing the loss, with a reference to a master to ascertain the amount. No costs are allowed to either party as against the other in the court below, but costs of the appeal are awarded to the libellant.

FRELINGHUYSEN v. BALDWIN.

(Circuit Court, S. D. New York. January 7, 1884.)

REMOVAL OF CAUSE—REV. ST. § 639, SUBD. 3—CITIZENSHIP AT INSTITUTION OF SUIT.

Where a case is removed under Rev. St. § 639, subd. 3, the requisite diversity of citizenship must exist both when the suit is begun and when the petition for removal is filed.

Motion to Remand.

Martin & Smith, for plaintiff.

Abbett & Fuller, for defendant.

WALLACE, J. Since the decision in *Miller v. Chicago, B. & Q. R. Co.* 17 FED. REP. 97, the supreme court, in *Gibson v. Bruce*, 2 Sup. Ct. Rep. 873, has construed the language of sections 2 and 3 of the removal act of 1875 to require as a condition of removal that the requisite diversity of citizenship exist both when the suit was begun and when the petition for removal is filed. That decision seems to control the present case, where the removal was procured by the plaintiff under subdivision 3 of section 639 of the Revised Statutes, the parties both being residents of New Jersey when the suit was brought, but the defendant having removed subsequently to New York. The language of this subdivision is substantially similar to that of section 2 of the removal act of 1875, so far as it relates to the question now under consideration, and the reasons stated in the opinion of the court in *Gibson v. Bruce* apply with equal force to a removal under subdivision 3 of section 639.

The motion to remand is granted.

POOLE and others v. THATCHERDEFT, Defendant, and another, Garnishee.

(Circuit Court, D. Minnesota. December 13, 1883.)

1. REMOVAL OF CAUSES—GARNISHMENT UNDER THE STATUTE OF MINNESOTA.

Proceedings in garnishment, instituted under the Minnesota statute, are to be considered as auxiliary to the main action, when considered with reference to the right of removal to the federal court.

2. CASE STATED.

The main action against the defendant had proceeded to judgment in the state court; garnishee proceedings had been instituted in the same court, and in the same action, to enforce the judgment; during the pendency of this proceeding the plaintiff had the cause removed to the federal court. On motion to remand the cause to the state court, *held*, that the removal having been made after judgment had been rendered in the main action, was too late, and the cause must be remanded.

v.19,no.2—4

Motion to Remand Cause.

McCRARY, J. This is before the court as a motion to remand. The plaintiff Horace Poole brought his action in the state court against Thatcherdeft, the defendant. In the case in the state court a process of garnishment was issued and served upon the garnishee, Mr. Rolph. A regular action was prosecuted to final judgment against Thatcherdeft. Rolph answered, denying any liability on the part of the garnishee under a provision of the statutes of Minnesota which are in chapter 66, Rev. St. 1878. The plaintiff obtained from the state court leave to file what is called a supplemental complaint, making the garnishee a party, and seeking to recover against him upon the ground that the original defendant, Thatcherdeft, had fraudulently conveyed to him a stock of goods. After the filing of this supplemental petition, the plaintiff in the case applied to the state court for the removal of the case to this court. It is perfectly clear that the original action against the defendant Thatcherdeft cannot be removed, because in the case final judgment had been rendered some time before application was made to the state court for the removal. But the proceedings under the supplemental petition can be removed only when the case is such that it would constitute a new original independent suit, and did not constitute a mere appendage to the original suit. If it was an original proceeding in itself, and not a mere auxiliary proceeding, it could be removed, otherwise it cannot. Questions very similar to this have frequently been before the court, and I think it has been uniformly held that all proceedings in the nature of garnishee proceedings for the purpose of merely enforcing a judgment of the state court are auxiliary in their character, and not original and independent proceedings. A bill in equity may be filed to set aside a fraudulent conveyance for the purpose of collecting an amount due by a judgment in the state court, and that cause of action may be transferred to the circuit court of the United States; but when the action is brought for the purpose of enforcing a judgment in the state court, whatever the form of proceedings may be, it is auxiliary in its character and cannot be removed, and we think that the rulings which have been announced in previous cases in other districts, applying the proceedings now before us under the statutes of Minnesota, and that it is in substance and in effect a garnishee proceeding and it cannot be maintained as an independent suit, but only as a part of the original suit against the original defendant. If the original judgment cannot be brought here we can have no jurisdiction in the supplemental proceeding. One reason is that if a judgment were removed and the money collected upon that supplemental proceeding, the court would be called upon to direct the application for the payment of the original judgment; it might be that upon this proceeding the judgment might be for more than the original judgment, if it was a separate proceeding conducted without any reference to the original case at all. At all events, it is brought, we think, for the pur-

pose of enforcing the payment of a judgment in the state court, and as that judgment is not before us we cannot take jurisdiction of the supplemental proceeding.

These views, we think, are supported by the following cases: *Pratt v. Albright*, 9 FED. REP. 634; *Weeks v. Billings*, 55 N. H. 371; *Chapman v. Bargar*, 4 Dill. 557; *Bank v. Turnbull*, 16 Wall. 190; *Barrow v. Hunton*, 99 U. S. 80; *Buford v. Strother*, 10 FED. REP. 406.

The statutes under consideration in those cases were not always exactly the same as the statute of this state, but we think they were in substance the same. We think the authorities are conclusive as to the question here.

The motion to remand is sustained.

WELLMAN and others v. HOWLAND COAL & IRON WORKS.

(Circuit Court, D. Kentucky. January 2, 1884.)

1. PETITION FOR REMOVAL—JURISDICTION.

After the filing of a petition for the removal of a cause to a federal court, and the tender of a valid bond, if the petition and record show good ground for removal, the jurisdiction of the state court is superseded, and an amendment of the pleadings subsequently allowed in the state court is invalid.

2. SAME—SEPARATE CONTROVERSY—NECESSARY PARTIES—DEFUNCT CORPORATION.

A corporation which has sold all its property and franchises, except the mere right to exist, and which has no officers or place of business, is not a necessary party in a suit against a stockholder to make him liable for his unpaid subscription, notwithstanding the fact that the corporation has still the power to reorganize and collect the stockholders' dues.

In Equity.

W. W. Thum and George Du Relle, for complainants.

Otto A. Wehle, for defendant.

BARR, J. The motion of complainant to remand to the state court must be determined by the relation which the Howland Coal & Iron Works bears to this litigation. The suit is to make defendant Small liable for his unpaid subscription to that company's stock to the extent, at least, of complainant's debt. The allegation of complainant in his original petition is that "the Howland Coal & Iron Works is now, and has been for several years, insolvent, its entire property and franchises having been sold out several years ago, and said corporation has long since ceased to do business, and has no officers or agents or office in this state, and has had none for three years or more last past." After the filing of the petition for removal in the state court and the tender of the bond, the complainant, by leave of state court, amended his petition, and alleged "that the defendant, the Howland Coal & Iron Works, is a resident of this state, and has a corps of or-

ganic officers maintaining and keeping up the corporate existence of the said defendant, but that none of the officers or agents of said defendant reside in this state, and residences of each and all its officers and agents are unknown to those plaintiffs. The plaintiffs desire to further amend their said petition, and say that by the charge that said defendant had ceased to do business they meant to say, and now so charge the fact to be, that said defendant Howland Coal & Iron Works has ceased to do business in the way of operating its mines, and transporting and selling the coal taken therefrom in the markets, which mining and selling coal was the chief business of said corporation."

This amendment should not have been allowed to be filed by the state court, as it came too late. The petition for removal had then been filed and the bond tendered, and thereby the state court had ceased to have jurisdiction over the cause, if the petition, with the record as it then existed, made a good ground for removal. *Railroad Co. v. Mississippi*, 102 U. S. 141. The allegations of the pleadings and the exhibits then and now in the record show that all of the visible property of this corporation had been sold, also its franchises, except the right to exist as a corporation. The corporation still had a legal existence, but not an actual one. It had no organization, no officers, or agents, but the stockholders still have the right to reorganize and elect officers. If this were done the corporation could sue and be sued, and it could collect the unpaid stock subscription and apply it to the payment of the debts of the company.

The complainant did not bring this suit against the corporation, but against Small, the stockholder. In its present condition no personal judgment could be rendered against the company, and it is exceedingly doubtful whether the company will be bound by the judgment should one be rendered against Small. It is true that complainant, after he had sued Small, who was a non-resident, and seized his property by process of attachment, attempted to bring the corporation before the court by a constructive summons; but if the corporation has no organization, officers, or agents anywhere, how can this corporation be even constructively summoned? While, therefore, this corporation is not defunct, it has no living, active existence, although in law it may survive sufficiently to have the power of reorganization for some purposes. Its present *status* makes the reasons which apply to a defunct corporation apply to this one. The Howland Coal & Iron Works is only a nominal party, if a party at all.

The motion to remand to the state court is overruled.

MASON and others, Adm'rs, v. HARTFORD, P. & F. R. Co. and others.

(Circuit Court, D. Massachusetts. January 18, 1884.)

1. JURISDICTION OF CIRCUIT COURTS—WHEN CONCURRENT WITH DISTRICT COURT.

By section 4979 of the Revised Statutes of the United States the several circuit courts have concurrent jurisdiction with the district courts "of all suits at law or in equity, brought by an assignee in bankruptcy against any person claiming an adverse interest, or by any such person against an assignee touching any property or rights of the bankrupt transferable to or vested in such assignee." By this section jurisdiction is conferred upon the circuit courts to ascertain and adjust all lien and other specific claims upon the property vested in the assignee claimed by any person adversely to the assignee representing the general creditors, without regard to the citizenship of the parties. Nor is such jurisdiction affected by the change of interest created by a conveyance made under the decree of the district court. Having once acquired jurisdiction of the subject-matter and the parties, the court will retain it for all purposes within the scope of the equities to be enforced.

2. EFFECT GIVEN TO TESTIMONY OF PARTIES ON FORMER TRIAL.

3. BILL OF REVIVOR—STATUTE OF LIMITATIONS—LACHES.

Ordinarily a bill of revivor may be filed at any time before it is barred by the statute of limitations, which, when the suit is abated by the death of the plaintiff, begins to run from his decease, or, according to some authorities, from the time administration is taken out. Where one acquires title with full notice and subject to an incumbrance of a lien, he cannot charge laches on the part of the person bringing suit to enforce the lien if the suit is brought within the time prescribed by the statute.

In Equity.

S. E. Baldwin, for defendants.

A. Payne, T. E. Graves, and W. S. B. Hopkins, for complainants.

NELSON, J. This is a bill of revivor and supplement filed by the administrators of Earl P. Mason, to revive a suit abated by his decease, and to bring in as defendants parties who have succeeded to the interest of some of the original defendants. The facts and proceedings in the suit, so far as it is necessary to state them, are as follows:

The original bill was filed in this court by Earl P. Mason in December, 1871, against the Hartford, Providence & Fishkill Railroad Company, whose road and franchises had been previously conveyed to and formed part of the railroad of the Boston, Hartford & Erie Railroad Company, the assignees in bankruptcy of the Boston, Hartford & Erie Railroad Company, adjudicated bankrupt by the district court of this district in March, 1871, the trustees under mortgages of the Hartford, Providence & Fishkill Railroad made prior to the consolidation, the trustees of the Berdell mortgage of the Boston, Hartford & Erie Railroad, made subsequent to the consolidation, and the treasurer of the state of Connecticut. The object of the bill was to enforce against that part of the Boston, Hartford & Erie Railroad in the states of Rhode Island and Connecticut, which was formerly the Hartford, Providence & Fishkill Railroad, a lien claimed by the plaintiff to exist on account of certain preferred stock issued by the Hartford, Providence & Fishkill Railroad Company in 1854, before the consolidation, the certificates of which stock contained a clause that the par value thereof was "demandable by the holder of the same from the company, at any time after April 1, 1865," and a demand of payment made upon the company in March, 1871. To that bill answers were filed in 1873, and replications were filed October 15, 1875.

On July 27, 1875, the trustees under the Berdell mortgage conveyed the whole railroad to the New York & New England Railroad Company.

On July 21, 1875, the district court, upon the application of the assignees, made an order authorizing and directing them to sell and convey their interest as assignees in the Boston, Hartford & Erie Railroad to the New York & New England Railroad Company, and in the order directed, at the request of Mason, that the deed of conveyance should contain a proviso and condition that "nothing in the same should be construed to affect the rights of any person or corporation, if any, holding stock, whether common or preferred, in the Hartford, Providence & Fishkill Railroad Company." In pursuance of this order, the assignees on July 28, 1875, conveyed their interest in the road to the New York & New England Railroad Company by a deed which contained the proviso and condition above mentioned, and also contained a stipulation by the grantee that it would assume the defense of this and of other suits then pending against the assignees, and would protect them therefrom.

On September 21, 1876, before any further proceedings were had in the suit, Earl P. Mason died intestate, and July 25, 1881, the present plaintiffs took out administration upon his estate in this district. The present bill was filed March 23, 1882, against the original surviving defendants, the New York & New England Railroad Company and Aldrich, Cooley & Gardener, who have been appointed trustees under the mortgages of the Hartford, Providence & Fishkill road, in place of three deceased defendants in the original bill.

In December, 1875, Earl P. Mason joined with the Boston & Providence Railroad Company and others, as owners of stock in the Hartford, Providence & Fishkill Railroad Company, in filing a bill in equity in the supreme court of Rhode Island, against the New York & New England Railroad Company and others, to set aside, as unauthorized and void, the conveyance of the Hartford, Providence & Fishkill road to the Boston, Hartford & Erie Railroad Company. That suit terminated March 12, 1881, by the entry of a final decree dismissing the bill.

The bill of revivor states the proceedings subsequent to the death of Earl P. Mason, and prays that the original suit may be revived for the benefit of his administrators. To this bill the New York & New England Railroad Company filed a demurrer to part, and plea to the residue, and three other defendants filed a plea to the whole bill. The case was heard upon the pleas and demurrer, and upon certain agreed facts which were made part of the case by stipulation of the parties.

1. By the demurrer of the New York & New England Railroad Company, objection is taken to the jurisdiction of the court for want of the requisite citizenship of the parties. Objection to the jurisdiction of the court, when the defect appears of record, may be taken at any stage of the proceedings; and the record in this case shows that in the original suit, and also in the bill of revivor, citizens of Rhode Island appear both as plaintiff and defendant. But we are of opinion that in this case jurisdiction does not depend upon the citizenship of the parties. By section 4979 of the Revised Statutes the several circuit courts have concurrent jurisdiction with the district courts "of all suits at law or in equity brought by an assignee in bankruptcy against any person claiming an adverse interest, or by any such person against an assignee, touching any property or rights of the bankrupt transferable to or vested in such assignee." By this section jurisdiction

is conferred upon the circuit courts to ascertain and adjust all liens and other specific claims upon the property vested in the assignee, claimed by any person adversely to the assignee as representing the general creditors, without regard to the citizenship of the parties. This has been settled by repeated decisions of the supreme court. *Smith v. Mason*, 14 Wall. 419; *Marshall v. Knox*, 16 Wall. 551; *Lathrop v. Drake*, 91 U. S. 516; *Eyster v. Gaff*, Id. 521; *Burbank v. Bigelow*, 92 U. S. 179; *Dudley v. Easton*, 104 U. S. 103. This case comes within the very letter of the statute. The plaintiff sets up, and seeks to enforce against a part of the railroad which was transferred to the assignees, by virtue of their assignment, a lien alleged to have been created, under the laws of Rhode Island and Connecticut, by the issue of preferred stock. That this court has jurisdiction to determine its validity, and if found valid to enforce it against the property, is clear. Nor is the jurisdiction affected by the change of interest created by the conveyance made under the order of the district court. Having once acquired jurisdiction of the subject-matter and the parties, the court will retain it for all purposes within the scope of the equities to be enforced. *Ober v. Gallagher*, 98 U. S. 199; *Ward v. Todd*, 103 U. S. 327. The conveyance to the New York & New England Railroad Company was made expressly subject to any lien which can be enforced against the road in this suit, and the case must therefore proceed as if no such conveyance had been made.

2. At the hearing of the Rhode Island suit, the present plaintiffs, the Rhode Island administrators of Earl P. Mason, were called as witnesses, and when asked whether in their capacity as administrators they were the possessors of any stock of the Hartford, Providence & Fishkill Railroad Company, answered that they had found among the effects of the deceased 281 shares of the common stock and 139 shares of the preferred stock. The defendants insist that by thus testifying they elected to treat the preferred shares as stock, and have thereby waived the right to treat it as an indebtedness in this suit. We do not think such a result can fairly be claimed from their testimony. Upon an inspection of the bill in that case, it is apparent that the plaintiffs in it sought relief as holders of the common stock, and not of the preferred stock. Their ownership of the common stock was the material point in issue, and so much of their answer as declared their ownership of the preferred stock was immaterial and unimportant. It would be unjust and inequitable to hold that their testimony amounted to an election to waive all rights acquired by their intestate by his demand of payment of the par value of the shares. That was plainly not their meaning, and no such effect should be now given to their testimony.

3. The next defense is laches. Ordinarily a bill of revivor may be filed at any time before it is barred by the statute of limitations, which, when the suit is abated by the death of the plaintiff, begins to run from his decease, or, according to some authorities, from the time

administration is taken out. Story, Eq. Pl. § 831; 56th Equity Rule. In this case the bill of revivor was filed within six years after the death of the original plaintiff, and within eight months after administration was taken out. But the New York & New England Railroad Company charges that before the filing of the bill of revivor it had expended over \$4,000,000 in obtaining possession of the road, in paying off liens, and in improving and completing it. But it acquired its title with full notice and subject to the incumbrance of the lien claimed in this suit. By its deed of conveyance it assumed the defense of the suit, and became from that time the real defendant. It can therefore stand in no better position than its grantors, the original defendants. During the pendency of the Rhode Island case this suit was allowed to lie dormant, with the acquiescence of both parties, since the success of the plaintiffs in that suit would have rendered this case of no importance. The expenditures of the New York & New England Company were not induced by the conduct of these plaintiffs or their intestate. They were made at its own risk, and ought not to preclude the plaintiffs from enforcing their lien.

The merits of the original bill are not open at this stage of the suit, and have not been considered. *Fretz v. Stover*, 22 Wall. 198.

Other points were urged at the hearing by the learned counsel for the defendants, but none of them appear to be of sufficient importance to require comment, and they are overruled.

Plea and demurrers overruled.

SCOTT and others v. BALTIMORE, O. & B. STEAM-BOAT CO.

ODELL and others, v. SAME.

PURCELL and others v. SAME.

(Circuit Court, D. Maryland. January 15, 1884.)

1. CARRIER—LIABILITY FOR GOODS DESTROYED BY FIRE ON WHARF.

Goods were delivered to the defendant, a steam-boat company, for transportation. The bills of lading did not designate any particular vessel. The goods were burned on the wharf by a fire not occurring through any neglect of the defendant. *Held* that, even though the goods were negligently delayed by the defendant, the delay was not the proximate cause of the loss.

Railroad Co. v. Reeves, 10 Wall. 190.

2. SAME—BILL OF LADING.

The bills of lading stipulated, "dangers of the seas, fire, breakage, leakage, accidents from machinery and boilers, excepted, and with liberty to tow and assist vessels in all situations." *Held*, that this was an exemption from liability from loss by fire while the goods were on the wharf awaiting transportation, as well as when on board the vessel.

At Law.

Bernard Carter, for plaintiffs.

John H. Thomas, for defendant.

MORRIS, J. These are three suits instituted to recover from the defendant steam-boat company for goods which the plaintiff delivered on the company's wharf at Baltimore, on December 21, 1877, to be transported by it, and which were burned on the wharf by a fire during that night. It is admitted that the fire was not occasioned by any want of care on the part of the company, and that after the fire broke out all possible effort was made to extinguish it and save the goods. By agreement the cases have been tried before the court without a jury. The steam-boat company had, at the time the goods were received by it, a daily line of steamers from Baltimore to West Point on the York river, and these goods were to be transported by that line, and thence by railroad to Richmond and other more southern points. The steamers sailed daily at 4 P. M., and it was known that goods received after 3 P. M. were not usually sent by that day's steamer. In fact, goods were received by the company during all the business hours of the day, and bills of lading given; none of them, however, specifying that the goods were to be forwarded by any particular vessel; and whenever goods were received during the day, which for any reason could not go by that day's boat, they were sent forward the next day.

Evidence has been submitted by the plaintiffs tending to prove that the goods were delivered at the company's wharf before 3 o'clock, and in time to have gone by that day's boat; but the evidence was not entirely convincing, and in the face of the positive testimony of the agent of the steam-boat company, that at 3 o'clock of that day there were no goods for the south remaining on the wharf, I am not prepared to find as a fact that the goods were delivered in time for that day's boat. I do not, however, consider the finding of this fact of any importance, for, as I understand the law, even if the company could have forwarded the goods by that day's boat and negligently omitted to do so, it would not affect its liability in these suits. The law is settled that in cases of this kind, unless the delay in forwarding the goods is so unreasonable in its nature as to be equivalent to a deviation, or unless the loss of the goods is the direct and proximate result of the delay, the carrier is not liable unless he would be answerable under his liability as carrier without reference to the delay. And where goods in the custody of a carrier are destroyed by storms, floods, or fire, in a place in which they would not have been but for the negligent delay of the carrier, the courts hold that the direct and proximate cause of the injury is the flood or the fire, and that the delay in transportation is only the remote cause. The supreme court of the United States so decided in *Railroad Co. v. Reeves*, 10 Wall. 190, and it was so held by the supreme court of Massachusetts in *Hoadley v. Northern Transp. Co.* 115 Mass. 304. This latter case was a suit to recover for the loss of goods by fire, which the

carrier had delayed forwarding, and which were burned at the place where they were delivered into his custody. The bill of lading in that case exempted the carrier from liability for loss from fire while the goods were in transit, or while in depots or warehouses or places of transshipment. It was held that the destruction of the goods by fire could not reasonably have been anticipated as a consequence of the detention; that the delay did not destroy the goods; and that there was no connection between the fire and the detention.

The important question in these cases, therefore, is whether, by the language of the bills of lading, the steam-boat company has exempted itself from its common-law liability for the loss of the goods by fire while on its wharf; for if, by the bills of lading, it is exempt for the loss by fire, it makes no difference, in my judgment, that the company was to blame for the detention; and if, by the bills of lading, it has not exempted itself, it is liable notwithstanding it was not to blame for the detention. The right of common carriers, by proper stipulations in a bill of lading, to limit their common-law liability for losses by fire, when the fire is not attributable to their misconduct, or that of any persons or agencies employed by them, is well settled, (*York Co. v. Central R. R.* 3 Wall. 107;) and by the act of congress of March 3, 1851, (Rev. St. § 4282,) it was enacted that the owners of vessels, except those used in rivers or inland navigation, shall not be answerable for loss by fire of any goods *on board*, unless the fire is caused by their design or neglect. If, therefore, the language of the bill of lading is sufficiently explicit to exempt the company from loss by fire, there can be no doubt as to the lawfulness of such an exemption. The language contained in the bill of lading given for the goods of the plaintiffs J. W. Scott & Co. and Odell, Ragan & Co. is: "Dangers of the seas, *fire, leakage, breakage*, accidents from machinery and boilers, excepted, and with liberty to tow and assist vessels in all situations." The language of the bill of lading for the goods of the plaintiffs Purcell, Ladd & Co. is: "And it is expressly contracted and agreed that loss or damage by *weather, fire, leakage, breakage*, and dangers of the seas are excepted."

It is contended on behalf of the plaintiffs that under the strict rules of construction applicable to stipulations by which the carrier seeks to limit his common-law liability the word "fire" in these bills of lading, and more particularly in the one first mentioned, being classed with dangers of the seas and other risks of navigation, it is to be taken as applicable only to fire after the goods are laden on board. After careful consideration I find myself unable to assent to this construction. The liability of the carrier as carrier begins from the moment of the receiving the goods, (*Hutch. Carr.* § 89,) and although preparatory to the transportation they are detained by him on his wharf or in his storehouse his responsibility then is in no respect different from his responsibility after the actual transportation has commenced. It is difficult, therefore, to see why, if he stipulates gen-

erally for exemption from losses from fire, he should not be understood to mean exemption while the goods are in his possession preparatory to their being laden, as well as afterwards. In most instances there must be some interval of time between the reception of the goods and their being actually laden on board the vehicle of transportation, and as the law sanctions contracts by which the carrier exempts himself from the risks of fire, it seems to me it would be a very strained and forced construction of these contracts now before me to hold that the exemptions in them from "*fire, leakage, and breakage*" do not apply to losses from those risks while on the wharf, because they are mentioned in the same sentences with other risks which are only encountered on the voyage itself.

I have not failed to consider the argument urged on behalf of the plaintiffs, based on the inconvenience and hardship occasioned by such an exemption as now upheld, arising from the fact that after the goods are delivered to the carrier the usual fire insurance which covers the goods while in the warehouse of the shipper is at an end, and that the ordinary marine policy does not attach until the goods are laden on board, and that as the shipper does not know whether the carrier has detained the goods on the wharf or has put them on board, he is at loss how to protect himself. This is, however, but one of the hardships resulting from the exemptions which carriers have been allowed to contract for. The lawfulness of such an exemption as that claimed in these present cases is too firmly settled by authoritative cases to be now doubted, and the difficulty is not to be cured by the court's refusing to give to the words of the contract their fair and reasonable meaning.

Verdict for defendant.

JONES v. VESTRY OF TRINITY PARISH.

(*Circuit Court, W. D. North Carolina. November Term, 1883.*)

1. MONTHLY SALARY—PRESUMPTION AS TO PERIOD OF EMPLOYMENT.

There is a presumption of law that a person employed at a monthly salary is engaged by the month, so that either party may terminate the contract at the end of any month, unless it affirmatively appears that a definite period of employment was contemplated by the parties to the contract.

2. FALSE REPRESENTATIONS—RESCISSION OF CONTRACT—RECOVERY OF DAMAGES.

A person who secures employment for a stated period by false and fraudulent representations may be dismissed at any time, and his employer may recover from him for any damage sustained by reason of the deceit.

3. CONTRACT OF SERVICE—INCOMPETENCY—RESCISSION.

A person who, representing himself as competent to discharge any duty, is employed for that purpose, may be dismissed upon his incompetency being shown.

4. SAME—BREACH—NEGLECT TO DISCHARGE—WAIVER.

One who, after a material breach of contract on the part of a person employed by him, continues to accept his services without reasonable cause for delay in discharging him, is presumed to have waived the breach, and will not be allowed to set it up afterwards.

5. SAME—BREACH OF CONFIDENCE.

A person in whom peculiar confidence is reposed may be discharged by his employer for misleading him with respect to the matter of confidence, even though the truth might have been ascertained by inquiry elsewhere.

6. SAME—WRONGFUL DISCHARGE—DAMAGES.

A person wrongfully discharged can recover the contract price for the full time of service agreed upon, without showing constant readiness to perform the work from which he has been dismissed.

7. SAME—SPECIAL CONTRACT—QUANTUM MERUIT.

One employed by special contract cannot recover on a *quantum meruit* for his services.

At Law.

J. H. Merrimon, for plaintiff.

McLoud, Davidson & Jones, for defendants.

Dick, J., (*charging jury*.) If the terms of the contract declared upon were in writing, or were admitted, or undisputed in the pleadings, it would be the duty of the court to construe them, and declare the rights and liabilities arising therefrom. As the contract was verbal, and the parties dispute about the terms of the agreement, it is your duty to ascertain those terms from the evidence, and apply the principles of law announced by the court to the facts proved. For the purpose of assisting you in performing such duty I will first refer briefly to some circumstances surrounding the parties at the time the contract was made, and to certain facts established by the pleadings or by uncontroverted evidence. A jury in ascertaining the terms of a contract, and a court in construing their meaning, clearly have the right to consider the language employed, and also the subject-matter and the surrounding circumstances, so as to ascertain as nearly as possible the intention of the parties. The vestry of Trinity parish desired to build a new edifice, which would afford more suitable accommodation for the members of the church and other citizens. For this purpose the vestry had collected about \$2,500 in cash, and had obtained about \$1,000 in reliable subscriptions. With this cash fund and subscription list, and confidently relying upon the liberality of the members of the parish and other citizens of the community, the vestry determined to commence the erection of the church edifice. They applied to Prof. Babcock, of Ithaca, New York, an experienced, skillful, and accomplished architect, to furnish appropriate plans and specifications for the building, suitable to the convenience and wishes of the congregation, and within the limits of the means accumulated, and such as could be reasonably expected to be realized from future donations. Under these circumstances, the plans and specifications were prepared and forwarded by the architect, who also recommended Mr. Richardson, of Ithaca, New York, as an experienced and skillful contractor and builder. After some correspondence, Mr.

Richardson came to Asherville, and being made acquainted with the views and wishes of the vestry and other surroundings, he offered to furnish material, and to construct the *nave* and *transept* of the edifice according to the plans and specifications, for the sum of \$3,500. Upon further consideration, he offered to build the chancel and tower for an additional thousand dollars. These offers were not accepted at the time. In a few months afterwards the vestry determined to accept the offers; but Mr. Richardson declined, as he was then engaged in other work, and the price of labor had greatly advanced. The vestry then concluded to commence the work under the superintendence of a building committee. Mr. King, of Raleigh, an experienced and skillful builder, was employed to have immediate charge of the work, and he made some preparation for the undertaking, but he soon became sick and died. About this time the plaintiff came to Asherville, and had several conferences with the building committee and with other members of the vestry, and engaged with them to superintend the erection of the church edifice according to the plans and specifications furnished by the architect. In the course of his employment he was to procure skilled workmen, and direct them in their labor; he was to make contracts for the delivery of suitable materials for building; he was to pay wages and for materials with the funds placed in his hands by the vestry, and keep and render proper weekly accounts of such transactions, and for his services he was to receive \$125 per month.

There is no evidence directly showing that any specific time for the continuance of such employment was expressly agreed upon, and there is now a difference in the understanding of the parties upon this question. As a general rule, in an employment at monthly wages, without any definite time as to the continuance of service, either party may terminate the contract at the end of a current month. This rule will not apply when it appears from the language and other terms of the contracts, the nature of the services, and the surrounding circumstances, that the parties evidently intended that the employment should continue until the accomplishment of a definite object. In this case the object of the parties to the contract was the erection of a building according to certain plans and specifications. The plaintiff represented himself as having a long and large experience in such business, and had thus fully qualified himself for the employment, and the defendants were desirous of procuring the services of a prompt, faithful, and skillful superintendent, who would, as speedily as possible, erect the edifice designed by the architect. You can consider the evidence as to all the facts and circumstances which attended and induced the making of the contract, in forming your conclusion as to the mutual intent of the parties as to the time of service which was to be rendered by the plaintiff. If you should find that the parties contemplated the continuance of the employment of the plaintiff for the entire time necessary for the completion

of the edifice, and that such was their mutual understanding of the agreement, then you will proceed to inquire whether the defendants had sufficient legal excuse for his discharge before the work was finished. It is conceded that the plaintiff was prompt and diligent in business, and rendered correct accounts for money expended for materials and labor.

It is insisted by the defendants that, before the contract was entered into with the plaintiff, he made representations as to the probable cost of the building, which were reasonably relied on, and were a material inducement to his employment; and that those representations were false and fraudulent, and caused much injury and loss. You have heard the evidence upon this subject, and if you find that the allegation is sustained, then I instruct you that such a fraud was sufficient legal excuse for his dismissal from service.

It is further insisted on the part of the defendants that the plaintiff was not competent in scientific and mechanical knowledge and skill to construct the building in accordance with the plans and specifications furnished by the architect. Upon this question of competency you have heard the depositions and testimony of several witnesses on both sides, who are acquainted with the plaintiff and have some knowledge of his qualifications as a builder. The evidence is conflicting, and if you find, from a preponderance of evidence, that the allegation is sustained, then I instruct you that the defendants were justified in discharging the plaintiff from their employment.

It is further insisted by the defendants that the plaintiff made a material, injurious, and expensive departure from the plans and specifications without their knowledge and consent. To this charge the plaintiff replies that there was no material and injurious departure, as alleged; and even if he did not strictly follow the plans and specifications, the defendants were informed of such departure, and by continuing his employment this alleged breach of contract was waived, and, after such condonation, was not sufficient cause for his discharge. If a person is continued in employment after a material breach of contract is fully known to the employer, a waiver and condonation is presumed by the law, and such breach cannot subsequently be relied upon as sufficient cause for the discharge of the employee. This presumption of law may be rebutted by evidence showing that there was in fact no waiver, and the jury may consider all the facts and circumstances in evidence, and determine whether there was reasonable cause for delay in discharging the employee.

It is further insisted by the plaintiff that some of the defendants very often saw the work as it progressed, and they could easily have obtained information from skilled workmen who were engaged in or saw the work, in regard to any departure from the plans and specifications, and yet his employment was continued for several months after the alleged departure. The principles embraced in the

legal maxim referred to by the counsel of plaintiff have no application to this case. As a general rule "the laws assist those who are vigilant, not those who sleep over their rights." This maxim is usually applied to persons seeking remedies in the courts, and it is the foundation of statutes of limitation, but it has a more extensive signification. In ordinary business transactions a person must avail himself of his own knowledge and all means of information within reach and easily accessible. If the truth or falsehood of a representation can be ascertained by ordinary vigilance and attention, it is a man's own fault if he neglects to inform himself by inquiry and investigation, and the law will not afford him relief from injury caused by such neglect. This rule does not apply to a case where a gross fraud has been perpetrated, or where a person has a right to rely upon the statements of another in whom peculiar confidence has been reposed. The defendants were unskilled in the work which they had undertaken, and they employed the plaintiff, upon his representations that he had the requisite knowledge and skill, to construct the edifice according to the plans and specifications. They reposed special trust and confidence in him, and they had the right to rely implicitly upon his statements in relation to his employment; and it was his duty to fully answer their inquiries and make them acquainted with his proceedings, and give them the benefit of all the information which he possessed, or by reasonable exertion could have possessed upon the subject; and there was no legal obligation requiring them to seek other sources of information. If the plaintiff misled the defendants upon these matters, or failed to give them correct and full information upon their inquiries, then they were justified in discharging him from their employment.

It is further insisted by the plaintiff that at the time he entered into the contract he reserved the right of exercising his own judgment and discretion in performing the work, when there was any discrepancy between the plans and the specifications, or when there was any uncertainty about the matter. This reservation did not authorize him to make any material departure from the plans and specifications against the will or without the consent of the defendants after they had been fully advised as to the proposed changes. You have heard the evidence and arguments of counsel upon the questions of fact in relation to a special contract for the entire time that would have been required for the erection of the building, and as to the causes for discharging the plaintiff from employment; and, guided by the principles of law which I have announced, I hope you will be able to come to a correct conclusion on this part of the case. If you find that there was a special contract for the employment of the plaintiff until the work entered upon was finished, and that the performance of his part of this entire contract was prevented by his discharge from service without legal excuse, then he is entitled to recover by way of damages \$125

per month for such time as the evidence shows would have been required to construct the edifice. Under such circumstances as would induce this finding it is not necessary for the plaintiff to aver and show that he made useless efforts to have himself reinstated in employment, and was able and ready to perform the work from which he had been improperly discharged. In this place I will not refer to the question whether the defendants have a right to recoupment or diminution of damages for defects in the work, and for loss and injury sustained by unnecessary expenses incurred by the action of the plaintiff as under the system of code pleading adopted in this state, and observed and used in this court, the defendants in their answer seek to recover such damages by way of counter-claim. I will instruct you as to their rights in such proceeding when I come to consider their answer. If you should find that there was no special contract as alleged, or that the plaintiff was properly discharged, then he cannot recover upon the first cause of action stated in his complaint.

In the second cause of action the plaintiff declares upon a *quantum meruit*, and avers that he is entitled to recover the value of the work and labor performed by him, as the defendants received and used the benefits of his services. The defendants were obliged to receive and use the work which had been done under the superintendence of the plaintiff, as it was on the church lot, and they had paid for the materials, and for the work executed by the actual builders; and the structure could not be abandoned or removed without great inconvenience, loss, and expense. I am of the opinion that the plaintiff cannot recover upon this count founded upon an implied contract. The law will not imply a contract when there is an express one, unless such express contract has been rescinded, abandoned, or varied by the consent of the parties. In this case the evidence on both sides establishes a special contract, certain and definite in all its terms, except as to the duration of the employment, in which the value of the services of the plaintiff is fixed by mutual agreement, and the plaintiff cannot, upon an implied contract, obtain any other measure of damages.

It is unnecessary to further consider this count, as the plaintiff, in his third cause of action, claims his stipulated wages for seven months of actual employment. The special contract, as admitted by both parties, expressly provides that the plaintiff shall receive the sum of \$125 per month, and is only indefinite as to the time of service. In considering the first cause of action in the complaint, I stated to you that upon a contract for wages payable monthly there is a legal presumption that the employment was by the month, and either party may rightfully terminate the engagement at the end of such period. I directed you to consider the evidence as to the language of the parties, the nature of the service, and surrounding circumstances, to ascertain whether this legal presumption was rebutted by it appearing that the mutual understanding and agreement of the

parties was that the employment should continue until the edifice was completed. If you find that there was such an entire contract, then upon this third cause of action I instruct you that the plaintiff is entitled to recover his stipulated wages for seven months, and his neglect to call for monthly payments in no way impaired this right. The services were performed for that period, and they were of value to the defendants, and of benefit in the subsequent construction of the edifice.

I will now proceed to consider the legal right of the defendants to recover damages under their counter-claim, which is in the nature of a cross-action. They aver that before they employed the plaintiff he was fully advised of the amount of funds which they had on hand and could reasonably anticipate for the purpose of erecting the building; and also of the offers which had been made by Mr. Richardson to undertake the construction, and plaintiff told them that he could probably save them \$500 on such offers. That this representation was reasonably relied on, and constituted a material inducement to the contract of employment, and it was false and fraudulent, and all the funds on hand were expended by plaintiff before all the foundation walls of the edifice had reached the water-table, and before a large part of the dressed stones, mentioned in the specifications, had been finished. When representations are made by one party to a contract, which are material, and may be reasonably relied upon by the other party, and such representations are false and fraudulent, and cause loss and injury, the party thus deceived is entitled to recover damages for the loss and injury sustained. You have heard the evidence upon this subject, and if it supports the allegation you should return a verdict for the defendants, assessing the damages in accordance with the loss and injury sustained, as shown by the evidence.

The defendants further insist that the plaintiff, before his employment, assured them that he was fully competent in knowledge, experience, and practical skill to construct the building according to the plans and specifications of the architect; and that, without their consent or approval, he willfully or ignorantly made material departures from such plans and specifications, which made the foundation walls insecure, and caused a much larger expenditure in construction than was contemplated by the architect; that the plans and specifications required that the walls should be bound together by bond-stones placed at certain distances from each other, and passing entirely through the wall, and that the walls should be built with uncoursed rubble-stones laid in horizontal lines and vertical joints; that the plaintiff used no such bond-stones, and the outside of the wall was built of ashlar stones of uniform thickness, cut, and dressed smoothly in bed and joints, and laid in continuous courses; and that the walls were rendered less secure, and the cost of material

and labor was far more expensive, than contemplated in the specifications. You have heard the statements and explanations of the plaintiff. Several intelligent and experienced builders and artisans have, in their testimony, explained the terms of art used in the plans and specifications, and, after a careful examination of the work, they have given you their opinion upon the matters in controversy. Although there is some conflict in the testimony, I hope you may be able to understand the subject, and correctly decide the questions of fact involved. If you find that the plaintiff departed from the plans and specifications without the consent or approval of the defendants, and such departure rendered the foundation walls insecure, and caused greater expense in the work than was contemplated by the architect, then the defendants are entitled to such damages as the evidence shows that they sustained by reason of defective work and increased expenditures.

The pleadings and trial in this case have been conducted in accordance with the mode of procedure provided in the Code system of this state, and there are substantially cross-actions between the parties. If you find that one party alone is entitled to recover, you will so render your verdict; but if you should think that the plaintiff has sustained the allegations of his complaint, and the defendants have proved their counter-claim, then you will assess the amount to which each party may be entitled, and deduct the less sum from the greater, and render your verdict for the party in whose favor the balance may appear.

MISSOURI RIVER, F. S. & G. R. Co. v. UNITED STATES.

(Circuit Court, W. D. Missouri, W. D. January, 1884.)

1. INCOME TAX—CORPORATIONS—PERIOD FROM AUGUST 1, 1870, TO JANUARY 1, 1871.

The case of *Blake v. Nat. Bank*, 23 Wall. 307, 320, followed, which held that corporations were not exonerated from the payment of income tax during the last five months of the year 1870.

2. ACTION TO RECOVER TAXES—DEDUCTION OF OVERPAID AMOUNTS.

In a suit by the United States for the recovery of taxes, the defendant is entitled to a deduction of any amount admitted by the plaintiff to have been previously overpaid, even though there is no plea of offset.

Error to the District Court.

The United States brought suit in the court below to recover of the Missouri River, Fort Scott & Gulf Railroad Company the sum of \$19,474.93, claimed as due for taxes, under the revenue laws, as income tax upon the earnings of said company for the year 1870. The case was heard by the court without a jury, upon an agreed

statement of facts, from which it appears that the gross receipts of said company for the 12 months ending December 31, 1870, were—

	\$1,199,220	58
That the expenses for the same period were	-	707,222 18
Leaving net earnings,	-	\$491,998 40

It also appeared that said company had overpaid the taxes due on gross receipts for that year the sum of \$209.50, but that it had paid no tax for that year upon the undivided net earnings during said year. The court found for the plaintiff for the whole amount claimed, and rendered judgment accordingly. The said railroad company, defendant below, brings the case here and assigns errors, as stated in the opinion.

Wallace Pratt, for plaintiff in error.

Wm. Warner, U. S. Atty., for defendant in error.

McCRARY, J. The errors assigned are (1) that the district court erred in finding the sum of \$5,124.98 due from the railroad company to the United States for taxes on net earnings from August 1 to December 31, 1870; (2) that the district court erred in not deducting from the amount it found due the sum of \$209.50, overpayment by the railroad company upon the taxes upon its gross receipts for the year 1870.

As to the first assignment, it presents a question which was settled by the supreme court in *Blake v. Nat. Banks*, 23 Wall. 307, 320. In that case, as here, it was insisted that, by oversight or otherwise, congress omitted to impose an income tax upon corporations from August 1, 1870, till January 1, 1871; that there was a hiatus of five months, so far as corporations were concerned, while as to individuals the tax was imposed for the entire year. This contention is expressly overruled by the case cited, and requires no discussion here.

As to the second error assigned, I think it ought to be sustained. The government agreed upon a statement of facts which became the only evidence in the case. That statement shows upon its face an overpayment to the government by the company upon one item of \$209.50. True, the government does not expressly agree to credit this sum upon the remaining claim against the company, but it does, in effect, agree that the court shall determine from the facts stated what sum, if any, is due. It is not a question as to the force and effect of a certified statement of account under the act of congress on the subject. The question is, what judgment is the United States entitled to upon the facts admitted? And the answer must be that the United States is entitled to the amount of tax due, less whatever sum has been paid. Nor is it necessary that the company should plead an offset. The government is bound to prove the amount due, and if in making proof it shows affirmatively that it has received into its treasury a partial payment, the court will take that fact into account.

The judgment is reversed, and remanded to the district court with direction to render judgment for the United States for the sum heretofore found due, less the sum of \$209.50 overpaid, as above stated, and interest thereon.

SENSENDERFER *v.* PACIFIC MUT. LIFE INS. CO.

(Circuit Court, W. D. Missouri, E. D. November Term, 1882.)

LIFE INSURANCE—POLICY TAKEN OUT FOR THE BENEFIT OF A CREDITOR—PROOF OF DEATH—NATURE OF EVIDENCE.

Absence of a person alone does not raise a presumption of his death; but such absence, in connection with surrounding circumstances, such as the failure by his family and friends to learn of his whereabouts, his character, and business relations, together with the fact that he was last known to be seen near the place where a murder is supposed to have been committed, and the reputation in his family and with his friends that he is dead, creates a very strong presumption of death, the law being satisfied with less than certainty, yet requiring a preponderance of proof. On the other hand, evidence to overcome the presumption of death, that the party supposed to be dead was in a financial condition which might have induced him to abscond, or that he was a speculator, or visionary, in his business or trades, is all proper evidence to be considered by the jury in establishing the fact.

At Law.

S. P. Sparks and *L. C. Krauthoff*, for plaintiff.

• *William McNeill Clough*, for defendant.

KREKEL, J., (*charging jury*.) The plaintiff, William Sensurederfer, sues the Pacific Mutual Insurance Company on a policy of insurance issued by the Alliance Mutual Life Insurance Society to said Sensurederfer on the life of John LaForce. It is claimed by plaintiff, Sensurederfer, that the Pacific Mutual Life Insurance Company is liable to him, because it has assumed to become responsible for the company which issued the policy, under a contract between the Alliance Mutual and the Pacific Mutual, read in evidence, and you are instructed that if the policy issued by the Alliance Mutual, and the contract between it and the Pacific Mutual, are found to be true and genuine, the Pacific Mutual is liable for the policies of the Alliance Mutual under the conditions and limitations hereinafter stated. LaForce had a right to insure his life for the benefit of a creditor; and if you are satisfied from the testimony that LaForce was indebted to the plaintiff, Sensurederfer, at the time the policy was issued, Sensurederfer has a right to recover thereon under the conditions hereinafter stated. The plaintiff, Sensurederfer, under the provisions of the policy, was bound to make satisfactory proof of the death of LaForce, the insured, and it is this which constitutes the real issue in the case, the defendant company claiming that the proof of death is not satisfactory. This proof—the proof of the death of LaForce—the plaintiff,

Sensenderfer, is bound to make, and he cannot recover on the policy sued on unless he satisfies you by a preponderance of evidence that La Force is dead, and that he died prior to the first day of December, 1877. The policy sued on requires the annual premium to be paid in advance,—and the proof shows that the said premiums have been paid up to the first of December, 1877,—so that if La Force died after that day, the policy had by its terms been forfeited, and no recovery could be had therein. If La Force is still living, or if the plaintiff, Sensenderfer, has not satisfied you by a preponderance of evidence that he is dead, and that he died prior to the first of December, 1877, the plaintiff cannot recover, and your verdict should be for the defendant. As already stated, the plaintiff, Sensenderfer, has to prove to your satisfaction that La Force is dead, and that he died prior to the first day of December, 1877. By proof to your satisfaction is meant that when you come to weigh and balance the evidence, as to the probability of La Force having been alive or dead before the first day of December, 1877, your mind shall arrive at the conclusion of his death; the law is satisfied with less than a certainty, yet requires a preponderance of proof establishing the fact of his death.

There are two theories regarding the life or death of La Force suggested by the testimony and in argument: The first, the theory of plaintiff, is that La Force is dead, as shown by reason of his continued absence; the failure to learn of his whereabouts; the attraction of his family and his not returning to it; his business relations; La Force's character and standing; and his being at or near the place where a murder is supposed to have been committed about the time of his (La Force's) disappearance. Each of these suggestions should be carefully examined by you, under the evidence and the allusions to them by me, and are intended to guide you in their consideration. Absence alone cannot establish the death of La Force, for the law presumes that an individual shown to have been alive and in health, at the time of his disappearance, continues to live, following in that particular the presumptions acted on in the daily affairs of life. While the death of La Force is not to be presumed from absence alone, it is yet a circumstance which should be taken into consideration, with other evidence in the case, and the conclusion of life or death arrived at from the whole facts and circumstances, including his continued absence. The length of absence is an important element in estimating the weight of this evidence, which increases or diminishes in importance when received in connection with the efforts made to ascertain his whereabouts or death.

There is evidence before you as to the family and social relation of La Force, which is not to be overlooked. There is also testimony as to La Force being in a neighborhood when a murder is supposed to have been committed. The testimony bearing thereon, and the disappearance of La Force about the same time, is to be carefully considered by you so far as it bears upon the question of La

Force being the murdered man, if a murder occurred. If, from the testimony in the case, you shall come to the conclusion that La Force was exposed to any extraordinary danger, it should have due weight in arriving at the fact of his death. The reputation in the family, of the death of one of its members, is proper evidence for you to consider, but not the *opinion* of any one. You have thus an outline of the evidence which the plaintiff claims establishes the fact of the death of La Force,—that is, that the probabilities of his death are greater than that he is living. If you shall come to this conclusion, your verdict should be for the plaintiff.

To weaken or destroy any presumption tending to establish the death of La Force, the defendant has introduced testimony and presents arguments, such as that La Force's financial condition may have induced him to abscond. This is proper testimony for you to consider. In this particular the disposition of La Force as a speculator on a larger or smaller scale, whether visionary or otherwise, in his trades, his being embarrassed, or in good financial circumstances, come in for consideration, and should receive such at your hands. Whatever bearing the testimony or the circumstances of the case present, calculated to weaken or destroy the probabilities of the death of La Force, introduced by the defendant, should be carefully considered by you in connection with the testimony introduced by the plaintiff in support of the conclusion of his death. If, in thus weighing the testimony and circumstances of the case for and against the probabilities of La Force's death, you shall come to the conclusion of the death of La Force, prior to the first of December, 1877, you should find the issues for the plaintiff; otherwise for the defendant. In case you find the issues for the plaintiff, you will allow him the amount stipulated in the policy, together with interest at 6 per cent. from the date of beginning this suit. If you find the issues for the defendant, you will so state in your verdict.

KELLOG and others *v.* RICHARDSON.

(Circuit Court W. D. Missouri, E. D. April Term, 1883.)

1. ATTACHMENT—WHEN CREDITOR MAY RESORT TO—UNDER THE MISSOURI STATUTES—ASSIGNMENT LAW OF MISSOURI.

Under the Missouri statutes a creditor may obtain an attachment against the property of his debtor on the affidavit that the debtor has conveyed and assigned or disposed of his property and effects, so as to hinder and delay his creditors, or is about to further fraudulently convey, assign, and dispose of the same with such intent. In order to maintain such an attachment it is not necessary to prove the act of the debtor to be fraudulent in fact; it is fraudulent in law if it hinders and delays creditors in the collection of their debts.

2. ASSIGNMENT UNDER LAW OF MISSOURI.

A debtor, under the laws of Missouri, may prefer certain creditors to others, by mortgage or deed of trust in part or all of his property, but he cannot make

such a preference in an instrument or instruments by which he disposes of the whole of his property at one and the same time. Such an act would be a virtual declaration of insolvency and would bring the debtor under the assignment law, which requires a distribution of the property of the failing debtor for the benefit of all the creditors in proportion to their respective claims. Neither can a debtor in failing circumstances, and unable to pay all his debts, convey his property in trust, and reserve to himself any benefit.

At Law.

John A. Gilliam and C. W. Thrasher, for plaintiffs.

Goode & Cravens, for defendant.

KREKEL, J., (*charging jury*.) Aside from the ordinary mode of collecting debts by suit and summons, the laws of Missouri in certain cases provide that a creditor may attach the property of his debtor, and thus secure the collection of his debt. There are 14 different causes mentioned in the Missouri statute, for which an attachment may issue. Under two of them,—the seventh and ninth,—the plaintiffs in this case have sued out their attachment; they have made affidavit as required in the provision of the law; mentioned that they had good reasons to believe, and did believe that defendant, Richardson, had fraudulently conveyed and assigned and disposed of his property and effects so as to hinder and delay his creditors; and that he is about to further fraudulently convey, assign, and dispose of his property and effects so as to hinder and delay his creditors. After the making of the affidavit and filing their bond, the plaintiffs were entitled to and obtained their attachment, under which they seized the property of the defendant, Richardson. The law provides that the facts sworn to by the plaintiffs to obtain their attachment, may be denied by the defendant under oath, and when so denied, the plaintiffs are bound to prove the existence of the facts alleged by them as ground of the attachment. This is what has been done by Richardson; that is, he has denied, under oath, that the facts set out in the affidavit of plaintiffs are true, virtually saying that he did not fraudulently convey, assign, or dispose of his property, nor was he about doing so, for the purpose of hindering and delaying his creditors in the collection of their debts. It is not denied that Richardson conveyed his property, but he says he did not do it fraudulently and for the purpose of hindering and delaying creditors in the collection of their debts. By hindering and delaying creditors in the collection of their debts is meant the doing of an illegal act which causes or presents an obstacle in the collection of the debt by a creditor. The act done by the debtor may not defraud the creditor in fact, and yet be fraudulent in law, because it hinders and delays creditors in the collection of their debts. Thus, for instance, a debtor may have property more than sufficient to pay all his debts, yet if he puts his property out of his hands so that it cannot be reached by the ordinary process in law, it is hindering and delaying in the eyes of the law, and a legal fraud. Such hindering and de-

laying of creditors in the collection of their debts, the law denounces and treats as a fraud.

Having thus given you the law regarding fraudulent conveyances for the purpose of hindering and delaying creditors, I proceed to define the right which a failing debtor has to deal with his property. Under the laws of Missouri a debtor has a right to select among his creditors, if he cannot pay all of them, whom he will pay or secure, in other words, whom he will prefer, but he cannot make such a preference in an instrument or instruments by which he disposes of the whole of his property at one and the same time. Such instruments fall within the provisions of the assignment law of Missouri, which provides that "every voluntary assignment of lands, tenement, goods, chattels, effects, and credits made by a debtor to any person in trust for his creditors, shall be for the benefit of all the creditors in proportion to their respective claims." Under this provision of law a merchant may give a mortgage or a deed of trust in part or all of his property, to secure one or more of his creditors, thus preferring them, but he cannot convey the whole of his property to one or more creditors and stop doing business. Such turning over and virtually declaring insolvency brings the instrument or act by which it is done within the assignment law of Missouri, which requires a distribution of the property of the failing debtor for the benefit of all the creditors in proportion to their respective claims. Such is the declared policy of the law; it places all creditors upon an equal footing. The law further is that no debtor in failing circumstances, and unable to pay all his debts, can convey his property in trust and reserve to himself any benefit. You are therefore instructed that if you find from the testimony that Richardson, in the instrument in evidence called a mortgage, conveyed more property than was necessary to pay the claims secured and provided, as the conveyance in this case does, for the delivery back of the balance of property not needed to pay the preferred creditors, to himself, such a reservation in the deed makes it void as to creditors not secured thereby, and hinders and delays them in the collection of their debts. You will remember the evidence as to the amount of claims secured, about \$4,500, and the value of the property conveyed by the mortgage, estimated at \$9,000. Richardson could not legally convey his stock of merchandise to certain preferred creditors, have them sell the property, pay themselves, and return the balance of the proceeds or property to him. Such conveyance and holding under it by the preferred creditors would amount in this case to a withdrawal of the property conveyed from the reach of creditors, and constitute a fraudulent conveyance for the purpose of hindering and delaying creditors, and fully justifying you in finding the issue for the plaintiffs, and you are instructed to do so if the facts are found by you as stated.

The time during which the sale by the preferred creditors is to be made is another matter to which your attention is specially directed.

The law is that even though the conveyance by which the transfer is made be otherwise valid, yet, if by virtue of its provisions the dealing with the property is such as necessarily delays creditors in reaching any remainder or surplus by creditors not secured, such a delay is a hindering and delaying of creditors, and fraudulent in law. Creditors are entitled to their pay when due. A reasonable time to dispose of the property conveyed may be taken, but it must not be with a view of earning profits and making gains. You are, therefore, instructed that if you shall find from the testimony that the property conveyed by Richardson to the preferred creditors could be disposed of in less time than provided for in the deed of trust, and without serious loss, in such case it hinders or delays creditors. It is no answer to this to say that creditors may resort to extraordinary remedies to reach the property conveyed and not needed to pay preferred creditors. The debtor has no right to compel creditors to resort to any of the extraordinary remedies alluded to in the argument of counsel. The conveyance in this case provides that the preferred creditors may sell the property conveyed at retail for two months and more, then advertise twenty days, and sell at public auction. It also provides that the creditors may hire clerks, pay store rents, and report monthly all their doings for Richardson. But for the fact that the conveyance does not set out the value of the property conveyed, the deed would be declared void as a question of law. If the property conveyed by Richardson to the preferred creditors was less in value than necessary to pay them, it might be a question as to whether such a condition as the one made for the sale, of the property contained in the conveyance in evidence would not be valid. In this case Richardson made a general assignment afterwards, thereby showing that in his view at least, there was an overplus. On this branch of the case you are instructed that if you find the value of the property so conveyed by Richardson to the preferred creditors greater than the debts secured, and further find that Richardson intended that the property should be disposed of at retail, and that the property not needed to pay preferred creditors should be returned to him, you should find the issue for the plaintiffs.

NEW HAMPSHIRE LAND CO. v. TILTON and others.

(*Circuit Court, D. New Hampshire. January 11, 1884.*)

1. FOREIGN CORPORATION—POWER TO HOLD LAND.

A corporation, even though it does little or no business in the state where it is organized, is not necessarily incapable of holding and dealing in land in another state.

2. DEED—ACKNOWLEDGMENT—AFTER EXPIRATION OF AUTHORITY.

A deed executed by a commission empowered to convey public land may be lawfully acknowledged by the commissioners after their authority has been revoked.

3. SAME—HOW FAR ACKNOWLEDGMENT IS NECESSARY.

An unacknowledged deed is good against all persons having actual notice of its existence.

4. SAME—UNCERTAINTY ARISING AFTER EXECUTION.

A valid deed does not become void because, by reason of the loss of a plat referred to therein, it has become difficult to define the boundaries.

5. DEED—ESTOPPEL.

The joint proprietors of a tract of land, who have accepted other land in exchange therefor, are estopped to deny the validity of a deed executed by a part of them only, on behalf of all, without power of attorney.

At Law.

W. S. Ladd, A. F. Pike, D. Barnard, C. H. Burns, J. Y. Mugridge, and Chase & Streeter, for plaintiffs.

H. Bingham, G. A. Bingham, G. Marston, I. W. Drew, E. Aldrich, A. S. Batchellor, and D. C. Remich, for defendants.

LOWELL, J. This case has occupied some weeks in the trial, and has, at the end, been submitted to me, as judge and jury, under the statute. It is a land case of much importance to the parties, and to others having similar actions now pending in the court. Notwithstanding the great mass of documentary evidence, the points in dispute are few and well defined. I will state first my findings of fact:

The plaintiffs are a corporation organized under the general laws of Connecticut, Revision of 1875, two days before the law of that state was modified by the act of 1880, which repealed the act of 1875. The defendants contend that the plaintiff corporation cannot hold lands in New Hampshire, excepting as incidental to any business which they may carry on in Connecticut; and that a foreign corporation is not authorized to deal in lands in New Hampshire as its principal business, or one chief part of its business. I find that there was no evidence that the corporation carries on any business in Connecticut. My ruling of law is given below.

Both parties claim under the state of New Hampshire. The plaintiffs demand nine twenty-fourth undivided parts of the Sargent & Elkins' grant, of about 50,000 acres, made by James Willey, land commissioner, in October, 1831. The tract is bounded by the easterly line of the town of Franconia, and by the same line extended northerly to the south-west corner of the town of Breton Woods, (now called Carroll;) thence by the south line of Carroll to Nash & Sawyer's location; thence by the same to the notch of the White mountains; thence southerly by Hart's location to land granted to Jasper Elkins and others in 1830; thence westerly to the first-mentioned bounds. The tenants claim 36 lots of 100 acres each, to which they trace a clear paper title from the state, beginning in 1796, provided the deeds from the state were valid and effectual.

In 1796 the legislature appointed Edwards Bucknam, John McDuffie, and Andrew McMillan, a committee to alter and repair the old road leading from Conway to the Upper Coos, and to make a new road from that road to Littleton, with power to sell, in lots of 100 acres each, lands

of the state through which this new road should pass. Lands were sold by the committee at four different public "vendues," and the tenants claim under the fourth sale. The description of the lands in the deeds of the second, third, and fourth sales is by ranges and lots on a plan of Nathaniel Snow, made by order of the committee. I find that two range lines were adopted, not precisely parallel, so that when the lots were extended there was a gore of a triangular form which remained ungranted. Nearly all of what is now the town of Bethlehem was granted by this committee. The deeds are all alike, and are carefully and well drawn, and the objections which the plaintiffs take to them apply to all. They may be spoken of, for convenience, as one deed. The objections are that one of the committee acknowledged the deed after the law appointing the commission was repealed, and that the deed is void for uncertainty in its description of the land. The plan of Snow, by which all these lots are described, cannot be found at the office of the secretary of state, if it ever was returned there, and cannot now be produced. Several copies of plans by Snow have been introduced in evidence, coming from the families of persons interested in the subject, but they differ from each other in some particulars, and no testimony shows clearly how, and when, and from what, they were severally copied. I find, however, as a fact that the copy called the "Cilley plan" contains internal evidence of having been taken from an older plan than those produced by the plaintiffs, and that it is sufficiently proved to be considered a copy of the original for the purposes of this case. I find that there was an original Snow plan by which the sales were made, and that it was made from actual knowledge of the base lines, but not from actual knowledge of the lines of the lots. I further find that the base lines being given, the lots can now be laid out upon the ground. When so laid out, the easterly part or corner will overlap the earlier grant to Nash & Sawyer; but it is not proved to my satisfaction that the committee or their surveyor knew this, but the contrary supposition is the more probable.

The grant by Willey in 1881 was made to Jacob Sargent, Jr., David Elkins, Enoch Flanders, Samuel Alexander, and John A. Prescott, and they at once sold an undivided equal interest to Joseph Robbins, so that the proprietors held by undivided sixth parts. In May, 1832, it was discovered that the road committee had conveyed away, or was supposed to have conveyed away, in 1796, all, or nearly all, of the upper portion (about one-half) of the Sargent & Elkins' grant of 1831; and thereupon an arrangement was made by which Willey granted the six proprietors another tract of about equal extent, and allowed them \$50 in money, and they made a deed of quitclaim, reconveying to him for the state about 23,000 acres, by metes and bounds, in which description is embraced the lots now in controversy, excepting lot 32, in range 18, and parts of lots 30 and 32, in range 17. This deed of reconveyance in its premises, or granting

part, after the description, contained these words: "Excepting and reserving all the right and title we should have had by James Willey's deed to us, dated October 27, 1831, of the above-described tract of land, provided all or any part of [the] land mentioned in the above-named bounds has not been lawfully disposed of by the authority of the state of New Hampshire previous to the deed given to us as above mentioned." This reservation is referred to again in the *habendum* and the clause of warranty. This deed, which purported to be made by all six of the proprietors, was executed by two of them, for themselves and the others. It is proved that the arrangement was made with all the proprietors, and that they all accepted and dealt with the land granted in exchange. The proprietors proceeded to divide the remaining land, and to deal with it in severalty, and no claim was made by or under them to this upper or regranted land for some 40 years or more afterwards, when the plaintiffs' predecessors in title bought from the heirs and devisees of some of the proprietors the nine twenty-fourth parts now demanded. As to the lot, and parts of two others, which are not included in the description of the reconveyance, I find that the plaintiffs never acquired a title thereto, because they had been divided and conveyed in severalty to third persons by the proprietors before the plaintiffs' predecessors purchased their undivided interest.

I now proceed to the points of law:

1. I rule, for the purposes of this case, that the plaintiff corporation has authority to hold and deal in lands in New Hampshire.

2. I rule that the deeds from the road committee are not rendered invalid by the fact that one of the committee acknowledged them after his commission had expired. A deed in New Hampshire is good, without acknowledgment, against purchasers with notice, *Montgomery v. Dorion*, 6 N. H. 250; *Wark v. Willard*, 13 N. H. 289; and by their deed of reconveyance, the proprietors of Sargent & Elkins' grant acknowledged notice of all preceding deeds. Independently of notice, the formal act of acknowledgment could be done after the commission had expired. See *Lemington v. Stevens*, 48 Vt. 38, and for cases somewhat analogous; *Bishop v. Cone*, 8 N. H. 513; *Gibson v. Bailey*, 9 N. H. 168; *Welsh v. Joy*, 18 Pick. 477; *Fogg v. Willcutt*, 1 Cush. 300.

3. The burden is on the plaintiffs to prove what lands are excepted out of the reconveyance; and they have failed to show this.

4. If the base lines of the plan were known by survey when the plan was made, and can now be pointed out, both of which facts I find to be established, the deeds of the committee are not void for uncertainty. However difficult it may now be, in the confusion of the various copies of the plan, to fix the exact boundaries of particular lots, the deed of reconveyance holds good, if the lands had been once lawfully disposed of by the state. The loss of the plan cannot make deeds void which once were good. It may be found to-morrow. The deeds have been assumed and acted on as good for more than 80 years;

and, whether a true copy of the plan can now be proved or not, the plaintiffs have no title if these deeds were good when made. Immense tracts of wild land have been sold by ranges and lots upon a plan; and all the authorities agree that if the lots can be laid out upon the ground in substantial accordance with the plan, the grants are effectual. *Corbett v. Norcross*, 35 N. H. 99; *Browne v. Arbuckle*, 1 Wash. C. C. 484; *Jones v. Johnston*, 18 How. 150, 154; *Wells v. Iron Co.* 47 N. H. 235, 259.

5. The plaintiffs contend, and I find it to be true, that certain lots of the fourth sale, if the Cilley plan be taken as a copy of the Snow plan, are laid out upon land which had before been granted to Nash & Sawyer. The argument deduced from this fact against the Cilley copy is legitimate, because the committee cannot be supposed to have intended to sell land which the state did not own. I have given the argument due weight in this connection; but finding, as I do, by the preponderance of all the evidence, that the Cilley copy is substantially accurate after all arguments for and against it are considered, it merely results that the committee did undertake to grant land which turns out to be part of Nash & Sawyer's location. This mistake cannot vitiate the title to all the rest of the town of Bethlehem; but, either the persons who took those lots get nothing, or all the lots abate in proportion. It does not matter in this case which of these alternatives is the true one.

6. The deed of reconveyance is to be considered the act of all six of the proprietors, though no power of attorney by which two of them executed the deed for the others is produced, because, by accepting the lands granted in exchange, they were estopped to deny that they authorized the execution of the deed.

My verdict, therefore, is (1) that the plaintiff corporation has not proved a title to the 36 lots in dispute; (2) that the defendants have proved a title to the same.

Sixty days are given the parties to file exceptions. If the plaintiffs except, the defendants have the right to except to my ruling as to the authority of the plaintiffs to hold lands in New Hampshire.

CERESUS MINING, MILLING & SMELTING CO. v. COLORADO LAND & MINERAL CO.¹

(Circuit Court, D. Colorado. January, 1884.)

1. LOCATION OF MINING CLAIM—END STAKES.

The statute of Colorado (Rev. St. 630) affords no support to one who, in locating his claim, fails to set the proper stakes at the end of the claim, when the proper position for them was not inaccessible, but merely difficult of access, or approachable by a circuitous route. In such case the title will only relate to the time when the stakes are subsequently set.

2. SAME—CHANGE OF LINES.

The locator of a mining claim cannot, after the location, change the lines of his claim so as to take in other ground, when such change will interfere with the previously-accrued rights of others.

3. ACTION FOR REALTY—DEFENSE.

A defendant in an action for the possession of real estate, when he claims only a part of the tract sued for, must show what part he claims.

4. ALIEN—RIGHT TO LOCATE MINING CLAIM.

Upon declaring his intention to become a citizen, an alien may have advantage of work previously done, and of a record previously made by him in locating a mining claim on the public mineral lands.

5. SAME—STATE COURT MAY NATURALIZE.

The necessary oath declaratory of intention by an alien to become a citizen of the United States may be administered in the courts of record of the state. One who has so declared his intention to become a citizen may make a valid location of a mining claim.

At Law.

L. B. Wheat, for plaintiff.

W. P. Thompson and *T. M. Patterson*, for defendant.

HALLETT, J. This controversy arises out of conflicting locations of mining claims on the public mineral lands. At the trial plaintiff had a verdict, which defendant now moves to set aside, on various grounds. The errors alleged with reference to defendant's title will first be mentioned.

Defendant's title: May 12, 1881, D. E. Huyck and C. M. Collins located the Maximus lode, in Pollock mining district, Summit county, Colorado. July 8th, in the same year, they filed a certificate of location. The lode was discovered on the eastern or south-eastern slope of a very steep mountain, and about 160 feet below the crest of the mountain. The locators intended to lay the claim across the mountain, so that one-half or more should be on the north-western slope. At that point the mountain is almost impassable at any season of the year, and on the eighth of July, when the survey was made, it was thought to be wholly so. What was done towards setting stakes at the north-western end of the claim is described by the surveyor by whom the work was done, as follows:

"We then went back to the discovery cut and chained up the mountain some distance, when we came to a perpendicular precipice, or cliff of solid

¹From the Colorado Law Reporter.

rock, over or around which we could not climb, owing to its precipitous nature and the fact that the crevices in the rock, and places where a foothold might have been had by one active enough to climb up the cliff, were filled with snow and ice, and it was both impracticable and dangerous to life and limb to get at the points where the stakes should be set. The side posts or stakes were set on the boundary lines of the survey somewhat short of or below the middle of the claim, and the end posts were placed further on, in conspicuous places, as near the side boundary lines as we could find places to put them. With my instrument I took the direction of the proper places of the upper end and side posts, and calculated the distances between the places where we did set them and their proper places, and marked its distance and direction from its proper place on each stake. The two middle side stakes and the two end stakes were set in such a way as to be evident and most likely to attract the attention of any one going up the gulch, and were within plain view of any one coming to the edge of the precipice above and looking down."

At the time of this survey there was a practicable trail at no great distance south, and a wagon road some miles north, upon either of which it would have been possible to go to the other side of the mountain for the purpose of setting the north-western end stakes. And later in the season it was possible to pass over the mountain at the place where the Maximus claim was located, or very near that place. The same surveyor surveyed another location, called the Bernadotte, which covered a part of the Maximus territory, for the same parties, on the thirtieth day of August in the same year. With reference to the matter of getting over the mountain at that time, he testified as follows:

"This survey was made much later in the season than the other, and the difficulties of snow and ice which we had encountered in surveying the Maximus did not then exist, and we were able to climb up to the top of the ridge and set the end stakes in their proper places."

Because of the difficulty or impossibility of getting over the mountain on the line of the Maximus claim on the eighth of July, when the survey was made, no stakes were set at the north-western end of the claim. In lieu thereof, witness stakes were placed on the south-eastern slope of the mountain, as described by the surveyor in his testimony quoted above. The north-western end of the claim was not inaccessible from that side of the mountain. The stakes were properly set at that end of the claim in August, 1882, and it is not claimed that the point was then or at any time inaccessible, except as to the matter of getting over the mountain in a direct line from the discovery cut. Upon these facts a question was presented at the trial whether the Maximus claim was properly marked on the surface at the north-western end in July, 1881, or at any time before August, 1882, when a survey for patent was made, and stakes were properly set. Defendant relies on a statute of the state, (Rev. St. 630,) in these words:

"Where in marking the surface boundaries of a claim, any one or more of such posts shall fall by right upon precipitous ground, where the proper placing of it is impracticable, or dangerous to life or limb, it shall be legal and

valid to place any such post at the nearest practicable point, suitably marked to designate the proper place."

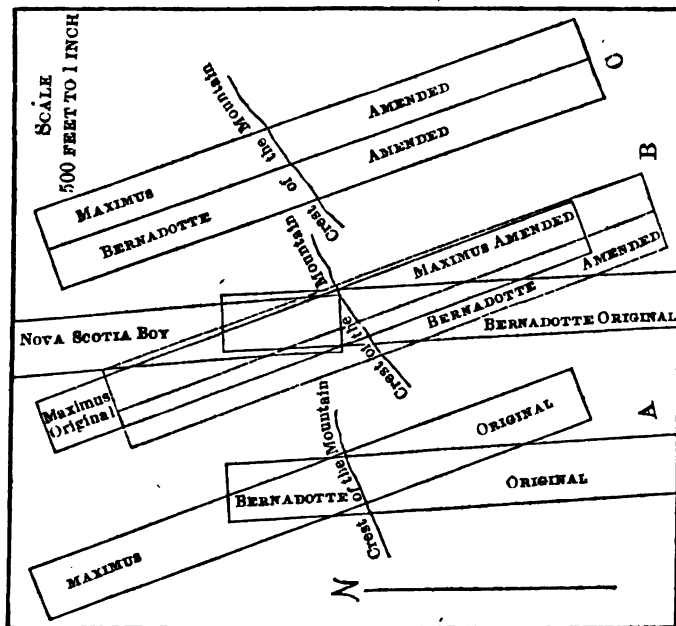
But the act affords no support to the defendant's position. It relates to the matter of setting stakes where the point or place where they should be set is inaccessible, and not to such circumstances as were shown in the evidence. The locators of the Maximus claim could have reached the north-western end of the claim, at the date of the location, by routes which, although circuitous, were entirely practicable; and later in the season they could have passed over the mountain at the very place where the claim is located. To hold such marking of boundaries to be sufficient would be to disregard the act of congress (section 2324) and of the state (Rev. St. 630) which manifestly require something more. Upon full argument and mature consideration, the ruling at the trial that the Maximus claim cannot have effect on the north-western side of the mountain before the date of the patent survey in August, 1882, when the stakes were properly set, seems to be correct. Defendant also asserts title to some part of the ground in dispute under another location called the Bernadotte, made in the latter part of August, 1881. No question was made as to the manner of setting the stakes on this location, but there was a controversy as to the situation of the discovery cut with reference to the side lines of the claim, the existence of a lode therein, and perhaps some other matters. During the trial but little attention was bestowed on that location, but at the close counsel for defendant proposed to discuss its validity before the jury and to ask a verdict for some part of the ground in dispute on that title, and he now complains that he was not permitted to do so.

The ruling of the court in respect to that matter was founded on a change in the location at the time of the survey for a patent in August, 1882, which as to the ground in dispute, was supposed to defeat the earlier location in 1881. In the first location of the Maximus and Bernadotte, in the year 1881, they were relatively to each other and the crest of the mountain in the position shown in diagram, A.

In the survey for patent in August, 1882, the Maximus was carried something like 190 feet in a south-easterly direction, so as to give it greater length on the south-eastern slope of the mountain, and less on the north-western slope; and the general direction of the claim was changed so as to carry it over on plaintiff's claim a distance of 30 feet more than was previously covered by it. The Bernadotte claim was changed to the north-easterly side of the Maximus and parallel with the latter, so as to make them uniform in length and direction. The relative position of these claims thus changed is shown in diagram, C. And the position of the claims as originally located and in the survey for patent, together with plaintiff's claim, the Nova Scotia Boy, is shown in diagram, B.

The most that can be demanded on behalf of the Bernadotte claim

is, that the territory embraced in the original and amended locations of that claim, and which is also within the lines of plaintiff's location, shall be regarded as subject to and held by defendant under the first location certificate. Where rights have accrued to others in respect to some part of the territory covered by the location, and the change of lines is radical and complete, as in this instance, that proposition may be open to discussion. But conceding it to be indisputable, there was no evidence that any part of the ground in dispute was in that situation. It is true that in some of the plats used by the witnesses, a small triangular piece of ground appeared to be covered by the original and amended locations of the Bernadotte, and in



plaintiff's location called the Nova Scotia Boy, No. 2. It is so represented in the diagram last above mentioned. But no description of the place was given, and the jury would not have been able to define the tract if required to do so. A party must always show the nature and extent of his demand, and where, as in this case, it is real estate and a part of a larger tract claimed, he must show what part. Failing in that respect, defendant was not entitled to go to the jury on the first location of the Bernadotte, nor on the first location of the Maximus, for want of boundary stakes, as already explained. The jury was correctly instructed that the Maximus and Bernadotte locations could have no earlier date than that of the survey for patent in August, 1882, and the question to be determined was whether the plan-

tiff's title to the Nova Scotia Boy, No. 2, had then accrued by the previous performance of all acts necessary to a valid location.

Plaintiff's title: The first work on the Nova Scotia Boy, No. 2, was done in 1879 by Benjamin T. Vaughn, the locator of the claim, who was an alien. A discovery shaft or cut, as required by the statute, was not made in that year, however, and it became a question throughout the trial whether such work was done at any time before suit. Plaintiff offered evidence tending to prove that the work was completed in 1880, and annual work was done on the claim in the years 1881 and 1882. This was denied by witnesses for defendant, and the matter was contested before the jury in the usual way. As already stated, Vaughn, who located the claim, was an alien, and it was shown that he declared his intention to become a citizen in a district court of the state, May 30, 1881. Defendant objected that he was not qualified to make a location in the year 1880, when the claim was said to have been located; nor was he so qualified at any time before the discovery of the Maximus lode by defendant's grantors on the twelfth day of May, 1881. As to the declaration of Vaughn of his intention to become a citizen, a court of the state was not competent to receive it. Defendant maintained that authority to naturalize an alien could not be exercised by any state tribunal, and it resides only in the federal courts. To this plaintiff replied, that any one, citizen or alien, may make a location, and the competency of the latter cannot be questioned except by the government. A location by an alien who has not declared his intention to become a citizen shall be maintained until the government avoids it. These propositions, renewed with some energy on the motion for new trial, do not demand much consideration. If Vaughn was not qualified to make a location before May 30, 1881, his declaration of that date made him so. And as defendant's right, whatever it may be, to the ground in controversy accrued long after that time, Vaughn's prior incompetency cannot avail. The only doubt touching that matter is whether, on declaring his intention to become a citizen, Vaughn could have advantage of what he had previously done towards locating the claim, and as to that, assuming that no other claim to the ground had intervened, no reason is perceived for denying his right to the fruits of his labor. Indeed, it may be contended that he should hold, from the first act done, his qualification to locate a claim, beginning with his declared purpose to enjoy the bounty of the government. But we are not concerned with that inquiry in this case. It is enough to say that Vaughn became qualified under the act of congress, in May 1881, and that what he had then done towards locating the claim should accrue to him as of that date.

The authority of courts of record in the several states, under the act of congress, (Rev. St. 2165,) to confer the right of citizenship, has been accepted in practice and recognized without discussion by courts since the act was passed. *Campbell v. Gordon*, 6 Cranch, 176; *Stark*

v. *Chesapeake Ins. Co.* 7 Cranch, 420; *Lans v. Randall*, 4 Dill. 425. A discussion of the question in a court of original jurisdiction at this time would seem to be unnecessary. If defendant wishes to deny the power of congress to confer such jurisdiction on courts of states, the supreme court is a more appropriate forum for the discussion. The position of the plaintiff, that an alien who has not declared his intention to become a citizen may make a valid location of a mining claim, finds no support in the statute. Rev. St. 2319. But this also was an immaterial question at the trial, since Vaughn was held to be qualified after his declaration of intention to become a citizen in May, 1881, and the jury supported his title as having become full and complete prior to August, 1882.

The motion will be overruled.

COLLINS, Adm'r, v. DAVIDSON.

(Circuit Court, D. Minnesota. December 7, 1883.)

1. CONTRIBUTORY NEGLIGENCE.

A person cannot recover for injuries sustained by reason of the negligence of another, when he has himself been guilty of negligence, but for which the mischance would not have occurred.

2. SAME—SUDDEN FRIGHT.

Imprudent conduct growing out of sudden fright is chargeable to the person whose negligence gave rise to the alarm.

3. ACTION FOR INJURIES CAUSING DEATH—MEASURE OF DAMAGES.

Damages, in an action by personal representatives for injuries causing death, are measured by the pecuniary loss, including the deprivation of future pecuniary advantage occasioned thereby to those who take the benefit of the judgment

At Law.

E. M. Card, for plaintiff.

C. K. Davis and Williams & Goodenow, for defendants.

McCRARY, J., (charging jury.) This suit is brought by the plaintiff, as administrator of the estate of Frank Collins, deceased, to recover damages for personal injuries causing the death of said Frank Collins, which injuries, as plaintiff alleges, were caused by the negligence of the defendant or his agents. The suit is brought under and by virtue of the provisions of section 2 of chapter 77 of the Statutes of Minnesota, which is as follows:

"When death is caused by the wrongful act or omission of any party, the personal representatives of the deceased may maintain an action, if he might have maintained an action, had he lived for an injury caused by the same act or omission; but the action shall be commenced within two years after the act or omission by which the death was caused. The damages thereon cannot exceed five thousand dollars, and the amount recovered is to be for the exclusive benefit of the widow and next of kin, to be distributed to them in the same proportions as the personal property of the deceased person."

The deceased, Frank Collins, came to his death by reason of a collision between the steam-boat Centennial and a small boat or skiff of which he was one of the occupants, at or near Lake City, on the Mississippi river, in this state, on the twelfth day of June, 1882. It is admitted that the defendant was at the time of the accident the owner, master, and captain of the said steamer, Centennial, and that at said time and place he and his agents and servants were navigating the said steam-boat. The plaintiff alleges that the collision, and consequent injury and death of the deceased, were caused by the wrongful act of the defendant, his agents and servants, in negligently running the said steam-boat upon the small boat aforesaid. This allegation is denied by the defendant, and this question, to-wit, was the defendant, through his servants and agents, guilty of negligence? is the first question for your consideration.

It was the duty of the defendant, and his agents and servants in charge of said steamer, to exercise ordinary care and prudence to avoid injury to persons in other boats or vessels in the river, and to avoid collision with other boats and vessels. A failure to exercise such care and prudence would be negligence, within the legal definition of the term. Negligence is the want of ordinary care; that is to say, the want of such care as a person of ordinary intelligence and prudence would exercise under the circumstances. If you find from the evidence, and upon due consideration of all the facts and circumstances shown thereby, that the persons in charge of the steamer Centennial were guilty of negligence within the rule as I have stated it, and that such negligence was a cause of the collision which resulted in the death of Frank Collins, then it will be your duty to find for plaintiff, unless you further find that said Frank Collins, or some of those in the small boat with him, were also guilty of negligence which contributed to—that is, had a share in causing—the collision. And in considering this question of contributory negligence you will be governed by the same rule as to what constitutes negligence that I have already given you; that is to say, the deceased, and those in the boat with him, were bound to use ordinary care and prudence in order to avoid the danger of collision, or such care as a person of ordinary intelligence and prudence would have exercised under the same circumstances, and a failure to do so would be negligence; and if it contributed to the injury it would be contributory negligence, and would defeat the plaintiff in the present action. It was the duty of the persons in charge of the steamer to keep a lookout and to avoid collision with the small boat, if by the exercise of ordinary care and diligence it was possible to do so. It was also the duty of Collins and the other persons with him in the small boat to look out for passing steamers and to keep out of the way of such steamers, if by the exercise of ordinary care and diligence they were able to do so. A failure of the persons on the steamer to perform this duty will, if proved, amount to negligence; a failure of the persons in the small

boat to perform this duty will, if proved, amount to contributory negligence. You will see, therefore, that you are to inquire and decide upon the evidence before you, and in the light of these instructions, these questions: (1) Were the servants and agents of the defendant who were in charge of the steamer guilty of negligence, which caused, or was one of the causes of, the collision? (2) If this question is answered in the affirmative, then was the deceased, Frank Collins, or any of the persons in the small boat with him, guilty of negligence which contribute to the collision and injury?

If you decide the first question in the negative, you need not consider the second, because the plaintiff's case must fail if the negligence of the defendant's agents and servants is not established. But if you decide the first question affirmatively, then you must consider the second, because the plaintiff cannot recover if the alleged contributory negligence has been established. In other words, in order to recover, the plaintiff must establish the negligence of defendant or his agents, and you must also find from the evidence that the deceased and those in the small boat with him were free from contributory negligence. By going into the small boat with the other persons on board of it, the deceased subjected himself to the consequences of their negligence, if any, in the control and management of the said boat.

In considering the question of the negligence of the persons in charge of the steamer, you will inquire whether the pilot saw or could have seen the small boat in time to avoid a collision; and if so, whether ordinary care was used to avoid such collision. And in this connection you will consider the question whether the course of the steamer was directly towards the small boat, or so far to one side as to have avoided the danger of collision, if the small boat had not been moved towards the line upon which the steamer was proceeding. In considering the question of contributory negligence, you will inquire, in the light of the evidence, whether, in the effort to lift the anchor by some one on the small boat or by any other means, the small boat was moved towards the line upon which the steamer was advancing, and if so, whether such movement of the small boat was negligence and contributed to the collision; or, in other words, whether, but for such negligent movement, if there was such, the collision would have occurred. In the light of all the evidence, and with special reference to these inquiries, you will determine the material question of fact as to negligence and contributory negligence, upon which your verdict must depend. In considering the evidence, you will bear in mind that the question, what is negligence? depends in some degree upon the circumstances of the particular case under consideration. The degree of care to be exercised depends upon the nature of the duty being performed and the extent of the danger attending the situation. The greater the danger, the greater the care required. A person having control of the machinery by which a steam-boat is propelled and guided, is bound to use such care to avoid collision with other vessels

as ordinary prudence would suggest. And so a person occupying a small boat in or near the usual channel of passing steamers, should use like care and caution. In the case of sudden and unexpected peril, endangering human life and causing necessary excitement, the law makes allowance for the circumstance that there is little time for deliberation, and holds the party accountable only for such care as an ordinarily prudent man would have exercised under these circumstances.

If the defendant was guilty of negligence in running his boat in a direction to bring him into collision with, or dangerously near to, the small boat, and if, by reason of such negligence, the persons in charge of the small boat were suddenly and greatly alarmed, and rendered for the moment incapable of choosing the safest course, then if what they did was the natural result of such fright and alarm, even if not the safest thing to do, it would not amount to contributory negligence. But if the steamer was proceeding in the usual course, and so guided as to avoid the small boat in case it had remained stationary, and so as not to go so near it as to endanger in any way the safety of the small boat, then the defendant was not guilty of negligence. If the pilot of the steamer directed his course so as to be sure of doing no injury to the small boat, he had a right to assume that the small boat would not be moved towards the line of the steamer. You will observe, therefore, that if you find that the persons in the small boat were suddenly alarmed and took measures for their safety when excited, and when incapable, by reason of the alarm and excitement, of deliberating and acting wisely, then you will consider and decide, from the evidence, whether such alarm was caused by the negligence of the persons in charge of the steamer. If it was, it will excuse the persons in the small boat of the charge of contributory negligence, provided they acted as men of ordinary prudence would have done under the circumstances. If the alarm was not the result of the negligence of the persons in charge of the steamer, or if it was a rash apprehension of danger which did not exist, it would not excuse the persons in the small boat for having adopted an unsafe course, if they did so.

If you find from the evidence that the persons in the small boat were not guilty of negligence, within the rule as I have stated, and that the accident was occasioned by the negligence of the persons in charge of the steamer, then you will find for plaintiff; otherwise, you will find for defendant. The burden is upon the plaintiff to show by a preponderance of evidence that the defendant was guilty of negligence. The burden is upon the defendant to show by a preponderance of evidence that the persons in the small boat were guilty of contributory negligence. If you find for plaintiff, you will then come to the question of damages; and in considering that question, if you come to it, you will bear in mind that you cannot find more than \$5,000, but you may find that sum or any less sum. The measure of damages in cases of this character is as follows: If you find for

the plaintiff, you will allow him such damages as you deem to be reasonably sufficient to make good to the heirs of the deceased the pecuniary loss to them occasioned by his death, not exceeding the sum of \$5,000. In determining this amount, if you come to the question, you may consider any evidence before you tending to show what was the reasonable expectation of pecuniary benefit to said heirs from the continuance of his life. The age of deceased, his pecuniary circumstances, his habits of industry, his accustomed earnings, measure of success in business, and the like, as far as they appear in evidence, are proper to be considered.

MOWAT and others v. BROWN and others.

(Circuit Court, D. Minnesota. January 10, 1884.)

1. COUNSEL'S FEES—LAW OF ONTARIO.

In the province of Ontario it is settled, by the case of *McDougal v. Campbell*, that a barrister can maintain an action to recover his fees for services rendered as counsel.

2. SAME—BILL OF EXCHANGE—CONSIDERATION.

Even in those jurisdictions where a counsel cannot collect his fees by process of law, an action will lie upon a bill of exchange or promissory note given in consideration of his services.

Stipulation is filed waiving a jury, and the case is tried by the court. The action is brought upon a bill of exchange accepted by the drawee:

[Stamp.]

"\$1,000.

TORONTO, April 20, 1880.

"Three months after date pay to the order of ourselves, at the Bank of Commerce, here, one thousand dollars, value received, and charge to the account of

MOWAT, MACLENNAN & DOWNEY.

"To Mess. Brown & Brown, St. Catharines, Ontario."

Indorsed across the face:

"Accepted. BROWN & BROWN."

Issue is joined by the answer that the consideration for the bill is barristers' fees, and it is claimed that, by the law of the province of Ontario, in Canada, suit to recover such fees cannot be maintained.

Atwater & Atwater, for plaintiffs.

Welsh & Botkin, for defendants.

NELSON, J. It is admitted that the law of the province of Ontario governs the contract; and this case has been argued upon the single point whether or not, in this province, a counsel, who is also an attorney, can recover his fees for services rendered as counsel in matters in litigation. It appears to have been decided by the court of queen's bench, in that province, contrary to the law of England, that

counsel can sue for fees. HARRISON, C. J., dissenting. See *McDougall v. Campbell*, Easter Term, 1877, (U. C. 41 Q. B. 332.) The chief justice vigorously combats the progressive views asserted by the majority, "as tending to lessen the standard of professional rectitude at the bar." I shall accept this decision of the court as settling the case upon the point controverted, and hold that, in the province of Ontario, a counsel can maintain a suit for his fees, and that the common-law rule is modified. It may be stated here that in England, where seven-eighths of the barristers reside in the city of London, a change in the organization of the legal profession is mooted¹ to unite the functions of the attorney and barrister in one person, which, if adopted, (as is not unlikely,) will extend to a complete revolution of the common-law doctrine.

But there is another reason for giving the plaintiff judgment which is satisfactory to my mind. The suit is upon a bill of exchange accepted by the defendant. The fact that the common-law doctrine prevails in the province of Ontario, should we admit it, cannot be urged to defeat a recovery in this case. There is nothing in the doctrine of an *honorarium*, or a gratuity, which forbids the client, or attorney, who engages counsel, to give, for the services rendered, his note or similar obligation. An action will lie for its non-payment, as the consideration is not illegal. This is a different thing from suing for fees. See *Mooney v. Lloyd*, 5 Serg. & R. 412.

Upon full consideration, I think judgment must be rendered for the amount of the bill of exchange, with interest and costs, and it is so ordered.

*In re JAY COOKE & Co.**

(District Court, E. D. Pennsylvania. December 22, 1883.)

BANKRUPTCY—EQUITABLE ASSIGNMENT—SUBROGATION—CONSTRUCTIONS OF STATUTES—ACTS JUNE 22, 1874, (18 ST. AT LARGE, 142,) AUGUST 8, 1882, (ST. 1882, P. 376.)

The Soldiers' & Sailors' Orphans' Home proved a claim against the bankrupts, and subsequently, by act of congress, an appropriation was made to the home of the amount of the claim, and the attorney general was directed "to inquire into the necessity for and to take any measures that may be most effectual to enforce any right or claim which the United States have to this money, or any part of the same, now involved in the bankruptcy of Jay Cooke & Co." In pursuance of a subsequent act, the home by deed transferred all its property, real and personal, to the Garfield Memorial Hospital. *Held*, that the United States had not acquired any title to the claim, either by subrogation or equitable assignment, and that the hospital was entitled to receive the claim against the bankrupts.

In Bankruptcy. Exceptions to examiner's report.

¹See article by "English Lawyer" in the *Nation*, December 20, 1883.

²Reported by Albert Guilbert, Esq., of the Philadelphia bar.

The examiner (Joseph Mason) reported that on the twenty-fifth day of May, 1874, a claim for \$11,350.97 had been duly proved against the bankrupts by the Soldiers' & Sailors' Orphans' Home.

By an act of congress approved June 22, 1874, it was provided, *inter alia*,—

"That the following sums be and they are hereby appropriated out of any moneys in the treasury not otherwise appropriated, to supply deficiencies in the appropriations for the services of the government for the fiscal year ending June 30, 1874, and for former years, and for other purposes, namely:

"For the Soldiers' & Sailors' Orphans' Home, Washington city, District of Columbia, to be expended under the direction of the secretary of the interior, eleven thousand three hundred and fifty dollars and ninety-seven cents: provided, that hereafter no child or children shall be admitted into said home except the destitute orphans of soldiers and sailors who have died in the late war on behalf of the union of these states, as provided for in section 3 of the act entitled 'An act to incorporate the National Soldiers' & Sailors' Orphans' home,' approved July 25, 1866: and provided, further, that no child, not an invalid, shall remain in said home after having attained the age of sixteen years.

"And the attorney general is hereby directed to inquire into the necessity for and to take any measures that may be most effectual to enforce any right or claim which the United States have to this money, or any part of the same, now involved in the bankruptcy of Henry D. Cooke, or of Jay Cooke & Co." 18 St. 142.

The act of July 25, 1866, referred to, provided, *inter alia*,—

"That said corporation shall have power to provide a home for, and to support and educate, the destitute orphans of soldiers and sailors who have died in the late war in behalf of the union of these states, from whatever state or territory they may have entered the national service, or their orphans may apply to enter the home, and which is hereby declared to be the objects and purposes of said corporation."

But there appears to be no provision in said act for any aid, assistance, or appropriation from or the exercise of any control over the management of the affairs of the corporation by the United States, except the provision that congress may at any time thereafter repeal, alter, or amend the act.

On December 15, 1879, the attorney general of the United States gave an official opinion to the secretary of the treasury, in answer to a letter from him as to an offer made to him to purchase the claim in question, from which opinion are taken the following extracts:

"On examining the statutes, it seems to me quite clear that an appropriation was made for the purpose of reimbursing the Soldiers' & Sailors' Orphans' Home for the moneys lost by the failure of Jay Cooke & Co., and that the United States treated the claim against that firm as one which was thereafter its own. This reappropriation was accepted upon these terms by the home when it received the money.

"The present legislation seems to me ample to enable the secretary of the treasury to demand and receive the amount of dividend from the bankrupt estate. In case there should be a refusal by that estate, it would also seem that the attorney general had, under the act, ample power to enforce the claim, and to collect, in the name of the United States, or that of the home,

the amount which was due as a dividend on account of the deposit, and pay the same into the treasury." Op. Atty. Gen. vol. 16, p. 407.

To obtain a direct payment of the dividends upon this claim to the United States is the purpose of the present petition. It avers that the sum appropriated has been paid by the United States to the said home, and that under the provisions of the act of congress of June 22, 1874, it was intended that the United States should be substituted for the said home, as to any claim which might exist for this amount against the said firm of Jay Cooke & Co. It was therefore contended by the attorney of the United States that the act referred to, *ipso facto*, effected an equitable assignment of the claim to the United States, but he was unprepared to prove either the fact of payment of the appropriation, or the matters set forth above in the opinion of the attorney general, as to the nature of the acceptance of the appropriation. It appeared, further, upon the hearing, that by an act of congress, approved June 20, 1878, an appropriation of \$10,000 was made for the support of the said corporation, including salaries, etc., with the following proviso:

"Provided, that the institution shall be closed up and discontinued during the ensuing fiscal year, and that the title to the property, real and personal, shall be conveyed to the United States before any further payments are made to the trustees of the said institution." 20 St. 209.

And that by another act of congress, approved August 8, 1882, it was provided as follows:

"That the board of trustees of the National Soldiers' & Sailors' Orphans' Home, of the District of Columbia, are hereby empowered to transfer and convey all the property, real, personal and mixed, of the National Soldiers' & Sailors' Orphans' Home to the Garfield Memorial Hospital, located in said district; and the said Garfield Memorial Hospital is hereby empowered to sell and convey the same, and apply the proceeds to the object for which it was incorporated: provided that this act shall not be construed to make the United States liable in any way on account of said transfer, or the changing of the direction of the trust." St. 1881-82, p. 376.

On June 2, 1883, a petition for intervention, (in the proceedings pending as to the claim in question,) of the Garfield Memorial Hospital was presented, praying that it be substituted to the rights and title of said Soldiers' & Sailors' Orphans' Home, and that the award be made in its favor, and that its petition be taken and considered as an answer to the petition filed by the United States. This petition of intervention set forth, *inter alia*, the incorporation of said Garfield Memorial Hospital and the act of congress of August 8, 1882, (recited in the register's former report,) and that by deed dated October 2, 1882, duly executed and recorded, the trustees of the said orphans' home, conveyed, transferred, and assigned all the assets of that corporation, including said award, to the Garfield Memorial Hospital. A copy of said deed was produced reciting a resolution of the board of trustees of said orphans' home, to transfer and convey all the property real, personal, and mixed, of said orphans' home to said Gar-

field Memorial Hospital, and that for the purpose of carrying out the transfer and conveyance, David K. Cartter, president, and Marcellus Bailey, secretary of the board, be and they were thereby authorized and empowered to execute, acknowledge, and deliver for and in the name of said orphans' home, a deed or deeds conveying and transferring all of said property to said Garfield Memorial Hospital, *followed* by appropriate terms of conveyance of certain real estate in the city of Washington, described by metes and bounds, "and also all other property of said party of the first part, whether real, personal, or mixed, in said District of Columbia," but containing no specific reference to or statement of the claim against Jay Cooke & Co.

Pending the consideration of the subject before the register, the depositions of David K. Cartter, president, and Marcellus Bailey, treasurer of the orphans' home, were taken on behalf of the United States. By their testimony, it was proposed to prove the purpose and payment of the appropriation in the act of June 30, 1874, (recited in the former report,) and that upon its receipt it was agreed that the claim of the orphans' home against Jay Cooke & Co. should be transferred to the United States. The *purpose* of the appropriation and its *payment* are clearly established and are not disputed by any of the parties to the present controversy. As to the nature of the acceptance, the president testifies as follows:

"It was an understanding by me that inasmuch as there was an appropriation to supply a deficiency of Henry D. Cooke, the treasurer, whose funds as such officer to a like amount were on deposit with Jay Cooke & Co., at the time of their failure, that it would be reimbursed the United States out of the assets of the bankrupt firm. I cannot say with certainty as to the understanding of the board. I have not the records in my possession, which may show what the understanding was."

The treasurer, after testifying that the payment of the appropriation had been made to him as treasurer, in answer to the question whether said money was not received by said home with the understanding that the United States was to be entitled to receive all moneys that might thereafter be recovered from the firm of Jay Cooke & Co., says:

"I am not able to state whether such an understanding as that referred to in the interrogatory was had prior to the time I became connected with the home. I do not recall any action of the board of trustees after I became a member of it, touching this matter, nor do I believe there was any."

Several objections were made on behalf of the Garfield Memorial Hospital to these depositions, but as the testimony fails to prove any corporate action of the orphans' home as to the receipt of the money, it is unnecessary to consider them. While the orphans' home appears to have refrained from drawing the dividends from the bankrupt estate, there is no evidence of any actual assignment by it of the claim to the United States or that the appropriation of the act of June 20, 1878, of \$10,000, with the proviso (recited in the former report) of conveyance of the property of the home to the United States

was accepted by the home, or that anything was done in accordance with the terms of said proviso. The subsequent act of August 8, 1882, was evidently a repeal of or substitute for this proviso.

The principal question for determination, therefore, seems to be simply whether the acceptance of the appropriation made by the act of June 30, 1874, worked an assignment of the claim of the orphans' home to the United States, or, in other words, whether such an assignment was an expressed or implied condition of the gift by the United States.

In the first place, it is to be observed that the sentence, "and the attorney general is hereby directed to inquire into the necessity for and to take any measures that may be most effectual to enforce any right or claim which the United States have to this money or any part of the same now involved in the bankruptcy of Henry D. Cooke, or of Jay Cooke & Co.," is, if taken literally, inexplicably obscure and without intelligible meaning; for the only money mentioned is the money then being appropriated, and how that can be involved in any bankruptcy, or that there can be any right or claim of the United States to be enforced with respect to it, is utterly incomprehensible. It is therefore very apparent that some words necessary to give coherence to the language have been omitted. Another part of the same statute, however, very clearly suggests what these words are.

Henry D. Cooke, it appears, was also treasurer of the reform school of the District of Columbia, and as such officer had deposited the funds belonging to said corporation also with Jay Cooke & Co. To supply the deficiency in this case occasioned by their failure, it was likewise provided by the act of June 30, 1874, (18 St. 146,) that the sum of \$31,772.29 should be appropriated to reimburse the fund of the reform school in the District of Columbia, for work done and materials furnished in the erection and furnishing of the buildings and grounds of the same; and the attorney general was also directed "to take such measures as should be most effectual to enforce any right or claim which the United States have to this amount of money, or any part thereof, now involved in the bankruptcy of Henry D. Cooke, or of Jay Cooke & Co., the same having been in the hands of Henry D. Cooke as treasurer of said reform school at the time of his bankruptcy, and being then moneys belonging to the United States, and to inquire into this loss of the public moneys and ascertain who is responsible therefor, and institute such prosecutions as public justice may require, and that he report his proceedings therein to congress in his next annual report." Interpolating, therefore, the words "amount of" in the sentence quoted from the section of the orphans' home appropriation, and adding thereto (in accordance with the fact) "the same having been in the hands of Henry D. Cooke as treasurer of said Soldiers & Sailors' Orphans' Home," remove all ambiguity and obscurity of expression.

As I assume that it will not be pretended that the mere gift to this

charity, to relieve its temporary embarrassment, caused by the failure of its bankers, entitles the donor to its claim against the bankers as a matter of right, (irrespective of what gratitude might suggest,) the determination of the true construction and purpose of this *addendum* to the act of appropriation will be decisive of the present controversy.

Fortunately, as to the meaning of the similar words in the other appropriation, there is the judicial interpretation of the late judge of this court given in the present case, upon the presentation of the question by the direction of the attorney general of the United States, who, pursuant to the requirement of the statute, caused a proof to be made of the moneys due the reform school as a debt to the United States. In disallowing this proof (in an opinion filed February 4, 1875) the court, CADWALADER, J., said:

"The present purpose of tendering proof in the name of the United States is manifestly to obtain a statutory preference to the whole amount of the debt in question instead of a simple dividend, to which alone the local corporation, if the creditor, is entitled. I am of opinion that the debt is to the local corporation, and is not entitled to a preference. When the fund, of which that now claimed is the balance, was paid from the treasury of the United States to the treasurer of the local corporation, it became the money of that corporation, which is therefore the creditor entitled to make proof."

No appeal was taken from this decision. The local corporation subsequently made proof and appears to have received all the dividends, and no further claim of any nature appears to have been made by the United States therefor.

Now, while it is true that the present contention on behalf of the United States of subrogation to the claim of the creditor for a dividend (and not a preference) does not appear to have been made in argument or passed upon by the court, and therefore this opinion may not be justly considered as altogether conclusive of the present question, yet the absence of suggestion of such a right of the United States, and the subsequent payment of the dividends to the corporation claimant, show that no other view was entertained by the court, or the law officers of the United States, than that the whole object of the *addendum* to the act of appropriation was simply to endeavor to secure a preference in the distribution of the estate of the bankrupts. Such a purpose was entirely consistent with the spirit of the legislation, the relief of the charities; to obtain for them, if possible, in the name of the United States, a position in the court of bankruptcy, which in their own names could not be accorded to them. To attribute to the words used the further purpose of endeavoring to obtain for the United States reimbursement for the moneys then being donated, seems unwarrantable, because an express proviso that the charity assign its claim to the United States could have been readily added to the provisos already annexed to the gift. That there is no such proviso is conclusive that such was not the legislative intent. The addition of it would have rendered unnecessary any action by the attorney general, and would indeed have been inconsis-

ent with the claim for a preference; for the United States, as assignee, could have no greater right than its assignor. *U. S. v. Buford*, 3 Pet. 12.

It seems, therefore, reasonably clear that upon the assumption that because the United States had made large appropriations of money to both the orphans' home and the reform school, portions of which moneys were on deposit with the bankrupts at the time of their failure, it was supposed that possibly a claim might be sustained against their estate, as if the money had been deposited by the United States directly, and a priority in distribution be thus obtained. Congress, therefore, when making an appropriation to supply the loss by the insolvency, thought expedient to direct the attorney general to consider this view of the matter and endeavor to enforce it by appropriate action. Greater prominence was probably given to the case of the reform school, as appears from the greater particularity of specification of its supposed right in this respect, because it seemed to gather additional support from the fact that the reform school was an auxiliary to the administration of justice in the District of Columbia, was wholly supported by congressional grant, and was under direct governmental supervision; but by a suggestion of the right of the United States in either case it was not intended to stipulate for any return for the gift then made, and no such condition, it is respectfully submitted, can be found either by actual expression or implication in the act of appropriation.

The register therefore recommends that the prayers of the petition of the Garfield Memorial Hospital be granted, and that the costs of the present proceedings be paid by the trustee of the estate of Jay Cooke & Co., out of the dividends upon the claim of the National Soldiers' & Sailors' Orphans' Home.

The United States excepted to this report.

J. K. Valentine, Dist. Atty., and *Henry P. Brown*, Asst. Dist. Atty., for the United States.

L. W. Barringer and *Reginald Fendall*, for Garfield Memorial Hospital.

BUTLER, J. Exceptions dismissed and report affirmed

In re JESSUP, Bankrupt.

(*District Court, S. D. New York. January 10, 1884.*)

1. BANKRUPTCY—DISCHARGE—SECTION 5110, SUBD. 2.

Where a bankrupt, after his adjudication, but before the appointment of an assignee, sold a piano which he had included in his schedules of property, received the proceeds, and paid them from time to time in part for fees to his attorneys for use in the bankruptcy proceedings, held, this act was in violation of subdivision 2, § 5110, Rev. St., and forfeited his right to discharge.

2. SAME—SALE OF PROPERTY AFTER PETITION FILED.

The bankrupt, after filing his petition, has no right to sell any of his property even to raise money to pay lawful fees.

Bankrupt's Discharge.

J. W. Culver, for the bankrupt.

P. & D. Mitchell, for opposing creditors.

BROWN, J. The only objection which is available to the opposing creditors is that in relation to the sale by the bankrupt of a piano belonging to him at the time of his petition in bankruptcy, and included in the schedules filed by him. The exact date of the sale is not in proof; but as the bankrupt has failed to show that the sale of it was prior to his petition, and as it is included in the schedules filed by him, it must be assumed to have been made after the filing of his petition and schedules in 1877. Section 5110, subd. 2, provides that "a discharge shall not be granted if the bankrupt has been guilty of any fraud or *negligence* * * * in the delivery to the assignee of the property belonging to him at the time of the presentation of his petition and inventory, except such as he is permitted to retain under the provisions of this title, or if he has caused, permitted, or suffered any loss, waste, or destruction thereof." The piano was not an article which the law authorized the bankrupt to retain. He sold it to the Chickerings, according to his own testimony, for about "\$240 or \$250—, might have been \$200." He says he applied the proceeds to pay for "legal proceedings in this bankruptcy proceeding;" that he paid it to his attorneys. "Question. All that you got for the piano?" *Answer*. I don't recollect, as I paid by installments,—sometimes one amount, sometimes another, as the case demanded." The evidence of one of his attorneys shows various payments to the register, clerk, and marshal during the pendency of the bankruptcy proceedings, amounting altogether to about \$150.

The sale of the piano by the bankrupt after the filing of his petition was a plain violation of subdivision 2 of section 5110. It makes no difference whether the sale was before the appointment of the assignee or after. Before the appointment of an assignee the bankrupt was himself a trustee in respect of his property for the benefit of his creditors; he was bound to preserve it for delivery to the assignee when appointed. *March v. Heaton*, 1 Low. 278; *In re Steadman*, 8 N. B. R. 319. The resolution for a composition not having been presented to the court for approval for a long period, the delay of the bankrupt in this respect, as well as his acts in the mean time, were entirely at his own risk. When, in 1883, after slumbering nearly six years, the composition proceedings were revived, presented to the court, disapproved, and set aside, and an assignee appointed, this revival of the old proceedings could not be available for the bankrupt's discharge, except on the condition that his acts in the mean time had not violated any of the provisions of section 5110.

Even if the sale of the piano, or of other property, after filing his petition and schedules, for the purpose of defraying expenses of bankruptcy proceedings, could in any case be justified, the explanation in this case is not sufficient, since it does not cover the whole proceeds, taking as it stands every word of the testimony given by the bankrupt and his attorney on that subject. While a portion of the expenses testified to might doubtless have been allowed out of the proceeds of the estate, it does not appear that this would apply to all or even the major part of the expenses testified to. It is plain, also, from the bankrupt's testimony, that there was no specific application of the proceeds of the piano to these expenses; but that, having got from \$200 to \$250 by this sale in 1877, he afterwards, as the proceedings in bankruptcy required,—most of which have been within a year past,—paid to his attorneys such sums as they demanded. I would not intimate, however, that a bankrupt, after having filed his petition and schedule, may dispose of his property even for the payment of bankruptcy fees. Such a course is incompatible with the rights of the assignee, would be liable to manifest abuses, would raise embarrassing questions concerning the manner and *bona fides* of such sales and the disposition of the proceeds, and is, I think, wholly inadmissible; and it is, also, so far as I have found, wholly unsupported by any authority. The provisions above quoted very plainly forbid any such disposition by the bankrupt, and make it his duty to turn over all the property belonging to him at the time of the presentation of his petition and inventory to his assignee, unless that is superseded by a composition approved by the court. The advice of counsel is, in such a case, no defense; nor is the absence of a fraudulent intent material. The statute declares the "discharge shall not be granted if he has been *negligent* in such delivery, or has caused or suffered any loss or waste of his property." I must hold his acts in regard to the sale of the piano unauthorized and unlawful, and such as section 5110 visits with a denial of his discharge. *In re Finn*, 8 N. B. R. 525; *In re Thompson*, 13 N. B. R. 300.

The discharge cannot, therefore, be granted.

HELLER and another v. BAUER and others.¹

(Circuit Court, C. D. Missouri. January 7, 1884.

PATENT FOR PROCESS—INFRINGEMENT.

Where a patent process consists of a number of steps, all well known except the first and last, the use of all except the first and last steps will not infringe the patent.

¹Reported by Benj. F. Rex, Esq., of the St. Louis bar.

In Equity.

M. McKeag for plaintiffs.

E. J. O'Brien for defendants.

TREAT, J. This is a suit for an alleged infringement of plaintiffs' rights under patent No. 164,858. The patent is for a process "intended for all oil-finished work when it is desired to represent a rich veneering, or imitation of wood." The successive steps of the process are enumerated in the claim and set out in the specifications. There is nothing new in the pigments used, nor in their mixtures with oil. Such mixtures were known long before the patent was issued,—not only in oil, but also in water and beer. Nor was there anything new in the use of a crumpled cloth, for the manipulation mentioned, to work out the blending of colors, so as to imitate different kinds of woods. The patent contains no disclaimers, and therefore it is somewhat vague in its terms. A proper construction, however, shows clearly enough that it is for a process for enameling wood, consisting essentially of successive steps to be taken in the use of various pigments, etc., as described; each of which steps is an essential part of the process itself.

It appears from the evidence that the defendants did not use either the first or last of the steps named, and it is doubtful whether the plaintiffs have ever used either of them. The other steps were well known, and had long been in use, and no patent therefor would have been grantable. If the addition of the first and last steps enumerated made a new process within the purview of the patent law, it is obvious that there could be no infringement unless those were used. It is doubtful whether the patent is not void for want of novelty, but it is not necessary to decide that question. It is clear that no infringement has been proved.

The bill will be dismissed, with costs.

UNITED STATES DAIRY Co. and others v. SMITH.

(*Circuit Court, S. D. New York. August 4, 1880.*)

PATENTS FOR INVENTIONS—PATENT No. 146,012—MOTION FOR INJUNCTION DENIED.

BLATCHFORD, J. Patent No. 146,012 seems to make the use of the udder necessary in divisions 6 and 7 of the specification, in obtaining from margarine the resulting material. There is no suggestion that it may be dispensed with, or that any good result can be obtained without using it. In the reissue the udder is omitted in the description, and in claims 5 and 6, and then it is stated that the use is "expedient." If the use of the word "expedient" brings in the ud-

v.19,no.2—7

der as parts of claims 5 and 6, the defendant does not infringe. If the use of the udder is no part of those claims, then the reissue, as to those claims, claims inventions not suggested or indicated in No. 146,012, and is invalid. It may be that the proofs for final hearing may put the case in a different aspect, but, as the case now stands, the foregoing considerations are sufficient to require that the motion for injunction be denied. The same disposition is made of the motions as to Flagg and Boker.

ROEMER v. NEWMAN and others.

(Circuit Court, D. New Jersey. December 22, 1883.)

1. PATENTS FOR INVENTION—INJUNCTION—CONTEMPT.

Where defendants have consented to a decree that a patent is valid, and an injunction restraining them from using the mechanism which it embraces, they must obey the writ until it is dissolved, and cannot, in a proceeding for contempt, assail the validity of the patent.

2. SAME—AGREEMENT BETWEEN PARTIES—EVIDENCE—DECREE REOPENED.

As the evidence in this case is conflicting, and leaves the question as to whether complainant allowed defendants the privilege of using the fastening claimed to infringe his patent, the rule to show cause why they should not be attached for contempt should not be made absolute, but the decree *pro confesso* should be reopened, the release of damages canceled, and the case proceed to final hearing.

On Attachment for Contempt.

Briesen & Betts, for the motion.

A. Q. Keasbey & Sons, *contra*.

NIXON, J. This is a motion for attachment for contempt against the defendants for violating an injunction. The petitioner brought an action in this court against the defendants for the infringement of letters patent No. 195,233. No answer was filed. A decree *pro con.* was entered, and an injunction was issued restraining the defendants from any further infringement of said letters patent. The allegation of the petition is that the injunction has been violated. The defendants set up three grounds of defense: (1) That the complainant's patent is void; (2) that before the decree *pro con.* was taken the complainant conceded to the defendants the right to use the fastening which is now complained of; and, (3) that there has been no infringement.

1. With regard to the first defense, it is only necessary to say that the defendants are not allowed in this proceeding to assail the validity of the patent on which the injunction has been issued. They consented to the decree that the patent was valid, and to the injunction restraining them from using the mechanism which it embraced, and they must obey the order of the writ until it is dissolved. *Phillips v. City of Detroit*, 16 O. G. 627.

2. The bulk of the testimony has been directed to the second point, to-wit, whether the complainant agreed with the defendants that the manufacture and use of a certain fastening, marked in this proceeding Exhibit A, would be regarded by the complainant as a violation of the injunction. There is no doubt that the manufacture complained of, and which is alleged to be a violation, no more nearly resembles the invention claimed by the complainant's patent than does Exhibit A; and if the testimony shows that at the time of agreeing to the decree it was understood between the parties that Exhibit A was not an infringement, the complainant should not be allowed, on this motion for contempt, to stop its manufacture and use. The testimony is conflicting. The complainant denies that there was any admission made or license granted for the use of Exhibit A, and the defendants produce several witnesses who are sworn to prove it. It is difficult to determine where the truth lies, and it is charitable to hope that there was an honest misunderstanding between them. At the time that the decree *pro con.* was allowed against the defendants, the complainant signed a paper releasing them from all claims for damages and profits. Possibly both parties were acting under a misapprehension, and the best solution of the case, in my judgment, is for both to agree that the decree should be opened, the release of damages canceled, and the suit proceed to a final hearing.

At all events, I am not willing, on the evidence taken, to make the rule to show cause why the defendants should not be attached for contempt absolute. The same is discharged, but, under the circumstances, without costs.

DAVIS v. FREDERICKS.

(Circuit Court, S. D. New York. January 2, 1884.)

1. PATENTS FOR INVENTIONS—PATENTABILITY.

Letters patent No. 54,803, granted to Thomas B. Davis, on December 6, 1868, for an improvement in scoops, *held* to embody a patentable invention.

2. SAME—CALCULATION AND EXPERIMENT CONTRASTED WITH MECHANICAL SKILL.

A result which required calculation and experiment beyond mechanical skill and good workmanship is entitled to be classed as inventive. A new thing produced, better for some purposes than had been produced before, although it appears easy of accomplishment when seen, is such success as is within the benefits of the patent law.

3. SAME—PUBLIC USE.

Where an inventor gives another an article embodying his invention, and, without his knowledge or consent, it is shown to others, who manufacture and sell the same for two years prior to an application for a patent, this will not constitute a public use within the meaning of the acts of 1836 and 1839, and render the patent void.

In Equity.

Andrew J. Todd, for orator.

Charles F. Moody, for defendant.

WHEELER, J. This suit is brought upon a patent granted to the orator, numbered 84,803, dated December 6, 1868, for an improvement in scoops. The defenses relied upon are want of invention, and prior public use. The orator appears to have made the invention in the fall of 1865, and to have made application for the patent June 6, 1868. The first scoops, so far as shown, were struck up by hammering, in one piece, except the handle. Then they were made of sheet-metal, cut into shape in one piece, bent up, and fastened at the joints, ready for the handle. They had oval surfaces, and would not rest firmly and hold their contents securely when set down. The orator's scoop was made from one piece of sheet-metal, cut into such peculiar shape that when bent up and fastened it had a flat surface on which it would rest when set down, full or partly full, so as to hold the contents securely; and the acting parts were well shaped and strengthened in making them of this form. To fix upon the necessary pattern for the sheet-metal to produce this result must have required calculation and experiment beyond the practice of mere mechanical skill and good workmanship. It seems to be entitled to be classed as inventive. A new thing was produced, better for some purposes than had been produced before, although many skilled workmen had been practicing the making of those known before, and making as good as they could without reaching this. He hit upon this while no one else did, although it appears to be easy of accomplishment when seen. This success seems to be within the benefits of the patent law.

From the evidence it appears that the orator showed his invention to one Ray, and gave him a scoop embodying it, and afterwards another at his request, but not to sell. Without the orator's knowledge he gave them to others, who commenced making them for sale, so that they were in public use and on sale, but without his consent or allowance, more than two years prior to his application. It is not considered that this being in public use and on sale without the consent or allowance of the inventor invalidates the patent, under the acts of 1836 and 1839, by force of which it was granted, and by the construction of which its validity is to be determined. *Campbell v. Mayor, etc., of New York*, 9 FED. REP. 500. The case of *Shaw v. Cooper*, 7 Pet. 292, cited for the defendant upon this point, arose under the act of 1800, (2 St. at Large, 37,) in which it was provided that every patent which should be obtained pursuant to that act for any invention, art, or discovery which it should afterwards appear had been known or used previous to the application, should be utterly void, and is not an authority upon this question. In *Egbert v. Lippmann*, 104 U. S. 333, the language of the opinion of the majority of the court, as well as that of Mr. Justice MILLER, dissenting, seems to

favor the view that consent or allowance of the inventor is necessary to invalidate the patent under these acts, although this question was expressly left open.

Let there be a decree for the orator, with costs.

THE TITANIA. (Two Cases.)

(District Court, S. D. New York. December 29, 1883.)

1. SHIPPING—LEX LOCI.

On a shipment of goods in England, upon an English vessel, on an ordinary bill of lading, the liability of the vessel is to be determined according to the law of the place of shipment, as the law of the flag.

2. SAME—INSURANCE—BILLS OF LADING—EXCEPTION—DAMAGE THAT MAY BE INSURED AGAINST.

A clause in a bill of lading that the ship-owner shall "not be liable for any damage to goods capable of being covered by insurance," *held*, to refer only to insurance obtainable of the ordinary insurance companies, in the usual course of business, or on special application, and not to insurance which might possibly be obtained in special or peculiar insurance associations, and thus construed, was a valid exception.

3. SAME—STOWAGE—INJURY TO GOODS.

Where goods in one of the compartments of the steamer T. were injured by a spare propeller which was stowed and fastened in the same compartment, and on the T.'s sixth voyage broke loose during a severe gale, and, in being tossed about, broke through the sides of the ship, whereby water was taken aboard, *held*, that the damage thus caused was a damage by a "peril of the seas," and within the exceptions of the bill of lading, it being found that the propeller was properly stowed.

4. SAME—SEAWORTHINESS.

Proper stowage of articles which, on becoming loose, may imperil the safety of the ship, is one of the elements of seaworthiness.

5. SAME—AVOIDING DAMAGE—NEGLIGENCE.

Where the damage might have been avoided by the use of ordinary care and diligence on the part of the ship, the insurers are not liable; the negligence, and not the perils of the seas, is then considered the proximate cause of the loss.

6. SAME—CUSTOMS AND USAGE.

The seaworthiness of a vessel is to be determined with reference to the customs and usages of the port or country from which the vessel sails, the existing state of knowledge and experience, and the judgment of prudent and competent persons versed in such matters. If, judged by this standard, the ship is found in all respects to have been reasonably fit for the contemplated voyage, the warranty of seaworthiness is complied with, and no negligence is legally attributable to the ship, or her owners.

7. SAME—SHIP-OWNERS' LIABILITY.

Though ship-owners are liable for latent defects, this principle does not affect the seaworthiness of the vessel where, if all the facts were known at the time she sails, she would still be regarded by competent persons as reasonably fit for the voyage, according to the existing knowledge and usages.

8. SAME—PROPER STOWAGE.

Stowage, according to custom and usage, and the best judgment of experienced persons, is sufficient to protect the ship from the charge of negligence, as against insurers.

9. SAME—CASE STATED.

Upon the facts in this case, *held*, that the spare propeller was sufficiently stowed, according to such knowledge and judgment; that the vessel was sea-

worthy at the time she sailed; that the injury to the goods could be covered by an ordinary policy of insurance; and that the libelants could not, therefore, recover of the ship or her owners for the damage in question.

The libels in these two cases were filed to recover damages for injuries to merchandise, consisting of burlaps and paper stock, during the voyage of the steamship *Titania* from Dundee to New York, through the spare propeller becoming unfastened and being tossed from side to side in the ship in the compartment where these goods were stowed. The *Titania* was a steamship belonging to the Red Cross line of steamers, plying between Dundee and New York. The goods were shipped on the ninth of October; the vessel sailed from Dundee on the 11th. On the forenoon of Saturday, the 22d, when about two days off from Halifax, she encountered a "hard gale and very heavy sea, and the ship labored heavily, the ship lurching at times 35 degrees," according to the statement in the log. The gale increased throughout the day, the ship rolling fearfully. At half past 9 in the evening, it being found that the ship was making water, an examination was made, and the spare propeller between decks was found to be adrift, and that it had knocked holes through the iron plates on each side of the ship in that compartment; and parts of the cargo and dunnage were afloat in the water taken in through these holes. The *Titania* thereupon put into Halifax, accompanied by another vessel, where she arrived on the morning of the 25th; after repairs she proceeded to New York, which she reached on the second of November. The *Titania* was a steamer of about 1000 tons, and her building was completed in May, 1880. This was her sixth trip across the Atlantic. The spare propeller, weighing from four to five tons, was put between-decks near the mainmast, and secured by chains carried through the boss at the axis of the propeller, and fastened to four ring bolts, secured to iron plates, which were riveted through the iron deck, one between each blade of the propeller, with wooden chocks near the ends of the blades.

A good deal of evidence was given on the part of the claimants tending to show that it was customary for steamers to carry a spare propeller, and that this one was fastened in one of the most approved modes, and in the usual manner, with the best material, and in strict accordance with Lloyd's rules, special survey, and believed sufficient by persons having very large experience in fastening and securing such propellers. Before leaving Dundee on the last trip, the chief officer, as he testified, examined the fastening of the propeller carefully, feeling each turn of the chain, and found it taut and tight, as on the previous voyages. After the accident the chain was found in pieces; one of the ring-bolts broken, and one of the plates torn and rent; the rivets were out of their holes; but the margin of the holes did not present the appearance of the bolts having been drawn out through them. The chains had been made taut by wooden wedges, driven between the top of the boss and the chains above, near where

the chains pass down through the holes in the center of the boss. The bill of lading contained the usual exception of injury through "perils of the sea," and various other special clauses, among which it was provided that the ship-owner is "not to be liable for any damage to any goods which is capable of being covered by insurance."

The libelants contended that the vessel was unseaworthy, when she sailed, through the insufficient fastening of the propeller. The defects alleged were, chains of insufficient size; an insufficient number of rivets fastening the plates to the deck; that the deck beneath was not strengthened; that the chocks were not bolted to the deck; but, most important of all, that the wedges which were used for tightening were of yellow pine, and too small in size. Through the loosening of these wedges, as it was surmised by the libelants, some play was probably first afforded for the motion of the propeller, and after that, in the heavy rolling of the ship, breaking loose naturally and inevitably followed. There was no evidence, however, to show what first gave way, or in what particular manner the propeller broke loose. The *Titania* on this voyage was very light, and in consequence rolled more than she otherwise would in the heavy seas. The claimants contend that the ship was in all respects seaworthy; that the fastenings of her propeller were in all respects proper and sufficient; and that the accident was properly to be ascribed to the perils of the seas; and also that the loss in question was subject to the special exception above referred to, because it was capable of being covered by insurance.

Treadwell Cleveland, for libelants.

Goodrich, Deady & Platt, for claimants.

Brown, J. The bills of lading in these cases contain numerous exceptions from liability on the part of the ship-owner, only two of which seem applicable to this case, namely, the general exception of "perils of the seas," and the special exception that "the ship-owner is not to be liable for any damage to any goods which is capable of being covered by insurance." If the breaking loose of the propeller and the consequent damages to the goods arose through negligence in the proper stowage or fastening the propeller, then it cannot be covered by either of these exceptions. The shipment being made in England, and on an English vessel, the law of the flag governs. *Lloyd v. Guibert*, L. R. 1 Q. B. 115; *Chartered, etc., v. Netherlands*, 9 Q. B. Div. 118; 10 Q. B. Div. 521; *The Gaetano & Maria*, 7 Prob. Div. 137; *Woodley v. Mitchell*, 11 Q. B. Div. 51. But although, under the English decisions, it seems to be settled that ship-owners may exempt themselves from damages caused even by their own negligence, provided this intention be unequivocally expressed, (Macl. Ship. 409, note; *Chartered Mercantile, etc., v. Netherlands, etc.*, 9 Q. B. Div. 118, 122; 10 Q. B. Div. 521; *Steel v. State Line, etc.*, 3 App. Cas. 88;) yet such causes of special exemption, being inserted for the benefit of the ship-owner, are construed most favorably to the shipper and most

strongly against the ship-owner, and will not be held to embrace the latter's own negligence, unless that be specially excepted in connection with the actual cause of the loss. *Macl.* 409, 509, 510; *Hayn v. Culliford*, 3 C. P. Div. 410; 4 C. P. Div. 182; *Taylor v. Liverpool, etc.*, 9 Q. B. 549.

The clause in relation to insurance cannot reasonably be construed as intended to mean any possible insurance, in any possible company, and upon any possible premium. It must be held to refer only to insurance which might be obtained in the usual course of business from the ordinary insurance companies, either in the usual form, or in the customary mode of business, on special application. The evidence on the part of the libellant shows, however, that no insurance against negligent stowage of the propeller could be obtained in any ordinary insurance company either in the usual course of business or on special application. On cross-examination one of the witnesses stated that he had heard of companies or associations in England that insured against everything; but he did not know of any such company, and he had never seen any such policy. An association somewhat like that, with the terms of the mutual obligations of its members, appears in the case of *Good v. London Steam-ship Owners' Mut. Prot. Ass'n*, L. R. 6 C. P. 563. The defendants, however, gave no further evidence in regard to such associations, and it seems clear to me, even if their existence had been proved, that possible insurance or indemnity in such mutual protective associations, with their peculiar terms and conditions, is not to be construed as the insurance referred to in this clause of the bill of lading. I see no reason, however, for not regarding the clause as valid, construed as referring only to insurance which might be effected in the ordinary course of insurance business. Thus construed, it exempts the ship-owners from loss which might be thus insured against, and which might be recovered of the insurers, if not directly caused by negligence on the part of the ship.

The question in this case is, therefore, practically, a question between the ship-owners and the insurers; for if the libellant under this restrictive clause did not obtain insurance, it was his own fault, and the liability of the ship-owners is not increased. And the question is, whether the injury to the goods is to be deemed caused by a peril of the seas as the proximate cause of the loss which would be covered by an ordinary marine insurance, or whether it was caused directly by negligence on the part of the ship. The damage itself is within the terms of ordinary marine policies; but if it might have been avoided by the use of ordinary care and diligence on the part of the defendants, then the insurers would not be liable; for in such cases the negligence, and not the peril of the seas, is deemed the proximate cause of the loss. *Story*, *Bail.* § 512a; *Clark v. Barnwell*, 12 How. 280; *Gen. Mut. etc., v. Sherwood*, 14 How. 351, 364; *Lamb v. Parkman*, 1 Sprague, 353; *Woodley v. Mitchell*, 11 Q. B. Div. 47; *Ionides*

v. *Universal Marine, etc.*, 14 C. B. (N. S.) 259; *Chartered Mercantile Bank v. Netherlands, etc.*, 9 Q. B. Div. 118, 123; 10 Q. B. Div. 521, 543. And if the ship is to be deemed unseaworthy at the commencement of the voyage, by reason of any improper or negligent stowage of the propeller, the policy of insurance would not attach; and the ship would also be answerable upon an implied warranty of seaworthiness. Arn. Ins. 4; 1 Pars. Mar. Ins. 367, 368; Macl. 406, 407.

There is no suggestion of any fault on the part of the ship after she sailed. If there was any negligence in regard to the spare propeller, it existed at the time of sailing. Moreover, the shape and weight of the propeller were such as manifestly to endanger the safety of the ship, if improperly stowed and fastened. Hence, the stowage of the propeller directly affected the seaworthiness of the ship, and the question, therefore, comes down to this; was there any such negligence or want of care in the stowage and fastening of this spare propeller as made the ship unseaworthy at the time of sailing on this voyage, or such as would prevent a recovery on an ordinary policy of insurance for this damage? The evidence shows, in this case, that the propeller broke loose during severe gales, and while the ship was rolling in an extraordinary manner. This great rolling was doubtless in part due to her lightness on the voyage, the deck on which the propeller was fastened being four feet nine inches above the waterline. But it is not suggested or claimed that there was any such lightness of the vessel as rendered her in any way unseaworthy or unfit for the voyage. Where a ship becomes unseaworthy during severe weather, or one part of the cargo does damage to another part, it is manifest that neither is the ship, from a consideration of the result alone, to be pronounced unseaworthy when she sailed, nor is the cargo necessarily to be held improperly or insufficiently stowed. The question is essentially the same as respects each. If, upon all the evidence no negligence is recognizable, the damage in either case is set down to perils of the sea.

To determine the question upon the facts of this case, it will be useful to consider—*First*, what is the test or criterion of seaworthiness, and the extent of the ship-owner's obligations in that respect? As between the ship-owner and the insurer, the former is bound to provide against *ordinary* perils, while the latter undertakes to insure against *extraordinary* ones; "although," as Duer, J., observes in the case of *Moses v. Sun Mutual Ins. Co.* 1 Duer, 170, "to discriminate between ordinary and extraordinary losses is, in some cases, a matter of great nicety and difficulty." By extraordinary is not meant what has never been previously heard of, or within former experience, but only what is beyond the ordinary, usual, or common. By seaworthiness is meant "that the ship shall be in a fit state, as to repair, equipment, crew, and in all other respects, to encounter the *ordinary perils* of the contemplated voyage." *Dixon v. Sadler*, 5 Mees. & W. 414; 2 Arn. Ins. c. 4; 1 Pars. Mar. Ins. 367; Macl. 410; *Biccard v.*

Shepherd, 14 Moore, P. C. 471. In the case of *Gibson v. Small*, 4 H. L. Cas. 418, Lord CAMPBELL says: "With regard to its (seaworthy) literal or primary meaning, I assume it to be now used and understood that the ship is in a condition in all respects to render it *reasonably safe* where it happens to be at the time referred to." In *Knill v. Hooper*, 2 Hurl. & N. 277, 284, the court say: "Seaworthy or not, is always a question for the jury, and in all cases the question for the jury will be, whether the ship was, at the commencement of the voyage, in such a state as to be *reasonably capable* of performing it." In *Turnbull v. Jansen*, 36 Law T. (N. S.) 635, BRETT, L. J., says: "A contract of sea insurance is against extraordinary perils; therefore, the implied warranty of seaworthiness is that the vessel will be fit to encounter *ordinary* perils." Substantially the same language is employed by THOMPSON, J., in *Barnewell v. Church*, 1 Caines, 234; and in *Dupont, etc., v. Vance*, 19 How., CURTIS, J., defines seaworthiness of the hull to be competency "to resist *ordinary* action of the sea." In the case of *Adderly v. American Mut. Ins. Co.* Taney, 126, it is said if the leak was such "that a prudent and discreet master, of competent skill and judgment, would have deemed it necessary to examine and repair the leak, there could be no recovery; but if he might reasonably have supposed that the vessel was seaworthy for the voyage in which she was then engaged, notwithstanding the leak, and on that account omitted to examine and repair, such an omission would be no bar." In *The Reeside*, STORY, J., defines perils of the seas to be those "which cannot be guarded against by the ordinary exertions of human skill and prudence." 2 Sumn. 567, 571.

The standard of seaworthiness, moreover, does not remain the same with advancing knowledge, experience, and the changed appliances of navigation. 3 Kent, *288. In *Tidmarsh v. Washington, etc., Ins. Co.* 4 Mason, 439, 441, STORY, J., in charging the jury as to the defense of unseaworthiness, said:

"The standard of seaworthiness has been gradually raised within the last thirty years, from a more perfect knowledge of ship-building, a more enlarged experience of maritime risks, and an increased skill in navigation. In many ports, sails and other equipments would now be deemed essential which, at an earlier period, were not customary on the same voyages. There is also, as the testimony abundantly shows, a considerable diversity of opinion, among nautical and commercial men, as to what equipments are or are not necessary. Many prudent and cautious owners supply their vessels with spare sails and a proportionate quantity of spare rigging; others do not do so, from a desire to economize or from a different estimate of the chances of injury or loss during the same voyage. * * * It would not be a just or safe rule in all cases to take that standard of seaworthiness, exclusively, which prevails in the port or country where the insurance is made. * * * It seems to me that where a policy is underwritten upon a foreign vessel belonging to a foreign country, the underwriter must be taken to have knowledge of the common usages of trade in such country, as to equipments of vessels of that class, for the voyage on which she is destined. He must be presumed to underwrite upon the ground that the vessel shall be seaworthy in her equipments, according to the general custom of the port, or at least of

the country to which she belongs. It would be strange that an insurance upon a Dutch, French, or Russian ship should be void, because she wanted sails which, however common in our navigation, never constituted a part of the maritime equipments of those countries. We might as well require that their sails and rigging should be of the same form, size, and dimensions, or manufactured of precisely the same materials as ours. In short, the true point of view, in which the present case is to be examined, is this, was the *Emily* equipped for the voyage in such a manner as vessels of her class are usually equipped in the province of Nova Scotia and port of Halifax for like voyages, so as to be there deemed fully seaworthy for the voyage and sufficient for all the usual risks? If so, the plaintiff on this point is entitled to a verdict."

The question of seaworthiness, therefore, as regards the implied warranty in favor of the insurer or of the shipper of goods, is to be determined with reference to the customs and usages of the port or country from which the vessel sails, the existing state of knowledge and experience, and the judgment of prudent and competent persons versed in such matters. If judged by this standard, the ship is found in all respects to have been reasonably fit for the contemplated voyage, the warranty of seaworthiness is complied with, and no negligence is legally attributable to the ship or her owners. Where actual defects, though latent, are established by the proofs, that is, such defects as at the time when the vessel sailed would, if known, have been considered as rendering the vessel unseaworthy for the voyage, such as rotten timbers, defective machinery, leaks, etc., such defects, though latent, are covered by the implied warranty of seaworthiness, and are at the risk of the ship and her owners, and the policy does not attach. 2 Arn. Ins. c. 4; 1 Pars. Mar. Ins. 369; Abb. Ship. †340; 3 Kent, *205; *Lee v. Beach*, 1 Park. Ins. 468; *Quebec Marine, etc., v. Commercial, etc.*, L. R. 3 P. C. 234; *Work v. Leathers*, 97 U. S. 379; *The Vesta*, 6 Fed. Rep. 532; *Hubert v. Recknagel*, 13 Fed. Rep. 912. But this principle cannot be applied to cases where, all the circumstances being known, the vessel would still be deemed by competent persons, and according to existing knowledge and usages, entirely seaworthy, and reasonably fit for the voyage, although subsequent experience might recommend additional precautions. It was long ago held, (*Amies v. Stevens*, 1 Strange, 128,) and is laid down in Abb. Ship. †389, as elementary law, that "if a vessel reasonably fit for the voyage be lost by a peril of the sea, the merchant cannot charge the owners by showing that a stouter ship would have outlived the peril." This principle applies equally to the stowage of the cargo.

The same result is derived from a consideration of the question as a matter of stowage only, not affecting the seaworthiness of the ship. For it is well settled that in determining what is proper stowage, the customs and usages of the place of shipment are to be considered, and if these customs are followed, and if none of the known and usual precautions for safe stowage are omitted, no breach of duty, or negligence, can be imputed to the ship; and in case of

damage under great stress of weather, the injuries will be ascribed to perils of the seas, and held to be chargeable upon the insurers. In 3 Kent, *217, it is said: "What is an excusable peril depends a good deal upon usage and the sense and practice of merchants, and it is a question of fact to be settled by the circumstances peculiar to the case." This point was much discussed in the case of *Lamb v. Parkman*, 1 Sprague, 343, in which SPRAGUE, J., says, (page 350:)

"The question before the court is whether there was a want of proper skill and care in stowing the cargo. Improper stowage is distinctly set up in the answer as the first ground of defense. Now, it having been shown that this cargo was stowed in accordance with an established usage, why is not that decisive in favor of the libelants? * * * Suppose a question had arisen whether this cargo was sufficiently protected by dunnage at the bottom or sides, must it not have been decided by usage? And if so, why not as to the top? It must be presumed that the parties intended that this cargo should be stored throughout in the usual manner."

The same point was decided in *Baxter v. Leland*, Abb. Adm. 348, and in *Carao v. Guimaraes*, 10 FED. REP. 783. And in the case of *Clark v. Barnwell*, 12 How. 283, the court say, in reference to any possible negligence in the stowage: "For aught that appears every precaution was taken that is usual or customary, or known to shipmasters, to avoid the damage in question;" thereby clearly indicating the rule of diligence applicable to such cases.

I have not been referred by counsel to any case closely resembling the present; that of *Kopitoff v. Wilson*, 1 Q. B. Div. 377, is, however, similar, though much stronger in its evidence of negligence than the present. There the defendant's ship had taken aboard large quantities of armor plates to carry to Cronstadt. They weighed from 15 to 18 tons each, and were placed on the top of a quantity of railway iron and then secured there by wooden shores. There was a conflict of testimony as to whether this was or was not a proper mode of stowing them. The plaintiffs contended that it was improper, and made the ship unseaworthy for the voyage. She encountered bad weather, rolled heavily, and after she had been out at sea some hours one of the armor plates broke loose and went through the side of the ship, which, in consequence, went down in deep water and was totally lost with all her cargo. On the trial before BLACKBURN, J., and a jury, to recover for the loss of the plates, the question was left to the jury to determine whether the vessel, as regards the stowing, was *reasonably fit* to encounter the ordinary perils that might be expected at that season from Hull to Cronstadt; if not, was the loss occasioned by that unfitness. The jury found on the first question, in the negative, and on the second, in the affirmative; and thereupon a verdict was directed for the plaintiff. The court *in banc*, upon a rule *nisi*, held these instructions correct.

In the present case no fault is found with the place or general method of stowing and securing this spare propeller. The general plan of securing it was approved by the libelant's witnesses; and

the expert upon whose testimony the libelant chiefly relies as to the unseaworthiness of the ship, suggested for her return voyage, after this accident, no change in the place or general method of securing the spare propeller, but only the addition of a few more rivets, a heavier chain, and the fastening of the chocks to the deck. These are obviously matters of detail necessarily depending upon the judgment of persons in charge of such work.

From the large mass of evidence on this subject put in by the claimants, it seems to me impossible to hold that this propeller was not stowed and secured in a manner believed and judged, by persons having the largest experience and who were most competent in such matters, to be sufficient and safe in all respects. The ship was built, and this propeller was stowed and fastened, under the inspection of one of the Lloyd's surveyors, who testified that it was well and properly done, and was approved by him as the representative of the underwriters. And even in view of the accident which afterwards happened, he still gives it as his opinion that it was well and sufficiently secured, and that something extraordinary must have happened to account for its breaking loose. What did happen to cause its getting loose does not appear. The proof of the good quality of the material and work, and of its strength, was ample. Nearly a score of witnesses, many of whom had stowed and fastened from 20 to 200 propellers each, testified that it was done according to the best and most approved method, and in all respects in the usual manner. As I have said above, the vessel had already crossed the Atlantic five times from May to October, not only without accident, but, according to the testimony of the mate, without loosening any of the propeller's fastenings. No evidence was given on the part of the libelant in any way discrediting the statements of so many witnesses, or showing that this propeller was not secured in the usual manner, and with all the usual precautions adopted in connection with that mode of stowing; and there is no reason to doubt that it was in fact secured in the same manner in which hundreds of other propellers had theretofore been usually secured, and always hitherto regarded as sufficient. No previous accident in any of this large number, similarly fastened, is known; and this accident occurred in the course of a heavy gale, accompanied by extraordinary rolling of the ship. I think, therefore, the loss should be fairly attributed to perils of the sea, as under somewhat similar circumstances was held in the case of *Barnewell v. Church*, 1 Caines, 217, 235, and *Dupont, etc., v. Vance*, 19 How. 162, 168.

The libelant's principal objection to the mode of fastening the propeller was the use of wedges too small in size, and made of yellow pine instead of oak. The objection to the use of yellow pine was upon the ground of its liability to be "chawed" under the heavy pressure of the chains. But the testimony of the expert on this point seems to rest principally upon his experience in English ship-yards

some years ago, when, as he says, only oak wedges were in use. But as this vessel was built and the propeller fastened in the customary manner in one of the largest English ship-yards in 1880, little weight can be given to the former experience of this witness in the use of oak wedges only, if yellow pine had come into subsequent use; and that yellow pine wedges were not liable to any such injury from the "chawing" of the chains as was supposed—if yellow pine wedges were in fact used—seems to me sufficiently evident from the fact that during five voyages across the Atlantic no perceptible injurious effect was produced upon them; for if there had been any such effect it would have been discovered on the examination previous to the last voyage.

I do not consider it by any means certain, however, that the wedges used were of yellow pine. This rests upon the testimony of Mackie, towards the close of the trial. He also gave the size of these wedges, first as three and one-half inches; subsequently he undertook to make a correction of his testimony in regard to the size of the wedges, when it became manifest that the wedges must have been larger than that, in order to support the four chains which ran through each ring. His testimony on this point must be considered so grossly erroneous that I should be unwilling to rest an important part of the case on his evidence. The libelant, at the close of the case, ingeniously and naturally seeks to make the most of this testimony, both in regard to the small size of the wedges and their being of yellow pine. No question was made in regard to them in the pleadings, nor at the time when the bulk of the claimant's evidence was taken upon commission abroad, from witnesses who best knew what was used, and the defendants had no available opportunity for direct proof in regard to them. Mackie necessarily spoke only from memory in regard to what he had observed on the previous voyages, as the wedges formerly used were not on board when the ship arrived; and it is possible that in the three years since this accident, the wedges which he remembers seeing may have been those put in at Halifax, where the *Titania* went for repairs, or those put in here for the voyage after the accident. In the subsequent survey, moreover, and in the particular directions given by the chief expert for the libelant, no directions whatever were given in regard to wedges. This, it seems to me, is strong contemporaneous evidence that the particular kind of wedges to be used was not considered material; if so, some directions on that point would naturally have been embodied in his recommendations. The same observations apply in regard to the wedges being single or double. In a matter of detail of this kind arising near the close of the trial, and resting upon the doubtful testimony of a single witness, who had no particular call to observe the matter attentively, I think much greater weight should be given, if the matter be regarded as in fact very material, to the mass of testimony showing that in all the details of the work the propeller was secured in the usual and customary manner, and in the mode fully approved by

competent judges and by previous experience. Every conceivable motive existed on the part of the owners to secure this, and I think the evidence requires me to find that this was done, notwithstanding the criticisms of the libelant's witnesses as to a few details, made after the event.

I must hold, therefore, that the vessel, in respect to the stowage of the propeller, was seaworthy at the time of sailing on this voyage; and that the damage to the libelant's goods arose through the perils of the seas in the severe gale and the extraordinary rolling of the ship consequent therefrom; that the damage would be covered by ordinary marine insurance, and was, therefore, within the excepted perils of the bill of lading, both under the general clause, and also under the special clause, as a risk which might be insured against, covered by the ordinary marine policy.

The libels should therefore be dismissed, with costs.

THE CHARLEY A. REED.

THE CITY OF TROY.

(District Court, S. D. New York. January 4, 1884.)

COLLISION—ERIE CANAL—SUCTION—CANAL REGULATIONS.

Where the canal-boats D. C. S. and C. A. R. were approaching each other in opposite directions on the Erie canal, the former on the tow-path side and both towed by horses, and the steam canal-boat City of T. overtaking the C. A. R., attempted to pass her on the left, and as she did so, the effect of the steam-boat, by the swell from her bows and the suction from her propeller, was to render the C. A. R., for the time being, unmanageable by her helm, and sent her bows across to the other side of the canal, so that she struck and injured the D. C. S., *held*, that the steamer was in fault for attempting to pass the C. A. R. when the two were so near meeting, instead of waiting until they had passed each other, and that the C. A. R. was also in fault for not having stopped her team of horses when the City of T. had approached within 20 feet of her stern, as required by canal regulation No. 49; *held further*, that a vessel, which in her navigation violates any express regulation will be held chargeable with contributory negligence unless she shows clearly that such violation could not have contributed to the collision.

Actions for Collision.

J. A. Hyland, for libelant Peters.

E. G. Davis, for libelant Linihan and the Charley A. Reed.

Beebe & Wilcox, for the City of Troy.

BROWN, J. The above libels were filed to recover damages for injuries through a collision on the Erie canal, near Buffalo, east of Black Rock, at about noon of October 1, 1880, between the canal-boats D. C. Sutton and the Charley A. Reed, by which both were damaged. The D. C. Sutton had a full cargo, was towed by horse, and was go-

ing westward, and, according to custom, near the tow-path which was there on the south side of the canal. The Charley A. Reed was coming eastward, loaded, and towed by horse, and was about in the middle of the canal, which was there 85 feet wide. The steam canal-boat City of Troy was at the same time astern of the Charley A. Reed, and overtaking her from the westward, proceeded to pass her by going between her and the heel-path side of the canal. In doing so, as it is alleged by the libelants, she rendered the Charley A. Reed unmanageable, and threw her bows across the canal, so that the latter ran into the Sutton, the bluff of the starboard bow of each canal-boat striking the other and inflicting some damage on each. The owner of the Sutton libeled both the other vessels, alleging that both were in fault; and the owner of the Charley A. Reed has libeled the City of Troy, as the one solely in fault.

It is evident that the collision arose through the steamer's undertaking to pass the Reed when the Reed and Sutton were approaching each other from opposite directions. Whether the City of Troy was justified in this must depend partly upon the regulations and partly upon the distance the canal-boats were apart when she undertook to pass. The evidence shows clearly that a steamer in passing a canal-boat renders the latter for the time unmanageable by her tiller; the swell from the bows of the steamer first throwing the stern of the canal-boat away from the steamer, and afterwards, as the steamer approaches the bows of the canal-boat, having the same effect on her bows, while at the same time the strong suction from the propeller of the steamer, as it approaches and passes the stern of the canal-boat, draws the stern powerfully towards the steamer. The latter co-operating with the repelling effect of the swell on the bows of the canal-boat, is frequently sufficient to send the latter upon the opposite bank of the canal, from which the steamer often assists by a line in jerking her off. These ordinary effects of a steamer's passing a canal-boat in the canal were well known to all the parties to this controversy. It is clearly dangerous, therefore, for a steamer to attempt to pass a canal-boat when there is any other craft in the canal, which may be met, not merely before the steamer herself has passed, but before the canal-boat would have time to recover her proper position in the canal. Regulation No. 49 of the canal board (Manual of Canal Laws, 349) requires that a horse-boat, when approached within 50 feet by another horse-boat overtaking it, and proceeding in the same direction, shall turn from the tow-path, and give the rear boat every practical facility for passing, and stop whenever necessary, until the rear boat shall have passed. The same regulation requires a horse-boat, when approached within 20 feet by a steam-boat moving in the same direction, "to turn towards the tow-path, and cause their horse to cease towing until the steamer has passed five feet ahead" of it.

According to the steamer's witnesses she was going about two and one-half miles an hour, while the canal-boats were going from one and

one-half to two miles. They testify that when about a length and a half astern of the Reed, two steam-whistles were given as a signal to the Reed that the steamer would pass. These were not heard on the Reed, and the latter's witnesses testify that when she was about a length off they shouted to the City of Troy not to attempt to pass until they had got by the Sutton. These shouts were also unheard. The steamer proceeded to pass along the berme bank, there being sufficient room for her to do so without any change in the Reed's position. The City of Troy's witnesses say that when her signals were given the horses of the two teams were 200 feet apart, which would make the Sutton and the Reed at that time from 500 to 600 feet apart. But when the bows of the City of Troy began to lap the stern of the Reed, as all the other witnesses testify, the teams of the Reed and the Sutton had passed each other, and the two boats were not more than from 100 to 200 feet apart. The captain of the City of Troy testifies that he slowed down while passing the Reed, the object of which was to lessen the effect of the swell and the suction upon the Reed. When the Reed and the Sutton were about 200 feet apart the Sutton's team was stopped; the Reed's team was stopped when the City of Troy had lapped the stern of the Reed. The stopping of the teams, however, affected the progress of the canal-boats only measurably. The Sutton at the time of the collision was nearly stopped by land, as there was a considerable current in the canal against her; while the progress of the Reed, with the same current in her favor, could not have been much checked during the short time that elapsed between her team's stopping and the collision.

As the canal-boat was going only some two and one-half miles an hour, it was very plain that she could not possibly have passed the Reed before the Sutton was reached, even if at the time when her signals were given the distance between the Reed and Sutton was 600 feet, and the distance between the City of Troy and the Sutton 750 feet. The boats were all about 100 feet long, and at those rates of speed, respectively, the City of Troy would gain but two lengths while the Reed was going three. Even if the former had not slowed down while passing, she had three and one-half lengths to gain from the time when the signals were given before she would have cleared the Reed, and the latter would still have to recover her proper place in the canal in order to avoid running into the Sutton. And as the Sutton, moreover, was approaching the Reed at about the same rate, it is clear that at the time the City of Troy's whistles were given the Reed and the Sutton were not far enough apart to enable the City of Troy to pass the Reed before the Sutton would come abreast, unless she was going at a more rapid rate than her witnesses admit; and if she was, there was the greater danger through the greater disturbing effect upon the Reed while passing. On the evidence, therefore, I cannot entertain any doubt that the attempt to pass the Reed, with

its known hazards, was rash and foolhardy, and that the City of Troy must be held liable on the general ground of want of due care and regard for the safety of the other boats in the canal.

Regulation No. 50, although not in terms including this case, does, I think, by analogy, condemn, if it does not prohibit, a steamer's ever undertaking to pass another boat when a third would come abreast of them before they had sufficiently cleared. That regulation provides that, where two boats "coming in opposite directions, shall approach each other in the vicinity of a *raft*, so that if both should continue they would meet by the side of such raft, the boat going in the same direction as the raft shall stop until the other boat shall have passed the raft." The evident purpose is to prevent passing three abreast, with all the dangers incident to that situation. The Reed in this case was in a situation analogous to the raft referred to in this regulation. The steamer was going in the same direction, and by this regulation would be required to wait until the Sutton should have passed the Reed. There was nothing in this case to prevent the City of Troy from waiting until the Sutton and Reed had passed each other, which they would have done in less than two minutes after the City of Troy had reached the stern of the Reed. There is no obligation in the regulations, and none which reason can suggest, that the Sutton should have stopped rather than the City of Troy which could easily control her own motions; but manifestly the contrary. When the City of Troy was seen about to pass the Reed, the Sutton did stop and hugged the tow-path bank, and no fault is attributable to her.

With regard to the Charley A. Reed, I am obliged to find a violation of regulation 49 on her part, in not stopping when the steam-boat approached within 20 feet. Her helmsman first testified that his team did not stop until the City of Troy "was right broad-side of us." He afterwards said that when he first slowed up, the City of Troy had lapped about 10 feet. The regulation is explicit in such cases that the boat ahead shall cease towing when the steamer has approached "within 20 feet." Considering the precautions necessary for the safety of the boats, there was no reason why the Reed, even independent of this regulation, should not have stopped as soon as the Sutton's team was stopped. No regulation required the Sutton to stop; her captain acted as a prudent person should act in view of probable danger. The Reed not only did not act with this care and prudence, though the danger was sooner visible to her, but she neglected the express requirement of the regulation as well. It is impossible to say that if she had slowed sooner this could have had no effect in avoiding the collision. The blow was a comparatively light one; she had a line thrown out to the City of Troy at the time for the purpose of keeping her off, and timely slowing by the Reed, as the regulation required, might possibly have been sufficient to avoid the collision altogether. The Reed must, therefore, be held liable for

contributory negligence in this respect. *The Pennsylvania*, 19 Wall. 125.

It results from this that the owner of the *Sutton* is entitled to a decree against both the Reed and the City of Troy, and that the owner of the *Charley A. Reed* is entitled to a decree against the City of Troy for half his damages, with costs to the libelant in each case.

RED WING MILLS v. MERCANTILE MUT. INS. CO.

(*District Court, S. D. New York. January 9, 1884.*)

1. SHIPPING—THROUGH BILL OF LADING—INSURANCE—CONSTRUCTION—STATE LINE.

The words used in insurance contracts are to be understood according to their ordinary scope and meaning, unless a more restricted use is established by general mercantile usage, or expressly brought to the notice of both parties.

2. SAME—TRANSFER OF GOODS.

Where flour was shipped by the Merchants' Dispatch Transportation Company, at Red Wing, Minnesota, for Glasgow, Scotland, by a through bill of lading of that company and the State Line, and the shipper thereupon effected insurance with the respondents upon a certificate of marine insurance "from New York to Glasgow on board of the State Line," and a portion of the flour, on arrival at New York, was loaded on board the steam-ship *Zanzibar*, which was not one of the regular steam-ships of the State Line, but of which that line had taken an assignment of a charter-party for a single trip from New York to Glasgow, the charter-party being a contract of affreightment merely, and the possession and the control of the *Zanzibar* remaining with her owners, and not with the State Line, *held*, that the *Zanzibar* did not form, even temporarily, a part of the State Line, and that the insurance did not attach, but that the loading on the *Zanzibar* was a transfer by the State Line of the flour so loaded to another steamer, in accordance with one of the provisions of the through bill of lading. *Secus*, had the possession and control of the *Zanzibar*, though for a single voyage only, been in the State Line

In Admiralty.

On the fourteenth of December, 1878, the libelants delivered to the Merchants' Dispatch Transportation Company, at Red Wing, Minnesota, 800 barrels of flour, to be transported from Red Wing to Glasgow, Scotland, and received what is known as a through bill of lading, entitled "The Merchants' Dispatch Transportation Company and the State Line." On the sixteenth of December the libelants took out a certificate of insurance from the respondents' company, to the amount of \$2,800, upon the 800 barrels of flour insured, to be shipped "on board of the State Line, at and from New York to Glasgow, Scotland." On the arrival of the flour at New York, one of the regular vessels of the State Line having been totally lost, and there being an accumulation of goods, the agents of the State Line, Austin, Baldwin & Co., took to themselves an assignment of a charter-party of the steam-ship *Zanzibar*, from the agent of the New York Central Railroad Company, who held a charter of the *Zanzibar*, for a

return voyage to Great Britain, and thereupon, on account of the State Line, Austin, Baldwin & Co. loaded her with wheat and peas in bulk, and other cargo, including 400 barrels of the flour in question. The Zanzibar shortly after sailed from New York and has never been heard from. The claim of the libelants for these 400 barrels of flour was adjusted by the respondents' agents in London as a total loss. Payment, however, was resisted, on the ground that the policy never attached as respects the Zanzibar, because, as alleged, she was not a vessel belonging to the State Line.

The through bill of lading contained, among others, the following clauses:

"(6) It is further agreed that the said Merchants' Dispatch Transportation Company have liberty to forward the goods or property to port of destination by any other steamer or steam-ship company than that named herein, and this contract is executed and accomplished, and the liability of the Merchants' Dispatch Transportation Company, as common carriers thereunder, terminates on delivery of the goods or property to the steamer or steam-ship company's pier in New York, when the responsibility of the steam-ship company commences, and not before. (7) And it is further agreed that the property shall be transported from the port of New York to the port of Glasgow by the said steam-ship company, with liberty to ship by any other steam-ship or steam-ship company."

The charter-party of the Zanzibar is dated December 18, 1878, and provided that the Zanzibar, classed as 100A11, in measurement 2,245 tons, should proceed from Liverpool to New York, and thence back, with a cargo of provisions and grain or cotton, at a specified rate of freight, to some one safe direct port in the united kingdom of Great Britain and Ireland, etc. On the twenty-eighth of December, the ship being then in New York, all right, title, and interest in the charter-party was transferred to the agents of the State Line. By the terms of the charter-party the navigation of the ship remained entirely under the control and at the expense of her owners, and not of the charterers.

Evidence was given at the trial to the effect that on vessels belonging to regular and known lines of transportation the rate of insurance is less than upon independent vessels. Evidence was also given by several agents of insurance companies that they would not consider a vessel employed upon a single trip, like the Zanzibar, to come within the description of "The State Line" referred to in the certificate of insurance.

Sidney Chubb, for libelant.

Scudder & Carter, for respondents.

Brown, J. I do not think that this case should be determined with any reference to what the agents of the insurance companies in New York might consider as coming within the description of "The State Line." The merchants who ship these goods by a through bill of lading, a thousand miles away in the interior, and who deal with the insurance company's agents there, have a right to rely upon the

ordinary meaning and scope of the terms used in the certificate of insurance, unless a more restricted meaning is proved to have been recognized and established by general mercantile usage, or else expressly brought to their notice, neither of which in this case has been proved. This insurance was not upon any particular vessel. It was manifestly intended to be as broad as "The State Line," which was acting in conjunction with the Transportation Company in obtaining goods on through bills of lading. In my judgment, therefore, "The State Line" must be held to embrace all vessels which were navigated under the possession, control, and management of the State Line, whether the vessels were such as existed on the date when the certificate of insurance was issued, or were new vessels introduced into that line afterwards, on board of which the goods might be shipped; or whether the vessels were owned or were merely chartered by that line, either before or after the date of the certificate, provided they were in its possession and control. Nor can I deem it of any consequence that the vessel performed but a single voyage, provided that upon the voyage on which she sailed she was in the possession and under the management and control of the State Line. If so, she was during that voyage a part of the State Line, and was one of the vessels of the State Line *pro hac vice*. If, on the other hand, the vessel which carried the flour was not in the possession or under the management or control of the State Line, then the case would be that of a carriage of the goods by another steamer to which the State Line had transferred them.

The express conditions of the through bill of lading gave the State Line the right "to transfer the goods to any other steam-ship or company;" and if the State Line did thus transfer the carriage of 400 barrels, a part of this consignment, to any other vessel, in accordance with this provision, it seems plain that the certificate of insurance would not attach to the latter vessel. The existence of this provision in the through bill of lading was notice to the libelants of the necessity of watchfulness on their part in respect to any transfer of the goods by the State Line to any other steamer, and of the need of provision for such a contingency in their insurance.

After the loss of the Zanzibar was suspected, some correspondence between the parties to this suit arose on that very point, from which it is clear that the libelants were aware of this contingency in regard to the insurance, and of the necessity of an assent by the insurance company in order to hold them as respects any other vessel to which the flour or any part of it might have been transferred by the State Line.

The terms of the charter of the Zanzibar, of which the agents of the State Line took the transfer, are such as show clearly that the State Line did not acquire the possession or have any control of the navigation of the latter vessel. It was a contract of affreightment only, and the assignment of it to the agents of the State Line gave

them the right only to lade the ship with such and such goods. The possession and the responsibility and control of the navigation of the Zanzibar remained solely with her general owners. And it was under such a charter-party that the 400 barrels in question were laden on board the Zanzibar by the State Line. This, in my judgment, was a transfer of so much of this flour to another steamer within the terms of the clause of the through bill of lading above quoted. The State Line had no possession of the Zanzibar and no control over her. They loaded the flour on board of her, as any merchant might have done, at a specified rate of freight, for which, under the terms of the charter-party, the vessel and her owners contracted to deliver these goods at Glasgow.

On the ground, therefore, that neither the possession nor the control of the Zanzibar upon this voyage was in the State Line, I must hold that the Zanzibar was not one of the vessels of the State Line, even temporarily or *pro hac vice*; that the certificate of insurance, therefore, did not attach; and that the libel must be dismissed, with costs.

THE B. B. SAUNDERS. (Two Cases.)

(District Court, S. D. New York. January 7, 1884.)

1. COLLISION—ACTION FOR DAMAGES—TORT.

An action for damages occasioned by collision is an action of tort founded upon negligence.

2. SAME—ANSWER—NEGLIGENCE.

Where the answer denies any negligence, the burden of proof is upon the libellant, unless the answer states, or by not denying admits, facts from which negligence is legally presumed.

3. SAME—INSPECTORS' RULES—FIFTH SITUATION.

The supervising inspectors, under the act of February 28, 1871, (section 4412, Rev. St.,) have authority to frame additional regulations in regard to steamers passing each other, not in conflict with the statutory rules. Their rules requiring steamers in the fifth situation to pass ordinarily to the right, but permitting vessels in peculiar situations to pass to the left upon sounding a signal of two whistles, is within the scope of their powers, and obligatory on vessels navigating the harbors.

4. SAME—ANSWERING SIGNALS.

The requirement that the signal in answer to the exceptional signal of two whistles shall be given "promptly," is not complied with except by an immediate answer, before other maneuvers are taken, where no reason for delay appears.

5. SAME—CASE STATED.

Where the tugs B. B. S. and O. were approaching each other upon crossing courses in the East river in the fifth situation, and the O., having the B. B. S. on her starboard hand, sounded a signal of two whistles, and the B. B. S., without first replying thereto, immediately signaled to her engineer to stop and back his engines,—a proper maneuver in accordance with that signal,—but did not immediately answer the two whistles, and very shortly after the O. gave a signal of one whistle, which was immediately answered by one whistle, and a collision ensued, and the case was submitted by both sides without other evidence, *held*, that the B. B. S. was in fault in not answering promptly the O.'s

signal of two whistles before proceeding to maneuver in accordance with it; that it is impossible to say that the delay and the change of signals may not have contributed to the collision; and that the B. B. S. was therefore liable.

The above libels were filed to recover \$9,500 damages for injuries sustained by the canal-boat H. B. Wilbur and cargo, which was in tow of the B. B. Saunders, through a collision with the steam-tug Orient, on the twenty-sixth of September, 1879, in the North river, opposite Harrison street. The Saunders, at about 12 m., had left pier 40, North river, with the Wilbur lashed to her port side to be towed to Newark. The day was clear and the tide slack. About 10 minutes after leaving the slip, when the tug was about a third of the way across the river and heading down stream, the Orient was seen coming out of the Harrison-street slip. She bore about three or four points off the Saunders' port bow. Shortly afterwards, as the answer states, the Orient "blew a signal of two blasts of her steam-whistle to signify to the Saunders that the Orient desired to pass across the river in front of the Saunders; that the pilot of the latter thereupon gave a signal to the engineer of his vessel to slow her engine; that almost instantly, and before said pilot had time to do anything further, the Orient blew a signal of one blast of her steam-whistle to signify to those on board the Saunders that the Orient intended to pass astern of her; that the Saunders immediately replied to said second signal with a single blast of her steam-whistle, and signaled the engineer of the Saunders to go ahead at full speed, and then put her helm to port; that these orders were obeyed, but the Orient continued upon her former course across the river without change until she struck the Wilbur."

The libelants called one witness, who was on board the Wilbur, who testified that he saw the Orient coming straight out of either Harrison or Canal street slip, apparently going across the river ahead of him; that he did not notice her again, being occupied, until she was within 30 or 40 feet of him, and that she came straight upon the Wilbur, striking her about amid-ships; and that at that time the head of the Saunders was canted towards New York, and that the captain only was in the pilot-house. They also read the deposition of the engineer of the Orient, showing that at the time of the collision the engines of the latter were backing, but he did not know whether her headway was stopped or not. Upon this evidence and the pleadings the libellant rested, and the claimants submitted the case upon this testimony, claiming that no *prima facie* case had been made out against the Saunders requiring any exculpatory evidence on their part. The answer also states that shortly before the collision, and when it was seen to be inevitable, the pilot of the Saunders starboarded his helm to ease the blow.

T. L. Ogden and Chas. M. Da Costa, for insurance company.

E. D. McCarthy, for libellant, Toole.

Butler, Stillman & Hubbard and W. Mynderse, for claimant.

BROWN, J. The libelants contend that it is a point of great practical importance in this case, and in others similar, that they should not be compelled to call unfriendly witnesses when not absolutely necessary; and they rested their case upon the pleadings, and the slight testimony of two witnesses, as making out a *prima facie* case of negligence in the Saunders, at the same time claiming, also, that the Saunders, having taken the tug in tow under a contract to transport her to Newark, should be legally treated as a bailee, bound affirmatively to excuse herself for not having fulfilled her engagement. The engagement to tow the tug to Newark is averred in the libels and is not denied in the answer. It is unnecessary to inquire how the burden of proof would stand if the libels were filed upon such a contract only. That is not the case here. They expressly state that they are filed in a cause "of collision." Both tugs were originally proceeded against; the averments are equally against both; negligence is charged against both; and the little evidence given does show that the Wilbur was run into by the Orient. Shortly after the commencement of the first suit, the Orient was sold for seamen's wages, and no surplus remained after satisfying that decree, and the case now proceeds against the Saunders alone. The case as presented is not one of contract, but of tort; and the foundation of the actions against both vessels is negligence in the tugs. A *prima facie* case of negligence must therefore be made to appear, either from the pleadings or from the evidence, or else the libels must be dismissed.

In the case of *The L. P. Dayton*, 10 Ben. 430, 433, 18 Blatchf. 411, the libellant in a somewhat similar case rested without any proof, both tugs being there before the court, and each by its own answer exculpating itself, and showing the whole fault to have been in the other. The canal-boat in that case was in tow of the Dayton. BLATCHFORD, J., says:

"As respects the Dayton, no *prima facie* case of negligence is shown by her answer. The fact that the collision occurred while the Centennial was under the control and direction of the Dayton, and had neither propelling nor steering power of her own, is not *prima facie* evidence of negligence in the Dayton."

See, also, the English cases there cited, and *The Florence P. Hall*, 14 FED. REP. 408, 416, 418; *The Morning Light*, 2 Wall. 550, 556.

I do not think the evidence sufficient to show that there was no lookout on duty, or no other pilot than the captain on board. The evidence is sufficient, however, to show that the two tugs were approaching each other upon crossing courses, so as to be in the fifth situation, the Orient having the Saunders on her own starboard hand. It was the duty of the Orient, therefore, to keep out of the way. She blew two whistles to indicate that she would cross the bows of the Saunders. The supervising inspector's rules of 1875 required that the Orient, in such a situation, should ordinarily go

astern of the Saunders, having previously given one blast of the steam whistle. Rule 2, and the illustrations, pp. 37, 38. The note under rule 6, however, states that—

“The foregoing rules are to be complied with in all cases except when steamers are navigating in a crowded channel, or in the vicinity of wharves. Under such circumstances, steamers must be run and managed with great caution, sounding the whistle as may be necessary to guard against collision or other accidents.”

And at page 38, under the illustrations, it is further said :

“When, for good reason, in rivers, and narrow and difficult channels, a pilot finds it necessary to deviate from the standing rule just stated, he shall give early notice of such intention to the pilot of the other steamer by giving two blasts of the steam-whistle, and the pilot of the other vessel shall answer promptly with two blasts of his whistle, and both boats shall pass to the left.”

In these rules I do not perceive anything beyond the scope of the powers conferred upon the supervising inspectors by section 4412 of the Revised Statutes, (Act of February 28, 1871, § 29, 16 St. at Large, 450; Act of 1852, § 29, 10 St. at Large, 72.) Under rule 19 of the statutory rules of navigation, (section 4233,) considered alone, when steam-vessels are crossing in the fifth situation, the steam-vessel which has the other on her starboard hand would doubtless have an option to go on either side of the other; but that option would exist, not by force of any statutory authority, but simply through the absence of any limitation as to the mode in which she might perform her duty of “keeping out of the way.” But after the statutory rules were adopted in April, 1864, (13 St. at Large, 58, p. 60, arts. 14, 18,) the authority of the supervising inspectors was renewed by the Act of 1871 (section 4412) to establish additional “regulations to be observed by all steam-vessels in passing each other.” Regulations thus established, and not in conflict with the statute rules, are manifestly binding.

It seems to me entirely competent for the inspectors, under this authority, to establish by rule in what particular mode vessels meeting in the fifth or sixth situation shall pass each other. The statute makes no provision as to the mode of passing, but requires only that the one vessel shall keep out of the way of the other. Where there are two ways of doing this, equally available, it is not inconsistent with the statute for the supervising inspectors to provide that it shall ordinarily be done in one of those ways, and not in the other; and by going to the right, rather than to the left, when there is nothing to prevent this course. All that I understand BENEDICT, J., in the case of *The Atlas*, 4 Ben. 30, to have disapproved in the former rules, was in so far as the regulation required a port helm *in all cases*. The vessel required to keep out of the way, he says, “may proceed according as the case requires, and it was a fault in her to port if star-boarding afforded the only opportunity of avoiding the disaster.” The present regulations of the supervisors, with the provisions above

quoted, provide fully for these contingencies and exceptions. The mere fact that rule 2 of the present regulations limits the course of the vessel bound to keep out of the way, in ordinary circumstances, to one of the two alternatives which she would otherwise have an option of choosing, is no objection, as it seems to me, to this rule. All regulations necessarily restrict, and are intended to restrict and make definite, what was previously undefined and subject to the choice of the parties; and the regulation in question seems to me to be clearly calculated to promote certainty in navigation, and to avoid danger, as well as to permit all reasonable and necessary means of doing so. In effect, it re-establishes what was regarded as the rule previously existing in ordinary cases. *The Johnson*, 9 Wall. 146, 153; *The St. John*, 7 Blatchf. 220; *The Washington*, 3 Blatchf. 276. Rule 2, requiring vessels meeting obliquely to pass ordinarily to the right, subject to the qualifications above quoted, and the requirement of signals to be given and answered "promptly," I must regard as strictly obligatory. Non-observance of these requirements has been repeatedly held to be a fault sufficient to charge the offending vessel with contributory negligence. *The Grand Republic*, 16 FED. REP. 424, 427; *The Clifton*, 14 FED. REP. 586; *The Wm. H. Beaman*, 18 FED. REP. 334.

The pilot of the *Orient*, presumably for good reason, desiring to pass ahead or to the left, gave two blasts of his steam-whistle, as required by the exceptions above quoted. The pilot of the other vessel heard these signals, and was thereupon required to "answer promptly." Instead of doing so, the pilot of the *Saunders*, as appears from her answer, proceeded to maneuver his own vessel upon the basis of that signal by an order to slow his engine, but without previously informing the *Orient* of that intention or maneuver, but "almost instantly," as the answer continues, "and before he had time to do anything further, the *Orient* blew a signal of one whistle, to which the *Saunders* replied with one, and put her engine full speed ahead. The collision followed, though, as the answer of the *Saunders* alleges, wholly through the fault of the *Orient*. The answer states no reason, however, why the signal of two whistles was not responded to "promptly" before signaling to her engineer to slow her own engines. The case as submitted, therefore, presents only the extremely narrow, but naked, technical question, whether, where no reason appears for a contrary course, an answering signal is required, by the inspectors' rules, to be given at once, and before any other maneuvers are taken; for if the rule does require that, then the *Saunders* is *prima facie* in fault, and is called upon either to justify her departure from the rule, or else to show that such departure in no way contributed to the collision. I think this question must be answered in the affirmative, and especially so where the signal received is one proposing an exceptional course, as in this case. The vessel first giving such an exceptional, though lawful, signal, certainly ought to

be informed immediately whether it is assented to or not, in order that her own navigation may be guided accordingly. She cannot rightly be kept in suspense, not knowing whether her proposal is to be assented to or not, or which way to shape her course. The object of mutual signals is the mutual understanding of each other's course. The rule requires a prompt reply to prevent suspense and miscalculation. To act upon exceptional signals received by maneuvering accordingly, without previous notice of acceptance, is a double wrong, and misleads in two ways: *First*, by inducing in the other vessel the belief of dissent through the delay; and, *second*, by a change of course or rate of speed without notice. If the rule requiring the answer to be given "promptly" is not enforced literally, so as to exclude all other maneuvers before answering which are not shown to be necessary by the circumstances, the regulation requiring an answer to signals can be of little avail, and might rather prove a snare than a help to safe navigation. It is impossible to say that the result of the delay in this case, however small it may have been, was not the cause of the Orient's changing her signal of two whistles to that of one whistle, and thereby the cause of the collision which followed.

As the evidence and pleadings, therefore, are sufficient to show that the rule of the fifth situation is applicable, and that the Saunders failed to respond promptly to the signal given, as required by the inspectors' regulations, and no reason for this failure to respond promptly being alleged in connection with this admission in the answer, or proved, I must hold that there is a *prima facie* fault shown in the Saunders in this respect; and, as it is impossible to say that this fault did not contribute to the collision, the libellant is entitled to a decree, with costs. *The Pennsylvania*, 19 Wall. 125, 137.

THE QUEBINI STAMPHALIA, etc.

THE CREDIT LYONNAIS.

(District Court, S. D. New York. December 31, 1883.)

1. SHIPPING—BILL OF LADING—BONA FIDE INDORSEE—FREIGHT PAYABLE—LUMP SUM—QUANTITY UNKNOWN.

Where a bill of lading, after reciting receipt of a given quantity, weight, etc., contains a further express provision, "quantity, weight, and contents unknown," the vessel may show that less than the amount stated was received, and will not be liable, as for short delivery, even to a *bona fide* indorsee of a bill of lading, if she delivers all that she received.

2. SAME—RECEIPT FOR MORE THAN ACTUALLY PUT ON BOARD.

If the master acknowledges receipt, knowingly, for a greater amount than has been put on board, *quære*, whether the vessel is liable, in an action *in rem*, for more than the amount actually laden on board.

3. SAME—CHARTER-PARTY.

The *bona fide* indorsee of a bill of lading is not affected by the provisions of a charter-party, of which he has no knowledge or notice, so as to be put on inquiry. In such a case he is liable for freight only, according to the provisions of the bill of lading.

4. SAME—CASE STATED.

Where the bill of lading provided, "freight to be paid for 410 tons, £451," etc., and "to pay in New York £300.13.4," *held*, this was notice of a specific sum to be paid, though the cargo was short of 410 tons, it appearing that the kilos actually receipted for amounted to only 400 tons.

In Admiralty.

Condert Bros., for libellant.

Butler, Stillman & Hubbard, for claimant.

BROWN, J. The libellant is the *bona fide* indorsee of a bill of lading given by the master of the *Querini Stamphalia* for certain iron shipped at Odessa on August 5, 1880, to be transported to New York. This suit was brought to recover for an alleged short delivery of iron to the amount of a little over 38 tons. The cross-libel was filed to recover £300 for unpaid freight. The evidence shows satisfactorily that all the iron was delivered which was received on board the vessel. No question is made but that this would be a good defense as against the shipper. The libellant, the *Credit Lyonnais*, however, contends that as *bona fide* indorsee of the bill of lading for value, it has a right to rely upon the representation as to the amount of iron shipped contained in the bill of lading, and a right to hold the vessel and her owners for the delivery of this amount. The bill of lading, however, expressly states that the "quantity, weight, and contents are unknown." In the body it recites the receipt of 406,000 kilos; and this is equal to only 400 tons. Only about 362 tons were delivered. In the margin of the bill of lading, however, is an entry "freight to be paid for 410 tons," etc. Numerous authorities establish the rule that a clause in the bill of lading reciting that the weight or quantity is unknown qualifies the effect of other statements as to the amount or weight, and authorizes proof to show that a less amount was in fact received on board. *Clark v. Barnewell*, 12 How. 272; *630 Quarter Casks of Sherry*, 7 Ben. 506; 14 Blatchf. 517; *Shepherd v. Naylor*, 71 Mass. 591; *Kelley v. Bowker*, 11 Gray, 428; *The Nora*, 14 Fed. Rep. 429.

In the cases on this subject I find no distinction made in favor of an indorsee of a bill of lading. Most of the cases above cited are those of such an indorsee. Nor do I perceive any reason why any such distinction in his favor should be made; for upon the face of the bill of lading itself he has notice of the qualification which authorizes the master to show that a less amount was actually received. He cannot be, therefore, in the legal sense, a *bona fide* holder relying upon a representation by the master of a specific amount received on board. There is no room, therefore, for any such estoppel as exists in favor of a *bona fide* indorsee where no such qualification appears on the

face of the bill of lading. *Bradstreet v. Heran*, 2 Blatchf. 116; *Meyer v. Peck*, 28 N. Y. 598; *112 Sticks of Timber*, 8 Ben. 214.

The case of *Jessel v. Bath*, L. R. 2 Exch. 267, is almost identical with the present. There the plaintiff was the assignee for full value and *bona fide* holder of the bill of lading of goods shipped on the defendant's vessel, and brought his action to recover for a short delivery of manganese. The bill of lading was similar to the present, stating "weight, contents, and value unknown." The court unanimously held that the action could not be maintained, either at common law or on the statute of 18 & 19 Vict., it appearing that the defendants delivered all that they had received, though less than the number of kilogrammes stated in the bill of lading. KELLY, C. B., says the bill of lading "may be reasonably and fairly read as meaning that a quantity of manganese had been received on board, appearing to amount to thirty-three tons, but that the person signing the bill would not be liable for any deficiency, inasmuch as he had not in fact ascertained, and therefore did not know, the true weight."

MARTIN, B., says:

"The person, therefore, signing the bill of lading by signing for the amount, with this qualification, 'weight, contents, and value unknown,' merely means to say that the weight is represented to him to be so much, but that he has himself no knowledge of the matter. The insertion of the weight in the margin, and the calculation of freight upon it, does not carry the matter any further; he calculates the freight, as it is his duty to do, upon the weight as stated to him. The qualification is perfectly reasonable, and I do not understand how a statement so qualified binds any one."

BRAMWELL, B., says:

"This document, though apparently contradictory, means this: A certain quantity of manganese has been brought on board, which is said by the shipper, for the purpose of freight, to amount to so much, but I do not pretend or undertake to know whether or not that statement of weight is correct. On a bill of lading so made out I think no one could be liable in such an action as the present."

These cases seem decisive on this branch of the present controversy.

Again, the indorsee of the bill of lading brings this action *in rem* against the vessel for short delivery. The case of *Pollard v. Vinton*, 105 U. S. 7, the case of *Hubbersty v. Ward*, 8 Exch. 330, and other authorities cited in *Pollard v. Vinton*, seem to me to hold that the vessel cannot be bound, whatever may be the liability of the master, for goods not put on board. In *Maude & P. Law Merch. Shipp.* 343, it is said, generally, that "the master has, as against his owners, no authority to sign bills of lading for goods not received on board; nor has he power to, nor does he, charge his owners by signing bills of lading for a greater quantity of goods than those on board; and all persons taking bills of lading by indorsement, or otherwise, must be taken to have notice of this." The vessel cannot, in this case, be

held liable for any short delivery, and the libel of the Credit Lyonnais must be dismissed, with costs.

In the libel for freight, there is a question how much freight can be claimed. The vessel was chartered by her owner to H. J. Morens, who agreed to load from 410 to 420 tons of old, heavy, wrought, scrap-iron, at the rate of 22 shillings per 20 cwt., one-third payable on signing bills of lading, and the rest on delivery of the cargo, "the owner and master to have an absolute lien on the cargo for all freight, dead freight, and demurrage." The iron shipped at Odessa belonged to the charterer. It was weighed in the city and thence brought several miles to the dock. After it had arrived there, a considerable amount was thrown out, before shipment, as unfit, by the charterer's agent, and other portions were stolen, so that considerably less than the lowest amount, namely, 410 tons, stipulated for in the charter, was furnished to the vessel. Under the stipulation for dead freight, the vessel had a lien on the 368 tons shipped for the full freight, at the rate of 22 shillings per 20 cwt., upon the 410 tons agreed to be furnished. The bill of lading was made out for 406,000 kilos, equal to 400 tons, or 10 tons only less than the stipulated amount; but the master was confident that there was even less than this, and he hesitated about signing the bill of lading for that amount, but was assured by the shipper's agent that any difference would be deducted. In the body of the bill of lading, freight was specified "to be paid on the said goods, 22 shillings per 1,015 kilos, as per margin," and in the margin were the following entries, "freight to be paid for four hundred ten tons, £451. Received $\frac{1}{3}$ —£150.6.8. To pay in New York, £300.13.4. Signed for shipper. G. WERTH."

There is no reference in the bill of lading to the charter-party; the indorsee of the bill of lading is not, therefore, affected by its provisions, except in so far as he had notice of it, and so put on inquiry, equivalent to notice. He has a right to rely upon the bill of lading, and cannot be held liable for dead freight, which is the subject of the present controversy, beyond what is required by the bill of lading itself. Conceding this to the fullest extent, it is impossible for me to read this bill of lading all together, without holding that the Credit Lyonnais were not only put upon inquiry by the peculiar character of the several clauses which this bill of lading contained in regard to payment of freight, and the amount, but also that they had express notice that the sum of £451, less the one-third already paid, was to be paid upon delivery of the cargo, as for 410 tons. The statement in the body of the bill of lading that freight was to be paid, 22 shillings for 1,015 kilos, is qualified by reference to the margin, which shows that 410 tons was to be paid for, while the amount stated to be received on board, namely, 406,000 kilos, amounted to only 400 tons. Here was a very plain ambiguity, even in this part of the bill of lading, which was of itself sufficient to put the indorsee on inquiry; and inquiry could not have failed to disclose the existence of the

charter-party, and the right of the vessel to receive freight on 410 tons. But again, the indorsements in the margin of the bill of lading, made and signed by the agent of the shipper, expressly direct "freight to be paid for 410 tons," namely, £451, which 410 tons amount to, at the rate of 22 shillings per ton. Deducting £150, the margin then reads "to pay in New York, £300.13.4." Here, then, is a specific adjustment of the amount of freight to be paid in New York, arrived at by computation, with the shipper's direction that that amount is to be paid and collected in New York, although it disagrees with the prescribed rate and weight, as given in the body of the bill of lading. The object of this indorsement by the shipper's agent was, as seems to me, plainly to give express notice, both to the captain that he must collect the full amount on delivery, not holding the charterer upon his charter for any deficiency in freight, and also to notify the indorsee of the amount which he must pay. That this amount was irrespective of the actual weight of iron receipted for, and, therefore, necessarily irrespective of the amount of weight delivered, appears upon the very face of the bill of lading.

By force of the terms of the bill of lading itself, therefore, I must hold that the Credit Lyonnais is liable for the full balance of the stipulated freight, and a decree should be entered therefor, with costs.

THE JENNIE B. GILKEY.

BAKER and others v. LORING.

(Circuit Court, D. Massachusetts. January 22, 1884.)

1. ADMIRALTY LAW—SCHOONER'S LIABILITY FOR NECESSARY SUPPLIES—WHAT CONSIDERED THE "HOME PORT" OF A VESSEL—RESIDENCE OF OWNER OR MASTER.

It is well established that the port of registry is *prima facie* the home port of a vessel, and this presumption must be overcome by clear proof, before any other home is taken as the true one; but it has often been decided, too, that the place of residence of the owners of a vessel is to be considered the home port, even when the registration is in another state, if the facts of ownership and residence were known, or might have been known, to the material-man. But as to majority and minority ownership, or as between the managing or not managing ownership, *quære*.

2. SAME—NAME OF PORT ON THE STERN.

The statute requiring the name of the port of registry to be painted on a vessel's stern is intended to give to all persons interested notice of the home of the vessel.

3. SAME—MASTER—"ACTING AND MANAGING OWNER"—SAILING ON SHARES.

Where a schooner was sailed by the master on shares, he to supply and man her, and pay a certain part of the net earnings to the owners, *held*, that he was not the "acting and managing owner," in the sense of Rev. St. § 4141, but the charterer; and that his sailing on foreign voyages from New York more or less often would not make New York his "usual residence," under that section, if his family lived in Massachusetts.

4. SAME—INSURANCE—PREMIUM.

It seems that premiums of insurance are not necessities for a ship; and *held* that where the account of a material-man was insured with the consent of the master and of one part owner, and the account was a charge on the ship but not on the owners personally, there was no privilege for the premiums.

In Admiralty.

C. T. Russell and *C. T. Russell, Jr.*, for libelants, appellants.

Geo. M. Reed, for claimant.

LOWELL, J. The schooner *Jennie B. Gilkey* was sold in the district court, and certain debts which were admitted to be privileged were paid out of the proceeds. The libel of *H. M. Baker & Co.*, of New York, for necessary supplies furnished the master in New York, for his last voyage, was rejected, because, according to the evidence in that court, New York appeared to be the home port of the schooner. A new case is made in this court, and has been very thoroughly prepared and argued, both upon the facts and the law. The claimant, *Mr. Loring*, owns the greater part of the vessel, and contests the lien of the libelants. When these supplies were furnished, the vessel was owned in Massachusetts, Maine, and New Hampshire, excepting that *Loud & Co.*, of New York, owned one sixty-fourth part. The case for the libelants is, that the schooner was built and largely owned in Boston, and had a permanent register in that port; that "Boston" was painted on her stern; that they believed, and had reason to believe, that she was a Boston vessel; and that in fact she was so. The contention of the claimant is, that New York was the home port of the vessel, because *Loud & Co.*, of that city, were her managing owners; or that the master was such owner, and usually resided in New York; that, therefore, she should have been registered there; and that admiralty, like equity, will hold that to be done which ought to have been done. If *Loud & Co.* were the husbands, or acting and managing owners, of the vessel, the registration should have been changed to New York when they were appointed to that office. *Rev. St. § 4141*. It does not necessarily follow that New York became, *ipso facto*, the home port, without change of registration. I have seen no case which decides that the home port shifts as often as the managing owner is changed, without change of papers, or that material-men are bound to discover who is the managing owner of a vessel, or what place is his usual place of residence. One case decides that the port of enrollment is the home port, if the managing owner lives there, though a majority of the owners live in another state. *The Indiana*, *Crabbe*, 479. In that case the decree was that the vessel changed her home port from a certain day, which was that of her new enrollment at the port of the managing owner, and not that of the sale to him; but the time between the conveyance and the enrollment was trifling, and the point does not appear to have attracted attention.

It has often been decided that the place of residence of the owners

is to be considered the home port, even when the registration is in another state, if the facts of ownership and residence were known, or might have been known, to the material-man, (*The Golden Gate*, Newb. 308; *The Albany*, 4 Dill. 439; *The E. A. Barnard*, 2 FED. REP. 712; *The Mary Chilton*, 4 FED. REP. 847;) but I have seen no case which brought up any question between majority and minority ownership, or between the managing and not managing ownership, in a case of this kind. It is equally well established that the port of registry is, in a case of this kind, *prima facie* the home port, to be over come by clear proof, before any other home is taken as the true one. *The Superior*, Newb. 176; *The Sarah Starr*, 1 Sprague, 453; 2 Pars. Shipp. & Adm. 326. Mr. Justice CLIFFORD said that the statute requiring the name of the port of registry to be painted on the stern is intended to give to all persons interested notice of the home of the vessel, and this statement is quoted in an opinion in the supreme court. *The Martha Washington*, 1 Cliff. 463, 466; *Morgan v. Parham*, 16 Wall. 471, 475. As I find the facts to be in this case, it will not be necessary to go beyond these decisions.

Loud & Co. testify that they acted merely as brokers or consignees of the vessel, and neither had, nor assumed to have, any of the powers of managing owners; and this is confirmed by all the evidence. The schooner's voyages, during some years, were chiefly between New York and foreign ports, and, as is so common with New England vessels, the master sailed her on shares. He undoubtedly took the responsibility, and gave the orders for all the voyages and business of the vessel; and Loud & Co. acted precisely as they did for all other vessels which they disbursed. The fact that New York was the headquarters of the vessel, as it must be of general freighting vessels on this coast, has no effect to make it the home port. *Hayes v. Pacific Mail Co.* 17 How. 596; *Morgan v. Parham*, 16 Wall. 471.

In taking out registration, Mr. Loring, the present claimant, represented himself to be the managing owner. He says that he signed the papers because he was told by Capt. Gilkey, his brother-in-law, that they were necessary, and knew nothing about their contents, which I take to be the fact. Still, Mr. Loring was the largest owner, and all the managing owner that the vessel had, unless the master shall be considered so. I agree with the claimant that it is doubtful whether the master can be the ship's husband, or acting and managing owner in the sense of this statute; but, however this may be, I do not find, as a fact, that Capt. Gilkey was such husband, or acting and managing owner, nor that he usually resided in New York. He managed the voyages of the vessel, as charterer and special owner, not as ship's husband, in the sense of the statute; nor did he reside in New York. Judge WARE decided that a merchant who passed most of his time in New York might be considered as usually residing there, though he was domiciled in Maine. *The St. Lawrence*, 3 Ware, 211. I have my doubts of the soundness of this opinion, but
v.19,no.2—9

do not now controvert it. Capt. Gilkey was often in New York, but it was because his vessel happened to be there at the end of his voyages. He called himself a resident of Boston, or of Somerville, which is a suburb of Boston, and his family lived in Somerville, and it is not proved that either he, or any one else, ever supposed that he usually resided in New York. I cannot think that, if the statute would ever admit the master to be the managing owner, it intends to say that his usual residence shall shift with the shifting business of his vessel. Seamen are considered to reside, for all municipal purposes, of voting, taxation, distribution of estates, etc., where their families live, and they consider themselves to have their home. *Guier v. O'Donnell*, 1 Bin. 349, note; *Boothbay v. Wiscasset*, 3 Greenl. 354; *Hallet v. Bassett*, 100 Mass. 167. While I do not, at the present time, dissent from Judge WARE's opinion that a business man may have a usual residence apart from his family, I hold that the master of a vessel does not acquire such a residence by putting into a foreign port more or less often. I hold, therefore, that the schooner was properly registered in Boston, and was a foreign vessel in New York, and that the libelants have a privilege for the supplies furnished her.

The only disputed items of the account are the premiums of insurance. The evidence upon this point is not very full. I understand that the vessel sailed on her last voyage in 1878, and suffered damage which caused heavy expenses in a foreign port; that the owners contributed funds to redeem her, and afterwards became dissatisfied with the conduct of Capt. Gilkey, and sent out another master who brought the vessel to Boston in 1881. The libelants, in the mean time, having had general authority or instructions from the master to that effect, kept themselves insured by annual policies, and the principal charges of this kind are for these insurances. There is, besides, a charge for insurance on freight in one of the voyages, which was authorized by the master. In August, 1880, the claimant, in answer to a letter from the libelants, which is not in evidence, wrote: "Think your bill against schooner Jennie B. Gilkey should be covered by a yearly policy, so to get the best rate you can, at the same time be able to cancel at any time." The next year he wrote a much more cautious letter, in which he referred them to any instructions they may have had from the master. It is apparent, on the face of this second letter, that he was afraid that he had committed himself in 1880. I am of opinion that neither the master nor the claimant had authority to charge the ship with premiums of insurance paid in New York to secure the libelant's account.

There is some difference of opinion whether insurance, though duly authorized, gives the underwriters a privilege for the premiums. The better opinion appears to be that it does not, because insurance is not a necessary supply for the ship itself, but only a prudent security for the proprietary interests of her owners. Compare *The Collier*,

3 West. Law M. 521; *The John T. Moore*, 3 Woods, 61; *The Heinrich Bjorn*, 8 Prob. Div. 151; *The Dolphin*, 1 Flippen, 580, and the reporter's note; *The Guiding Star*, 9 FED. REP. 521; *The Riga*, L. R. 3 Adm. & Ecc. 516.

The strongest argument made by the libelants is that the premiums may be regarded like interest, as a charge for delay of payment. In some bottomry bonds such a charge is made by agreement; but whether the courts will uphold it, is doubtful. See *The Boddingtons*, 2 Hagg. 422; *The Robert L. Lane*, 1 Lowell, 388; where the question was not decided, but only referred to. If it were proved that by a general, long-established, and well-known custom, premiums of insurance are to be added to the account by way of consideration for the forbearance, they might possibly be allowed, on the theory that the charge for interest was proportionally diminished, or that the arrangement was an entire one, from which no one item was to be separated. No such evidence was offered.

It must be remembered that the schooner was sailed on shares under a parol charter, which required the master to supply the vessel for her voyage, though not to repair her. The schooner is liable for necessities by virtue of a fiction of the admiralty courts, known to all the parties, and admitted in this case. But the insurance did not benefit the owners, for they were not personally responsible for this debt. The case appears somewhat stronger against the charge than if it were made in bottomry, inasmuch as the exigency was less. In bottomry, the owner is communicated with, in most cases, and if he cannot advance the money, the master must raise it on the best terms he can get. Here the libelants supposed, though they did not inquire, that the master was sailing the vessel on shares, and they therefore supposed it to be important for them to insure, because they had no resort to the owners. They protected their own interest, as a mortgagee might do, and can no more charge the premium against the ship than a mortgagee could charge it against the estate in the absence of a positive stipulation to that effect. I reject the items for premiums of insurance.

Decree for the libelants.

THE COLINA.

(District Court, D. Maryland. January 15, 1884.)

SHIPMENT OF CATTLE—UNFIT DRINKING WATER—LIABILITY OF VESSEL.

The owners of the steam-ship having contracted to supply ample condensed water for a cargo of 340 live cattle from Baltimore to Glasgow, and the court finding on all the testimony that the water furnished was unfit for cattle, and caused the death of 41 and deterioration in the value of all the remainder, *held*, that the ship was liable to the owner of the cattle for the losses suffered.

In Admiralty.

Sebastian Brown and Henry M. Rogers, for libelant.

Thomas & Thomas, for respondent.

MORRIS, J. This is a libel against the steam-ship *Colina*, of Glasgow, for the value of 41 cattle which died on the voyage from Baltimore to Glasgow, and for damages for the deterioration of the remaining 299. The ship sailed from Baltimore, April 18, 1882, with 340 of libelant's cattle on board, and on May 5th arrived at Glasgow. The voyage lasted 17 days. On the twenty-ninth and thirtieth of April quite heavy weather was experienced, during part of which the hatches were put down and the ship rolled considerably, but on the whole the voyage was a favorable one, and not beyond average duration. The libelant alleges that the death and deterioration of his cattle was solely in consequence of the unfit drinking water supplied them by the ship. The contract of shipment provides that an ample supply of condensed water is to be supplied by the ship, and the controversy turns upon the single issue of fact, did the ship supply suitable condensed water for the cattle? and if not, was that the cause of the loss? The testimony is quite contradictory, but every witness, apparently, who could have any knowledge of the matter in issue has been examined by one side or the other, and the court has been greatly aided by the very thorough manner in which the evidence has been presented, and by the able arguments of counsel. A careful consideration of all the testimony has satisfied me that the libelant is entitled to recover. I am led to this conclusion by the combined weight of very many different items of proof, some of which I will mention. In the first place, there is nothing whatever to indicate that the cattle were not good, healthy cattle when shipped. The testimony in behalf of the libelant shows them to have been in fine condition, fat, and suitable for exportation, and there is no testimony to the contrary. Starting on the voyage in this good condition, it is an uncontroverted fact that 41 died from time to time during the voyage, and that all the rest became more or less deteriorated, and that all were still rapidly losing flesh and strength from day to day up to the moment of arrival at Glasgow. This steady deterioration is proved, not only by all the cattle men who had them in charge, but is admitted by Capt. Maxwell, the master of the steam-ship. He says:

"They were thin when landed; not nearly in so good condition as when put on board. They were all more or less skinny looking, and in as poor condition as I have ever seen cattle after a voyage. They showed no signs of the bruises and knocking about of a rough voyage, and had a great craving for drink after they got ashore, unlike ordinary shipments on landing."

The testimony of the cattle men is that at first the cattle refused to drink the water, and that, to induce them to drink, they gave it to them mixed with bran; that when they did come to drink it, it did not quench thirst, and they craved drink all the time; that one after

another they became feverish and weak, their eyes bloodshot, their hair rough and staring, their bowels loose and very offensive, and those which died appeared to become delirious, and died in great agony. These various symptoms of distress, as detailed by the cattle men who observed them, are said by men of long experience in handling cattle, and by surgeons, to be such as would result from some sort of irritant salt, or other poisonous substance, taken into the stomach. There is no proof to show that such symptoms appear in any disease to which cattle are subject. Then it is testified that those of the cattle, which, in an almost dying condition, were butchered soon after arrival at Gasgow, appeared different from ordinary cattle, their bladders being greatly distended and dark in color, the urine dark, the kidneys fat and soft, and their eyes bloodshot. There are numbers of witnesses to all these facts, many of them persons of independent positions, long established and well known in Glasgow, and it is fair to presume that their testimony, if biased at all, would more likely be colored by a bias in favor of the owners of the steamship, who are their fellow-townsmen, than in favor of the libellant, an unknown American, residing in Chicago.

As to the difference in its effects between the ordinary drinking water of the ship and the condensed water supplied the cattle there is the testimony with respect to a certain bullock, which, for their amusement, some of the engineers made a pet of and supplied with drinking water because he refused the other. All the cattle men testify that his condition at the end of the voyage was exceptional, and that he alone showed no signs of the sickness which prevailed among the others, and was the only beast which went off the ship in as good condition as when shipped, and that he was lively and active, while the others were dull and sluggish, and difficult to get ashore.

There is, too, the chemical analysis of the bottle of water taken ashore by the head cattle man, and which he swears was a fair sample of the condensed water furnished. If it be true, as he swears, that the sample was a fair and honest one, then the chemical analysis and the testimony of the veterinary surgeon prove that it was unfit for cattle, and that its use would produce the symptoms in the cattle and the injuries complained of. It is true that the fact that the bottle of water taken ashore was a fair sample, rests only on the evidence of the dead cattle man, and, although not in any way impeached the court might hesitate to rest so vital and disputed a fact on the testimony of one man; but, as one of a great many corroborating items of proof, it has its weight. Certainly it is proof that the complaint about the water was not an after-thought, but was present in the minds of these cattle men during the voyage, and seriously considered by them. When complaint was made to the captain during the voyage, the cattle men testify that he admitted on tasting the water that it was salty. He says that he found it only brack-

ish or flat, but I think his offer to supply the water from the smaller condenser is proof that he did not then think the objection frivolous. The offer of water from the smaller condenser was declined by the cattle men, and, I think, from necessity, as the testimony of the officers of the ship shows that the cattle men would have been unable to have performed the labor of pumping and carrying the water from this small condenser to the casks in which it was to be cooled.

On behalf of the respondents there are several explanations suggested to account for the unusual, increasing, and fatal sickness among the cattle throughout the voyage; and, *first*, it is suggested that as the cattle were brought from Chicago to Baltimore in cars and were put directly from the cars on board the steam-ship, they may have been neglected and abused on that journey, and their subsequent ailments be attributable to that. But that journey on the railroad was about the middle of April, a season when they could not be exposed to any extremes of weather, and their appearance when shipped indicated no abuse or privation of food or water, or failing health from any cause; and if they had been injured on the railroad they would have got better as the effects of it passed off. The contrary was the case: the cattle during the voyage grew weaker and more distressed, and died more rapidly the longer they were on board. And, indeed, the cattle men swear that in their opinion, judging from the increasing severity of the sickness, if the voyage had lasted much longer all would have died.

Another explanation offered, and one which is supported by the testimony of the officers of the ship, is that the cattle men neglected the cattle on the voyage; that they did not feed and water them regularly, and allowed them when they got down to lie without assisting them to get up, so that the lying down prevented their passing urine, and that this caused the disorders of the bladder and kidneys, which resulted in their death. While I do not question that such retention of the urine would have caused most of the symptoms of distress and disease they exhibited, I am disposed to think that this complaint about the neglect of the cattle men is an after-thought. The captain could not have thought it to be a fact at the end of the voyage, for he gave a written certificate to the head cattle man that he "had been most attentive to his duties in tending the cattle during the whole passage, and that he was a most competent person for taking charge of cattle on board ship." The cattle men generally were men of experience in their duties, and had made frequent Atlantic voyages in charge of cattle. Another answer to this theory, that it was neglect that brought on the injuries, is that all the cattle suffered in the same way, although not to the same extent,—some resisting the disorder better than others, but all being appreciably affected. It can hardly be supposed that on a favorable voyage, with little rough weather, all the cattle got down. They are placed in narrow stalls to keep them

on their feet, and do not get down unless they are sick and too weak to stand, or are thrown down by the violent rolling of the ship and the breaking of the stalls.

It is said by the ship's officers that the two men who had charge of the cattle on the forward part of the upper deck were the only ones properly attentive to their duties, and that this explains why only one beast died in that part of the ship. These two men themselves, however, testify that all the cattle men helped each other to get cattle up when they were down, and that they gave only the same attention to their cattle that others did, and that they tasted the water repeatedly and found it very salty; that their cattle refused to drink it at first, as did the others; and, while as many cattle did not die in that part of the ship, they did all show more or less of the same symptoms, the same distress and thirst, and were deteriorated in the same way.

Another suggestion is that, by the carelessness of the cattle men, the casks containing the condensed water were left uncovered, and spray and sea-water was washed into them in the rolling of the ship. As there was a large number of these casks in different parts of the ship, and many of them below in the between-decks, this theory is too improbable to be accepted, and if true must have happened, more or less, on every voyage, and certainly should have been remedied by the ship-owners by differently placing the casks.

A consideration of the testimony, as a whole, has brought me to the conclusion that the water was unsuitable for cattle, and that it caused the deaths and deterioration by which the libelant has suffered the losses complained of; and I adhere to this finding of fact, notwithstanding the positive testimony that the same apparatus on other voyages, both before and after the one in question, supplied condensed water for quite as large cargoes of cattle which were carried by the same steam-ship without their suffering any injury. The fact that the water was bad, and that the cattle suffered from it on this voyage, is, in my judgment, established, and the libelant is not to lose his remedy because he cannot explain why it was bad.

As to the amount of the pecuniary loss which resulted from the deterioration of the cattle there is decided conflict of testimony. I have not found this question free from difficulty, and have been obliged to deal with it in some spirit of compromise. The cattle were not injured all to the same extent, and they would seem to have improved in appearance and strength after landing, and before the sale, and the sale seems to have been well managed in the interest of the libelant. Comparing the sales with the reported market prices, the cattle which survived seem to have sold better than was expected, and the loss to have been not so great as was estimated by those who judged by the appearance of the cattle as they came off the ship. I allow 30 shillings a head for the deterioration on all that were sold. For those that died I allow the average price brought by those that were sold. I have not allowed the additional sum for de-

terioration on those that died, because in all probability these were not the best beasts; and as to these, all further risks of the voyage, and all further expense of attending their keep and sale, ended with their death, and was saved the libelant.

The amount of the decree will therefore be:

STATEMENT.			
Cattle consigned to A. & T. Tierman, and stowed between-decks, total	-	-	179
For 25 died, at £24 each,	-	-	£600
For depreciation on 154 arrived, at 30 shillings each,	-	-	231
			£831
Cattle consigned to Young & McQuade, carried on main deck, total,	-	-	161
For 16 died, £23 each,	-	-	£368
Less one carcass,	-	-	16
			352
For depreciation on 145 arrived, at 30 shillings each,	-	-	217.10
			£569.10
Tiernan's,	-	-	831
Young & McQuade,	-	-	569.10
			£1,400.10
At current rate of exchange, say \$4.89. (No interest.)			

HOUGE v. WOODRUFF and others.

(District Court, S. D. New York. January 8, 1884.)

1. SHIPPING—DEMURRAGE—REASONABLE TIME—CARGO OF SALT.

A merchant who buys cargo on board ship after her arrival, taking no transfer of the bill of lading or charter-party, and having no knowledge of either, is bound only to the use of reasonable diligence in discharging in conformity with the custom of the port.

2. SAME—CHANGE OF BERTH.

Where a vessel has obtained a berth at the place assigned by the merchant, and is ready to discharge, and she proceeds at his request to another berth, where a further delay arises, the vessel is entitled to be paid for the expense and delay caused by such removal, in the absence of any special usage of the port or trade authorizing such a change at the vessel's expense.

3. SAME—CUSTOM.

By usage in the salt trade, rainy weather is deducted, salt not being removable without damage during such weather.

The bark Elliseff, of which the libelant was master, brought in ballast about 257 tons of salt from Lisbon to New York, where she arrived on the twenty-sixth of December, 1880. The salt came under a charter-party and bill of lading consigned to Hagemeyer &

Brun, who entered it in the custom-house and sold it on board to the respondents. The latter had no knowledge of the charter-party or the bill of lading, and took no transfer of either. The vessel went to Merchants' stores on the twenty-seventh of December, obtained a berth on the 28th, and gave respondents notice that the ship would be ready to deliver on the 29th. On the afternoon of the 28th the respondents, by letter, requested the captain to go to Wallabout to discharge. The captain at once called on the respondents, and, as he testified, refused to go unless the respondents would guaranty that there was sufficient water, which he said the respondents did guaranty. Mr. Woodruff, with whom this interview was held, denied this statement, and testified that he stated only that larger vessels than this had discharged at the Wallabout; that he did not think there would be any difficulty about it, and that the captain must examine and satisfy himself; that the captain went out and afterwards came back and said he would go, whereupon the vessel was taken, on the 29th, to the Wallabout by a tug hired by respondents for that purpose. On arrival there, the harbor-master stated that no berth could be had until the 31st, owing to the presence of other vessels. On the 31st a berth was in readiness, but in the mean time, owing to extreme and unusual cold, the vessel got frozen in, so that she was unable to reach her berth until the fourth of January. The discharge was commenced on that day and finished on the 12th. One thousand bushels per day, equaling 33 tons, was proved to be a reasonable and customary rate of receiving and discharging a cargo of salt, and that rainy days were not counted in the salt trade, as that article cannot be discharged in bad weather with safety. The charter-party provided for a discharge at the rate of 50 tons per day; the bill of lading contained no provision on the subject.

Butler, Stillman & Hubbard, for libellant.

Beebe, Wilcox & Hobbs, for respondents.

Brown, J. As the respondents bought this salt from the consignee, who had entered it as his own, and took no transfer of the charter-party or bill of lading, and had no knowledge of either, they are not responsible upon any of the provisions of those instruments. 1 Maude & P. Merc. Shipp. 393. The whole evidence, however, makes it clear that upon the purchase of the salt, which was by verbal contract only, they were to receive it from the ship. Their obligations with respect to the discharge are, therefore, only to use reasonable diligence, in conformity with the customs of the port, as in cases of the absence of any bill of lading, or of any stipulation in the bill of lading on the subject of discharge. *Coombs v. Nolan*, 7 Ben. 301; *The Hyperion's Cargo*, 2 Low. 93; *Cross v. Beard*, 26 N. Y. 85; *Henley v. Brooklyn Ice Co.* 14 Blatchf. 522; *Kane v. Penney*, 5 FED. REP. 830.

Considering the sworn testimony of the captain shortly after the transaction, and the contents of his letter of the 28th, I cannot doubt

that the vessel went to Merchants' stores by direction of the respondents. On the 27th she obtained a berth and was ready to discharge there on the 29th, after a delay of two days. She then went to the Wallabout, at the request of the respondents, where there was a further unavoidable delay of two days; but after those two days she could have obtained a berth had the ice not further delayed her. It cannot be assumed, in the absence of positive proof to the contrary, that the directions of the harbor-master were improper, or that there was any other vacant berth which she could have procured earlier. Where a vessel has once obtained a berth at a dock, directed by the merchant, and is in readiness to discharge there, the merchant certainly has no right, in the absence of a particular usage, or of some stipulation authorizing it, to send the vessel to another berth, except at his own expense for the removal, and for any delay which properly arises from it. Where an established usage has been proved giving the merchant a right to, at least, one change of berth in the discharge of the cargo, he is not liable for the delay caused by the removal, because that is a part of the vessel's obligation. *Smith v. 60,000 Feet of Yellow Pine Lumber*, 2 FED. REP. 396, 400; *Moody v. 500,000 Laths*, Id. 607. No such usage was proved in this case; nor, in fact, was any part of the cargo discharged at Merchants' stores.

The Wallabout basin was a proper and customary place for the discharge of salt. The respondents might properly have directed the vessel there in the first instance, but as the vessel had already lost two days' time in obtaining a berth at Merchants' stores under the respondents' direction, and the same time would have been necessarily lost at the Wallabout in obtaining a berth by the 31st, the respondents must be charged with the two days' double delay caused through their own change of direction. The master, it is true, seems to have acquiesced in this removal, because the charter-party required him to make one removal in delivery, if desired; and he does not appear to have understood that the respondents were not bound by the terms of the charter-party. The respondents cannot claim the benefit of this provision, unless they are willing to be bound to discharge at the rate of 50 tons per day, which they do not accept. The charter-party must therefore be wholly disregarded. As the first of January was a holiday, and the 2d was Sunday, there was but one additional day's lost time, namely, the 3d, before the vessel had got along-side her berth and commenced her discharge. This delay was caused by the ice, and not by the fact that the vessel grounded in the mud at low water. The ice arose from extreme and unusual cold,—a fortuitous accident of the elements, for which the owner of the cargo is not responsible, in the absence of specific lay days, and when liable only under the obligation to use reasonable diligence in receiving cargo. *Cross v. Beard*, 26 N. Y. 85; *Coombs v. Nolan*, *supra*; *The Mary E. Taber*, 1 Ben. 105; *The Glover*, 1 Brown, Adm. 166; *Fulton v. Blake*, 5 Biss. 371; *Kane v. Penney*, *supra*. After the 4th, one day, the

9th, being Sunday, there was no delay in discharging beyond the customary rate, which would allow eight working days.

Decree for the libelants for two days' demurrage, at the customary rate of 10 cents per ton per day, amounting to \$84.

THE ALPS.

(District Court, S. D. New York. December 28, 1883.)

1. SEAMEN'S WAGES—FINES—DISCIPLINE.

In modern maritime law fines upon seamen being a forfeiture of wages, *pro tanto*, cannot be imposed by the master by way of discipline and punishment for minor offenses, except as regulated and provided by statute.

2. SAME—MERCHANTS' SHIPPING ACT OF GREAT BRITAIN.

The merchants' shipping act of Great Britain provides that the shipping articles may contain such stipulations for fines as may be approved by the board of trade. When such approved stipulations are a part of the shipping articles signed by the seamen, fines may be imposed accordingly by the master.

3. SAME—SHIPPING ARTICLES.

Such fines, however, cannot be allowed in diminution of a seaman's wages except upon proof by the shipping articles that such stipulations were agreed upon.

4. SAME—SUMMARY PROCEEDINGS.

In summary actions for seamen's wages, the authority of the statute is sufficiently pleaded by a general reference to the law of Great Britain. The court is authorized by section 4597 of the Revised Statutes to inflict partial forfeiture of wages for disobedience of lawful commands.

5. SAME—CASE STATED.

Where a British seaman on a British vessel was fined by the master two dollars for foul language and quarrelsome conduct, and afterwards, on being required to listen to the reading of the entry on the log, imposing the fine, he refused to attend or listen, and was fined two dollars, being two days' pay for the last offense, *held* that, in the absence of proof of the shipping articles, the first fine could not be allowed or deducted from his wages, but that the last fine should be allowed by the court for the seaman's disobedience of a lawful command, under section 4597 of the Revised Statutes, as well as section 243 of the merchants' shipping act.

In Admiralty.

Hyland & Zabriskie, for libellant.

McDaniel & Souther, for claimants.

Brown, J. This is an action for seaman's wages upon an English ship, for 45 days, from June 12 to July 26, 1883. When the libellant was discharged at this port his wages for that period unpaid amounted to \$29.50, of which \$25.50 has been tendered and paid into the registry of the court. The difference of \$4 is a deduction by way of fines imposed by the master upon the seaman for alleged misconduct during the voyage; the first, a fine of \$2 for violent and abusive language to the steward in the hearing of the master, upon some controversy in reference to the food, about 12 days before the arrival of the vessel in this port. An entry was made in the log as follows:

"Thomas McCormick came aft and made use of profane and abusive language to the chief steward, also trying to provoke a quarrel by calling the steward 'a bald-headed son of a bitch;' for each of the above offenses he (Thomas McCormick) is liable to a fine of one dollar, which will be enforced."

The seaman was not notified of the fine or of the entry in the log until the day preceding the arrival of the vessel at this port. He was called to hear the entry read, when he refused to attend or to listen to it; and for this offense the further fine of two dollars was imposed by the master, and entered in the log. The libelant claims that the deduction of these fines cannot be allowed in this action, because the right to impose them is not properly pleaded nor properly proved. The answer, after alleging the profane, abusive, and quarrelsome conduct of the libelant, states that he was "thereupon fined by the master, as was his power and duty to do, pursuant to said shipping articles and to the laws of said kingdom." The previous part of the answer avers that the ship was a British ship, and that the libelant signed shipping articles, to which reference was made as a part of the answer. No copy of the shipping articles is annexed to the answer, nor have they been put in evidence. So far as the right to impose a fine rests upon a foreign statute, it must undoubtedly be properly pleaded, (*Holmes v. Broughton*, 10 Wend. 75; *Andrews v. Herriot*, 4 Cow. 525; *Ennis v. Smith*, 14 How. 400, 426; *Harris v. White*, 81 N. Y. 544;) but under the brief and somewhat informal pleadings allowed by the rules of this court in small causes (rules 164-175) this objection should not be entertained where, as in this case, the opposite party cannot possibly have been misled.

The authority to impose these fines rests upon section 149, sub. 7, of the merchants' shipping act of Great Britain, which permits the shipping articles to provide stipulations in regard to fines and other lawful punishments for misconduct, provided these stipulations have been sanctioned by the board of trade. Such stipulations thus sanctioned, and forming a part of the shipping articles, become obligatory upon the seamen shipping under them; but as these shipping articles have not been introduced in evidence, no authority for the deductions here claimed is proved. They cannot, without proof, be presumed to have existed in a given case, because the allowance of such stipulations is merely permissive, and is never obligatory. They may have formed a part of the articles, or they may not.

Aside from these stipulations, the first fine of \$2 cannot be sustained. Fines are *pro tanto* a forfeiture of wages, and under the modern maritime law, aside from statute, a forfeiture of wages is imposed only for misconduct of an aggravated character. By article 12 of the Laws of Oleron and article 24 of the Laws of Wisby, if one seaman "give another the lie, a fine of four deniers" was imposed; and if a mariner "impudently contradicted the master and gave him the lie, a fine of eight deniers." These small disciplinary fines have become obsolete with the currency in which they were imposed; and

under our statutes, (section 4596,) which is, in general, similar to section 243 of the British merchants' shipping act, no forfeiture of wages is incurred by quarrelsomeness or the use of foul language. The general maritime law empowers the master by means of other punishments to enforce proper discipline in these respects. Both of these statutes, however, authorize a forfeiture of wages for disobedience of lawful commands, in the discretion of the court, not exceeding two days' pay by the British statute, nor more than four days' pay by the statute of this country.

As the shipping articles have not been introduced in evidence, the first fine cannot be sustained; but the requirement on the twenty-sixth of July that the libellant attend to hear the entry in the log read, was a lawful command. Any such fines are by law required to be read to the seamen before entering the next port. Mer. Ship. Act, §§ 256, 244; Rev. St. § 4597. The libellant willfully disobeyed this last lawful command, for which the further penalty of two dollars was imposed, equal to two days' pay. I have very little doubt that the shipping articles, if produced, would show that the fines were lawfully imposed. The articles had been returned to England, and could not be obtained without some expense. Irrespective of them, the court may enforce, and in this case, I think, should enforce, a forfeiture of two days' pay for the libellant's disobedience to the lawful command to attend and hear the entry in the log read.

It is said that this court ought not to enforce fines imposed by an English statute not proved; but as the suit is within the discretion of this court to entertain, all parties being foreign, the libellant cannot complain that the court takes judicial notice of a statute of which there is no doubt.

Decree for the libellant for \$27.50, and his disbursements, without other costs.

THE QUAKER CITY.

(District Court, S. D. New York. January 10, 1884.)

COLLISION—OLD BOATS—REPAIRS—EXCESSIVE DEMANDS—COSTS.

Where a steam-tug maneuvering in a slip rubs against or strikes a barge moored at the wharf with unjustifiable force, she is chargeable with the damages properly attributable to her negligent act, though the boat struck was old and weak. In dealing with old boats, however, the repairs made should be closely scrutinized to prevent imposition, and nothing allowed for repairs beyond those made necessary by the blow. In this case but one-third of the claim allowed, and costs denied.

In Admiralty.

J. A. Hyland, for libellant.

Owen & Gray, for claimants.

BROWN, J. On May 18, 1881, the canal-boat Shady Run lay in the slip on the north side of the pier at the foot of Fortieth street, North river, discharging a cargo of ice. Her bows lay to the westward and about 12 feet inside of the end of the pier. At about 7 o'clock of that morning the steam-tug Quaker City, with the canal-boat L. D. Cummings lashed upon her starboard side and projecting somewhat ahead of the tug, came down the river and into the slip for the purpose of landing her along-side and outside of the boat next to the Shady Run. Owing to the shallow water, as stated by her pilot, the tug and tow not obeying the helm as usual, the stem of the Cummings struck the starboard bow of the Shady Run and inflicted some damage, on account of which this libel was filed. The claimants do not deny that the Cummings hit the Shady Run, but allege that it was but a slight blow or rub, such as is usual in the landing of canal-boats, and that the damage to the Shady Run arose from her rotten and unseaworthy condition.

Without going into the details of the evidence, there are various circumstances which satisfy me that the blow was one of more violence than the claimants' witnesses acknowledge, and that the claimants must be held responsible for the damages properly arising therefrom. The chief difficulty arises from the contradictory evidence in regard to the sound or rotten condition of the Shady Run. Complaint being made the same day by the owner of the canal-boat at the claimants' office, their agent and the captain of the Quaker City, on the afternoon of the same day, examined the bows of the Shady Run to ascertain the damage. They testify that no damage was visible on the outside; that on going down the hatch, inside the boat, with the owner, one beam was found loose or broken, and that the captain, on taking hold of it with the hand, pulled off a handful of rotten wood and showed it to the owner. The latter denies that any such circumstance occurred, or that the timbers were at all unsound or rotten. The evidence on the part of the canal-boat, including her owner and captain, and the carpenter who did the repairs on her, shows that from six to seven planks on her starboard bow were broken, each about six feet long, and one plank 16 feet long. The carpenter states that the repairs which he did were to renew the plank specified; to put in one new timber, about six or eight feet in length; to brace two adjoining ones; and he testified that the timber taken out was sound. He also put in a new bumper along the bow, and one new plank upon the deck.

Upon the evidence it is very difficult to form any satisfactory conclusion with regard to the seaworthy condition of the Shady Run. The fact that she brought a considerable cargo of ice, and without much leakage, if the testimony is to be believed, has considerable force. I can only repeat what was said in the recent case of *The Syracuse*, 18 FED. REP. 828, that the claimants should have procured further evidence than that of interested witnesses, if they intended

to rely for their defense upon the fact that the Shady Run was so rotten and unseaworthy as not to be entitled to any recovery. Having, as I must find, hit her bows with a blow more violent than justifiable in the ordinary handling of boats, whether new or old, I think she must be held answerable for the damage properly attributable to that negligent act, though the boat were old or weak. *The Granite State*, 3 Wall. 310. *The Syracuse*, *supra*.

The evidence satisfies me, however, that the repairs in this case went far beyond the natural effects of such a blow, even if the canal-boat was not staunch enough to resist ordinary handling. The bill of items of the repairs done shows nearly 800 feet of timber and plank used in these repairs, with numerous other items in proportion. This, as appears from the examination of the carpenter, was sufficient for many times the amount necessary to replace and repair the broken and injured parts.

The captain and agent of the claimants testify that on visiting the ship-yard while the repairs were going on they found the whole bow of the canal-boat taken out and in course of repair. This is denied by the carpenter and the owner of the boat. I am entirely satisfied from the evidence that the repairs were very greatly in excess of the injury done. The evidence is perhaps insufficient to determine exactly the proper amount. I shall allow provisionally what I gather from the present evidence, viz.: one-third of the bill of repairs; one-third of the demurrage claimed; one-half the amount claimed for the broken lines; and the whole of the bills for towage and dockage, as they would have been necessary in any event. These together amount, with interest to date, to \$72.20, for which a decree may be entered, but without costs, as the amount of repairs claimed is evidence of bad faith on the part of the libellant; except, however, that if either party is dissatisfied with my estimate of the damages, they may take an order of reference to compute the amount, at the risk of paying the expenses of the reference if not successful in obtaining a more favorable result.

GRONN v. WOODRUFF and others.

(District Court, S. D. New York. January 8, 1884.)

1. SHIPPING—ASSIGNMENT OF BILL OF LADING—CHARTER-PARTY.

A merchant purchasing goods on board a vessel after arrival, and taking an assignment of the bill of lading, is bound by its terms, but not by the terms of the charter-party, any further than it is adopted by the bill of lading.

2. SAME—BILL OF LADING—DEMURRAGE—REASONABLE TIME.

Where the bill of lading provides no stipulated days for the discharge, the merchant is bound only to reasonable diligence, according to the custom of the port.

3. SAME—REMOVAL OF VESSEL FROM BERTH.

Where a merchant procures the removal of a vessel from a berth already secured to another, for his own benefit, pays the cost of removal, and procures the cargo to be discharged within the average time allowed by the custom of the port from the day when she was first ready to discharge, *held*, no demurrage can be claimed.

In Admiralty.

Butler, Stillman & Hubbard, for libellant.

Beebe, Wilcox & Hobbs, for respondents.

BROWN, J. The bark *Spess* arrived at New York on January 3, 1881, with 265 tons of salt in ballast from Lisbon, upon a bill of lading which was transferred to the respondents. They entered the salt at the custom-house, paid the freight, and directed the vessel to Atlantic docks, where the vessel arrived on January 4th, and gave notice of her readiness to discharge on the 5th. On that day, at the respondents' request, the master consented to go to Twenty-third street and unload, where she was taken at the respondents' expense, and arrived at about 4 P. M. One wagon load was delivered on the evening of the 6th, and the discharge was ended early on the 15th, and might have been completed had the ship desired on the evening of the 14th. The bill of lading provided no stipulated days for the discharge, and it referred to the charter-party only as regards the payment of freight. The provisions of the charter-party, therefore, as respects the rate of delivery, did not bind the respondents. *112 Sticks of Timber*, 8 Ben. 214; *Kerford v. Mondel*, 5 Hurl. & N. Exch. 931. It was proved that 1,000 bushels, or 33 tons, per day was a reasonable and customary rate of discharge. This would leave eight working days for the discharge of this cargo.

Although the vessel had given notice that she would be ready to discharge on the 5th, I think the evidence shows that she did not get a permit, or tubs, and did not get ready, so that she could actually commence the discharge, before the 6th; and it does not appear that the removal from Atlantic docks to Twenty-third street, which occupied only some three hours, made any difference in her want of preparation. But even if the vessel had been ready upon the 5th, deducting Sunday, and the rainy days in the mean time, only eight working days were consumed in the discharge. Although on several of the working days considerably more than 33 tons per day were in fact discharged, I think the merchant cannot be held liable, in the absence of any stipulated lay days or agreement for dispatch, provided he gets the whole cargo discharged within the time which custom allows. As this time was not exceeded, the libel must be dismissed, with costs.

BOYD v. GILL and others.

CUTTER v. WHITTIER and others.

NOTT v. CLEWS and others.

PERKINS v. DENNIS and others.

(Circuit Court, S. D. New York. December 14, 1883.)

1 REMOVAL OF CAUSE—CONTROVERSY WHOLLY BETWEEN CITIZENS OF DIFFERENT STATES.

A controversy is not the same thing as a cause of action; and a suit against two persons jointly does not, merely because it might have been brought against either separately, involve a controversy wholly between the plaintiff and one of them, within the meaning of the act authorizing the removal of a suit to the federal courts where there is a controversy wholly between citizens of different states.

2. SAME—SEPARATE CONTROVERSIES.

When, however, the separate causes of action could both be pursued against different defendants, and settled independently of each other, the suit, even though it contain a joint cause of action also, involves separate controversies and falls within the term of the act.

3. SAME—BILL AGAINST FRAUDULENT TRUSTEES.

A cause of action against several trustees for the fraudulent misappropriation of trust funds, being *ex delicto* and involving, therefore, no right of contribution between the defendants, may in equity as well as at law be pursued either jointly or severally; and a bill in equity founded upon such a claim, and demanding a joint and several accounting by the trustees, involves such a separate controversy with each defendant that if one of the defendants is a non-resident the cause is removable.

4. SAME—FILING OF PETITION BEFORE TRIAL.

The trial of a cause upon demurrer is a trial within the meaning of the act requiring a petition for the removal of a cause to be filed before the trial thereof.

On Motion to Remand.

H. F. Averill and Geo. F. Betts, for plaintiff in each case.

Sewell, Pierce & Sheldon, for defendant Plumb.

Sherman & Sterling, for defendant Whittier.

Abbot Bros., for defendant Clews.

Arnoux, Ritch & Woodford, for defendant Dewing.

Before WALLACE and BROWN, JJ.

WALLACE, J. These cases and the case of *Langdon v. Fogg*,¹ decided by Judge BROWN, but in which he ordered a reargument, have been heard together, the questions being substantially identical, upon motions to remand the suits to the state court. In each case the action was brought in the state court by a resident plaintiff against a non-resident defendant and several resident defendants, and was removed to this court upon the petition of the non-resident defend-

¹18 FED. REP. 5.
v.19, No.3—10

ant. The right to a removal is challenged upon the ground that there is not a controversy in the suit which is wholly between the plaintiff and the non-resident defendant, and which can be fully determined between them, within the meaning of the second section of the removal act of March 3, 1875.

There are some immaterial differences in the allegations of the bills of complaint in the several cases, but the bill in each may be fairly treated as one brought by a stockholder in a mining corporation to enforce a cause of action which exists in favor of the corporation against the directors for a fraudulent appropriation of its assets, but which the corporation does not assert because it is controlled by the unfaithful directors, and the directors and corporation are consequently joined as defendants. The relief sought is that the individual defendants account jointly and severally concerning the profits they have made by the misappropriation of the corporate property, and be adjudged to pay the amount found due to the corporation into court for the benefit of the stockholders. This being the cause of action disclosed by the bill, it will be treated as one upon which a separate action could be maintained as between the plaintiff and the non-resident defendant. The rule may now be deemed established that where a *cestui que trust* seeks in equity to charge trustees with personal liability for their fraudulent acts, he may join all who have participated, or proceed against one or more of them severally at his election. The right of action in such a case arises *ex delicto*, and in equity as well as at law the tort may be treated as several as well as joint. *Heath v. Erie Ry. Co.* 8 Blatchf. 347; *May v. Selby*, 1 Younge & C. Ch. 235; *Franco v. Franco*, 3 Ves. 75; *Wilkinson v. Parry*, 4 Russ. 272; *Atty. Gen. v. Wilson*, 4 Lond. Jur. 1174. A proceeding against trustees for a fraudulent breach of trust is an exception to the rule that in a suit against trustees all of them must be made parties. *Cunningham v. Pell*, 5 Paige, 607. The reason is obvious. A trustee may insist that his co-trustees be joined, when he is sued for a breach of duty in which the other trustees are involved, because he is entitled to contribution. In cases of breach of trust not involving actual fraud, contribution may be enforced by trustees, as between themselves,—*Hill, Trust*. 814 and notes, (4th Amer. Ed.);—but no right of contribution exists where the demand sought to be enforced is *ex delicto*. *Ellis v. Peck*, 2 Johns. Ch. 131; *Miller v. Fenton*, 11 Paige, 18. The cause of action disclosed by the bill is therefore one capable of being determined as between the plaintiff and the non-resident defendant without the presence of the other defendants. The plaintiff, at his election, can dismiss his bill as against all the other defendants at any stage of the action and proceed against the non-resident defendant alone, and obtain against him the complete relief to which he would be entitled if the other defendants were joined.

The question, then, is whether the act of 1875 gives the right of removal whenever there is a cause of action in the suit between a

resident party on the one side and a non-resident party on the other, upon which a several recovery may be had against the latter, or whether the right exists only when there is a separate and distinct controversy to which all the substantial parties on one side are residents, and all those upon the other are non-residents. The language of the act declares that when in "any suit * * * between citizens of different states * * * there shall be a controversy which is wholly between citizens of different states, and which can be fully determined as between them, then either one or more of the plaintiffs or defendants * * * may remove," etc. Two diverse views of the meaning of this language are indicated by the adjudications of the federal courts. In *Peterson v. Chapman*, 13 Blatchf. 395, the action was one of trover, in which the plaintiff was a citizen of New York, and the defendants were one a citizen of New York, and one a citizen of Connecticut. It was held that, although the cause of action was such that the suit could be maintained by the plaintiff against either defendant alone, it was not a removable suit, because all the parties to the controversy were not residents upon the one side and non-residents upon the other; and that the plaintiff having elected to proceed against all jointly, the case disclosed but a single controversy, and that was one which could be fully determined only between all the parties to the suit. This decision was approved and followed by other judges in this circuit in *Sawyer v. Switzerland Ins. Co.* 14 Blatchf. 451, and *Van Brunt v. Corbin*, Id. 496. The latter case was an action of ejectment, and one, therefore, in which the plaintiff at his election might have proceeded against the defendants severally instead of jointly. The more recent case of *Tuedt v. Carson*, 13 FED. REP. 358, in the eighth circuit, is to the same effect. That was an action brought by the plaintiff against several defendants for a tort. Some of the defendants were residents of the same state with the plaintiff, and others were residents of a different state. It was held not to be such a separable controversy that the non-resident defendants could remove the case, although the plaintiff could at his election have proceeded against them alone. On the other hand, *Clark v. Chicago, etc., Ry. Co.* 11 FED. REP. 355; *Kerling v. Cotzhausen*, 16 FED. REP. 705; *People ex rel. v. Illinois Cent. R. Co.* Id. 881, are authorities for the broad proposition that whenever the suit is founded on a cause of action upon which, at the election of the plaintiff, the defendants might have been sued severally, a non-resident can remove the suit, although the other defendants with whom he is sued jointly are residents of the same state as the plaintiff.

It is urged that, since the decisions in this circuit referred to, the supreme court has considered the construction of the second clause of the second section of the act of March 3, 1875, and in the light of its decision in *Barney v. Latham*, 108 U. S. 205, the former judgments of this court should be reconsidered, and it should now be decided that whenever in a suit between a resident plaintiff and several defendants,

one only of whom is a non-resident, there is a cause of action which might be fully determined as between the plaintiff and the non-resident defendant, if the other defendants were not parties, the suit is removable. *Barney v. Latham* does not seem to sanction any such contention. Some misapprehension of that decision may have arisen by overlooking the distinction between a separable cause of action and a separate or separable controversy. The cases in the seventh and eighth circuits seem to interpret that decision as holding that whenever a separate action could have been maintained by the plaintiff upon the cause of action sued upon against one of the several defendants, as to such defendant there is a separate or separable controversy in the suit. In *Barney v. Latham* there were two separate and distinct controversies, as to one of which the requisite diversity of citizenship existed between all the parties to it, plaintiff and defendant, to authorize a removal of the suit. Speaking of this controversy the court, through Mr. Justice HARLAN, say that "such a controversy does not cease to be one wholly between the plaintiffs and the defendants because the former, for their own convenience, choose to embody in their complaint a distinct controversy between themselves and other defendants." That decision was commented on in the subsequent case of *Hyde v. Ruble*, 104 U. S. 407, and its result is tersely and clearly stated by the chief justice as follows:

"To entitle a party to removal under this clause there must exist in the suit a separate and distinct cause of action, in respect to which all the necessary parties on one side are citizens of different states from those on the other. Thus, in *Barney v. Latham*, two separate and distinct controversies were directly involved,—one, as to the lands held by the Winona & St. Peter Land Company, in respect to which the land company was the only necessary party on one side, and the plaintiff on the other; and the second, as to the moneys collected from the sales of lands before the land company was formed, as to which only the natural persons named as defendants were the necessary party on the one side and the plaintiffs on the other; one was a controversy about the land, and the other about the money. Separate suits, each distinct in itself, might have been properly brought on these two separate causes of action, and complete relief afforded in such suit as to the particular controversy involved. In that about the land the land company would have been the only necessary defendant, and in that about the money the natural persons need only have been brought in. In that about the land there could not have been a removal because the parties on both sides would have been citizens of the same state; while in that about the money there could have been, as the plaintiffs would all be citizens of one state, while the defendants would all be citizens of another."

It does not necessarily follow that a controversy is wholly between a plaintiff and each one of several defendants, and can be fully determined as between them, merely because such a controversy might have been presented if the plaintiff had elected to present it in that form. The controversy in a suit is the one which is actually presented, not the one that might have been. It is not wholly between the plaintiff and one of the defendants because it might have been if the plaintiff had so elected. Nor can a controversy be fully deter-

mined between a plaintiff and one of the defendants when in the form and substance which it has assumed the plaintiff insists, and has a right to insist, that so far as he is concerned it shall be determined as to both of the defendants. The controversy is the claim in form and substance as it is presented for determination; and if a joint recovery against several defendants is claimed upon a cause of action which justifies a joint recovery, the controversy is between the plaintiff and all the defendants against whom the claim is asserted. The opinions of Judge JOHNSON in *Peterson v. Chapman*, and of Judge TREAT in *Tuedt v. Carson*, are replete with satisfactory reasons against such a construction of the removal act as is insisted upon. There seem to be no controlling reasons, therefore, for receding from the former decisions in this circuit.

It remains to consider whether, under the bill here, which seeks a decree that the defendants account severally concerning the gains and profits received by each through the fraudulent acts complained of, there is not a controversy which is separate as between the plaintiff and each defendant, and which can be fully determined as between them. If the defendant has elected to pursue each defendant separately, and the cause of action disclosed by the bill justifies him in doing so, it would seem that the suit presents a separate controversy as to that defendant notwithstanding there is also a controversy between the plaintiff and all the defendants jointly. If this separate controversy can be fully determined between the plaintiff and defendant without the presence of the other defendants, the language of the removal act is satisfied. That it can be thus determined has already been shown, because the other trustees are not necessary parties to a suit brought against one for a fraudulent breach of trust. There is, therefore, a distinct controversy here between the plaintiff and each defendant. Some of the transactions assailed by the bill are not joint transactions on the part of the defendants. All of the defendants may not be liable to the same extent. The prayer as to this branch of the bill is against each defendant for a several accounting, and that is only necessary upon the theory that some of them are liable for a different amount than others.

It is no answer to the suggestion that the suit presents a separate and distinct controversy as between the plaintiff and each defendant, to assert that the decree obtained will be a single decree as to all the defendants. The same thing may be said of every decree in suits in equity, and could have been said in *Barney v. Latham*. For these reasons the actions were properly removed.

In the case of *Nott v. Clews* the additional point is made that the petition for removal was not filed by the removing defendant before the trial of the cause. As to four of the defendants separate demurrers were interposed and brought to a hearing. The demurrers were overruled, but leave was given to the defendants to answer upon payment of costs of the demurrers within 20 days. As the removal was

at the instance of one of the defendants who demurred, it is not material that when the demurrer was heard service of process had not been made on some others of the parties named as defendants. If the cause was not in a condition to be heard on demurrer, the objection should have been taken in time. As it is, after the removing defendant has elected to treat the action as severed, he cannot now be heard to say that the hearing and decision upon the demurrer is to go for nothing. The real question is whether the hearing and decision of a cause upon a demurrer is a trial of the cause within the meaning of the removal act. This precise question has been decided adversely to the defendant by Judge BENEDICT in *Langdon v. Fish*, and it was there held that such a hearing was a trial which precluded the subsequent removal of the suit. It was not held in that case that the hearing upon a special demurrer, or one which is addressed to merely formal objections in a bill or complaint, is a trial within the contemplation of the act. But if a defendant chooses to have the action tried upon the pleadings, instead of upon issues of fact, it is his right to do so, and the decision is a final determination of the action, unless in the discretion of the court a new pleading is permitted. By the Code of this state, and a large number of other states, the hearing of a demurrer is the trial of an issue of law. The term "trial" has thus acquired a more enlarged signification than it possessed when Blackstone defined it as "the examination of the matter of fact in issue in a cause." *Babbitt v. Clark*, 103 U. S. 606, is authority for the proposition that the trial of a cause upon an issue of law is a trial which will preclude the removal of the suit afterwards. In this case, therefore, the motion to remand is granted; in the other cases it is denied.

BROWN, J., concurs in the results.

SHARP v. WHITESIDE and others.¹

WHITESIDE v. SHARP.¹

(Circuit Court, E. D. Tennessee, S. D. July 4, 1883.)

REMOVAL OF CAUSE—CITIZENSHIP—SEPARATE CONTROVERSY.

Where the question to be decided in a cause is the right of a plaintiff to carry passengers into a certain park owned by one of the defendants, the other defendants being the lessees of such park, a separate controversy exists between the lessor and plaintiff, and if they are citizens of different states the cause is removable under the second section of the act of 1876.

In Equity

¹ See S. C., *post*, 156.

Lewis Shepherd, Key & Richmond, and Clarke & Snodgrass, for Sharp. W. H. Dewitt and Wheeler & Marshall, for Whiteside.

KEY, J. The first question to be determined in this case is whether the cause has been removed from the chancery court of the state to the circuit court of the United States. If it has been removed there other questions must be considered. If not, no order can be made or step taken except to remit the case to the chancery court of the state. It is conceded in argument that if this cause has been removed, or if it be removable, it is done, or it must be done, under the second clause of the second section of the act of 1875, declaring and defining the jurisdiction of the circuit courts of the United States. There are other defendants to the original cause, and all the defendants, except Florence Whiteside, are residents and citizens of the same state as L. J. Sharp, the complainant in the original bill. It is not denied that Florence Whiteside is a citizen of a different state from that of complainant, or that the allegations of her petition for removal, or the bond executed under it, are not in due form, or that the amount in controversy is sufficient, or the application made in time. The contention on this point is whether the controversy is so entirely between Mr. Sharp and Miss Whiteside that it can be fully determined between them. There is no question, for the fact is admitted, that Miss Whiteside has title to the turnpike road and the park described in the pleadings. The controversy is whether Sharp as a livery-stable man, has the right to carry his passengers into the park to which Miss Whiteside has title. In other words, is her title, in its character, servient to a right on the part of Sharp to enter the inclosed park against her consent. The alleged right of the other defendants is that they have leased the turnpike road and park from Miss Whiteside for the term of five years.

It appears to me that whether her co-defendants have made such a contract of lease or not, has no effect upon the point in controversy between the chief parties. Anything in regard to the lease is subordinate to and dependent upon the decision of the controversy between the principal parties. If Sharp has the right to enter the park, as he insists, he has it against the lessor and lessees alike. If he has no such right against the lessor he has not against the lessees. There is no complication of the question in controversy between the parties by the joinder of the defendants, and the case between the principals can as well be tried without Miss Whiteside's co-defendants as with them. Their controversy is perfectly, completely, and distinctly separable from that with the other defendants, in my opinion. It must follow, therefore, that the case is removable, and that it was removed under the petition of Miss Whiteside. This being so, the last bill, or amended bill, filed by Sharp was without any authority, force, or effect, and all the orders of the chancery court, or chancellor under it, are void. That portion of the record in the chancery court is out of the case. It appears, also, that upon the

same day upon which the petition for removal was presented, the petitioner took some other steps in the cause, upon which no action was taken by the court. I think these steps must also be taken as having no force or effect, as either having been taken after the petition was presented, or completely annulled and superseded by it.

In this state of the pleadings, and the record sent from the state court, I think it best to give the parties opportunity to perfect and present, if they desire to do so, the case it appears to have been their purpose to have done, and in doing so I do not mean that they must present the same or even similar papers or pleadings, but such as they may deem proper and necessary to present the issues raised, or to be raised. Until opportunity has been given to do this I think it best to postpone action on the application of Miss Whiteside for an injunction, so that we may have the whole case in a tangible and perfect shape. The exception made by Sharp's solicitors in this state of the case will be without force.

Leave is now given to Miss Whiteside to file the bill, she having given bond and surety for costs, but no new process and copy need issue.

WALSER and others v. MEMPHIS, C. & N. W. Ry. Co.¹

(Circuit Court, E. D. Missouri. December 3, 1883.)

1. JOINDER OF PARTIES—CORPORATIONS.

A corporation is a necessary party defendant to a bill to enforce a judgment against it by compelling contribution from its stockholders.

2. JURISDICTION—SUIT NOT WHOLLY BETWEEN CITIZENS OF DIFFERENT STATES.

Where there are two or more plaintiffs and two or more defendants, and one of the plaintiffs and one of the defendants are citizens of the same state, this court has no jurisdiction.

3. SAME—REMOVAL OF CAUSES FROM STATE TO FEDERAL COURT—AMENDMENTS.

Where a case has been brought here from a state court, no change of pleadings or in the relationship of the parties, by amendments in this court, can give jurisdiction not disclosed by original proceedings in the state court.

Motion to remand, on the ground that this court has not jurisdiction of this case and the same was illegally removed because the claims and demands of the complainants are several and not joint, and some of them do not exceed the sum of \$500, and because the controversy herein is not wholly between citizens of different states, but on the contrary is between citizens of the same state, and the controversy cannot be severed. For a report of the opinion of the court on a former motion to remand, and a fuller statement of facts, see 6 FED. REP. 797.

Joseph Shippen and John P. Ellis, for motion.

Broadhead, Slayback & Hauessler, for petitioning defendant.

¹ Reported by Benj. F. Rex, Esq., of the St. Louis bar.

TREAT, J. A similar motion was made and decided by this court at the March term, 1881, by Judge McCrory, in which I concurred. Since, then many proceedings and orders have been improvidently had. It may be that in the recent case of *Barney v. Latham*, 103 U. S. 205, it was supposed that opposite views to those expressed by this court had been established. It seems, however, that after the order of this court to remand the case to the state court and an appeal allowed, a subsequent order was entered vacating said appeal, and leaving open the motion to remand for further consideration. The right to vacate said appeal is questionable. Since that order, an amended bill, a demurrer, and a new motion to remand have been filed. The right to remove the cause was dependent solely upon the condition thereof at the time of the motion made in the state court; and no change of pleading or relationship of the parties, by amendments thereafter in this court, could give jurisdiction not disclosed by the original proceedings in the state court. The opinion by Judge McCrory, in 1881, has been fully confirmed by the many decisions of the United States supreme court since rendered. It is obvious, therefore, that the cause must be remanded, and all orders made since the original order to remand vacated.

An order will be entered accordingly.

DINSMORE v. CENTRAL R. Co. and others.

(Circuit Court, D. New Jersey. December 7, 1883.)

1. JURISDICTION—COLLUSIVE SUIT—OBJECTION, HOW RAISED.

The objection to a bill that it was not exhibited in good faith, but collusively and in the interests of others, goes to the jurisdiction of the court, and should be raised by plea in abatement and not by answer.

2. SAME—EVIDENCE NOT SUFFICIENT TO ESTABLISH COLLUSION.

The fact that some of the officials of a rival corporation, with which complainant has close business relations, have been friendly and active in giving him aid in the preparation of his case, will not sustain a charge of bad faith and render his suit collusive.

3. SAME—PRELIMINARY INJUNCTION REFUSED.

Upon examination of the bill, answer, and affidavits, no circumstances entitling complainant to a preliminary injunction appearing to exist, the motion, therefore, is denied.

In Equity. Motion for preliminary injunction.

Roscoe Conkling, Clarence A. Seward, Barker Grunmere, and Edward T. Green, for plaintiff.

1. Neither the act of March 3, 1875, nor the common law gives this court or any court jurisdiction of a suit which is simulated and fictitious, or in which the *reus* on either side is not the real party in interest. Such suits are called "collusive," (*Gardner v. Goodyear*,

3 O. G. 295,) and when the collusion is proved the case is summarily dismissed as not within the proper jurisdiction of the court. *American M. P. Co. v. Vail*, 15 Blatchf. 315; *Cleveland v. Chamberlain*, 1 Black, 426; *Lord v. Veazie*, 8 How. 254.

2. The allegation of collusion—that is, the want of real interest in one of the actors—is an allegation that the court has no jurisdiction by reason of the character in which one of the parties sues or defends. This exception to the jurisdiction is called by the courts a “personal” exception; asserts that the position of a litigant is assumed, and that the party is not an honest *reus* or actor. *Forrest v. Manchester, etc., Ry. Co.* 4 De G., F. & J. 131; *Colman v. Eastern Cos. Ry. Co.* 10 Beav. 1; *Salisbury v. Metrop. Ry. Co.* 38 L. J. Ch. 251.

3. That a suit is collusive must be objected to by plea in abatement, and if a defendant answers upon the merits he waives the objection, and cannot thereafter contest the jurisdiction. Story, Eq. Pl. § 721; Daniell, Ch. Pr. (15th Ed.) 630; *Underhill v. Van Cortlandt*, 2 Johns. Ch. 339, 367; *Conard v. Atlantic Ins. Co.* 1 Pet. 386, 450; *Dodge v. Perkins*, 4 Mason, 435; *D’Wolf v. Rabaud*, 1 Pet. 476; *Wood v. Mann*, 1 Sumn. 581; *Evans v. Gee*, 11 Pet. 85; *Rhode Island v. Massachusetts*, 12 Pet. 719; *Nesmith v. Calvert*, 1 Wood. & M. 37; *Brown v. Noyes*, 2 Wood. & M. 81; *Webb v. Powers*, Id. 510; *Sims v. Hundley*, 6 How. 1; *Bailey v. Dozier*, Id. 30; *Smith v. Kernochen*, 7 How. 216; *Sheppard v. Graves*, 14 How. 509; *Wickliffe v. Owings*, 17 How. 51; *Jones v. League*, 18 How. 76; *Dred Scott v. Sandford*, 19 How. 397; *Whyte v. Gibbes*, 20 How. 542; *De Sobry v. Nicholson*, 3 Wall. 423; *Van Antwerp v. Hulburd*, 7 Blatchf. 427; *Pond v. Vermont V. R. Co.* 12 Blatchf. 297; *Gause v. Clarksville*, 1 FED. REP. 355; *Kern v. Huidekoper*, 103 U. S. 485; *Williams v. Nottawa*, 104 U. S. 211; Equity Rule, 39; *Livingston’s Ex’r v. Story*, 11 Pet. 351, 393.

B. Williamson, George M. Robeson, Franklin B. Gowen, James E. Gowen, A. C. Richey, and G. R. Kaercher, for defendants.

Nixon, J. Two questions are presented for the consideration of the court—the first having reference to the *bona fide* character of the suit, and the second, to the propriety of the interference of the court, under the present aspect of the case, by ordering a preliminary injunction.

1. The answer of the defendants, after responding to the material allegations of the bill, charges that the bill of complaint was not exhibited in good faith, or for the honest purpose of asserting the complainant’s rights as a stockholder of the New Jersey Central Railroad Company, but in the interests of a rival company to the Philadelphia & Reading and the New Jersey Central roads. This is an exception personal to the complainant, and going to the jurisdiction of the court, and if introduced into the pleadings for contestation, it should have been by a plea in abatement. It has no proper place in the answer, and is always regarded as waived after the defendants have answered upon the merits. But as a very large amount of testimony has been

taken upon the subject, I have deemed it best to lay aside all technical objections to the informal manner in which the matter has been presented, and to ascertain, if possible, whether the defendants have sustained their allegations by their proofs. After a careful examination of the testimony furnished, I am of the opinion they have not sustained them. The most that has been done is to show that some of the officials of a rival company, with which the complainant has close business relations, have been friendly and active in giving him aid in the preparation of his case. I have never understood that a lawsuit is of such an exclusive and sacred character that parties may not have the sympathies and accept the aid of associates and friends in carrying it on without subjecting themselves to the charge of collusion.

2. With regard to the second point, the learned counsel, on the argument, took even a wider range than the testimony, and much time was spent in the discussion of questions that more appropriately belong to the final hearing. I do not propose to follow them now. Without intending to intimate any opinion on the merits of the controversy, it is sufficient for my present purpose to say, that, looking at the bill, answer, and affidavits, which furnish to the court the evidence on which to act on the question of a preliminary injunction, I find no circumstances existing and no facts developed which, in my judgment, authorize me to interfere, at this stage of the proceedings, by ordering such an injunction to issue.

The motion is therefore denied, but without prejudice to the complainant to renew it if any subsequent acts of the defendants, before final hearing, should render its renewal necessary or proper.

FERRY v. TOWN OF WESTFIELD.

(Circuit Court, W. D. Wisconsin. December Term, 1883.)

JURISDICTION—CITIZENSHIP.

Ferry v. Town of Merrimack, 18 FED. REP. 657, followed, and cause remanded to state court.

Decision Remanding Cause to the circuit court of Sauk county.

James G. Flanders, complainant's solicitor.

H. W. Chynoweth, defendant's solicitor.

BUNN, J. This cause was argued and submitted upon general demurrer to the complainant's bill. But in the examination of the case there appears upon the face of the bill a certain defect of jurisdiction, which will render it unnecessary to remand the cause to the state court. The suit is brought by William F. Ferry, a citizen of Illinois, against the defendant, a citizen of Wisconsin, upon a claim arising upon a

non-negotiable contract between the defendant town and the Chicago & Northwestern Railway Company, also a citizen of Wisconsin, and who assigned the claim to the plaintiff. The plaintiff is therefore suing upon a contract, his title to which is derived through a formal written assignment from a resident of the same state with the defendant, and who was itself incorporated by virtue of section 1 of the act of March 3, 1875, to maintain a suit thereon in the federal court.

The question was before us and decided in the case of the same plaintiff against the town of Merrimack, at the present term of this court, where the same defect appeared in the record. And we beg leave to refer to that decision for the grounds of the opinion that this court cannot take cognizance of such a case, whether originally brought here, or begun in the state court and afterwards removed to this court on the application of the plaintiff.

The case will be remanded to the circuit court of Sauk county, Wisconsin, from where it came to this court.

HARLAN, J., concurs.

SHARP v. WHITESIDE and others.

WHITESIDE v. SHARP.¹

(Circuit Court, E. D. Tennessee, S. D. October 1, 1883.)

1. JURISDICTION—REMOVAL OF CAUSE—DISSOLVING PRELIMINARY INJUNCTION GRANTED IN STATE COURT.

A circuit court of the United States has no revisory power over the chancery court of a state, but when, before removal of a cause from the state court, an *ex parte* preliminary injunction has been granted, it may in a proper case dissolve such injunction.

2. PRIVATE PROPERTY USED FOR PARK—CONTRACT TO EXCLUDE PERSONS NOT BROUGHT BY CERTAIN PARTY—TAX ON PROFITS—INJUNCTION.

The owner of what is known as the Point of Lookout mountain, a favorite resort on account of the extended view therefrom, who was also the owner of a chartered turnpike which was a regular toll road leading up the mountain nearly to the Point, inclosed her ground as a park and charged an entrance fee from visitors. Subsequently she entered into a contract with a certain party, by the terms of which he was to carry all passengers over her turnpike instead of over another route leading to the Point, and was to have the exclusive privilege of bringing or conveying persons into the park. Complainant, who was engaged principally in the business of carrying visitors to and from the park, sought to enjoin the owner from refusing admission thereto to such parties carried there by him as might tender the usual admission fee. *Held*, that the fact that the park had long been a popular resort for sight-seers, that an admission fee was charged, and that a tax was imposed by the state on the owner for the privilege of keeping a park, did not render the use to which the property was devoted a public use, or change the character of the property, and that the court could not invade the rights of the owner and enjoin her

¹See S. C., *ante*, 150.

from carrying out the terms of her contract. *Held, further*, that if she had attempted to interfere with any of the rights of complainant in the use of the chartered turnpike such interference would not have been tolerated.

3. SAME—TAXATION BY STATE—EFFECT OF, ON CHARACTER OR BUSINESS.

That the state imposes a tax on the privilege of deriving a profit from the use of property in a certain manner does not render such use public, but rather recognizes the fact that the property is private, and subject to the control of its owner.

Motion to Modify an Injunction granted in favor of complainant Sharp in the state court, and to grant an injunction in favor of Whiteside, under her cross and supplemental bill.

Lewis Shepherd, Key & Richmond, and Clarke & Snodgrass, for Sharp.

W. H. Dewitt and Wheeler & Marshall, for Whiteside.

KEY, J. A short time since it was held that this cause had been removed to the circuit court of the United States, and the parties were allowed to perfect their pleadings. The injunctions in the cause have hitherto been granted in the state court, and a motion to modify or dissolve the injunction granted complainant Sharp under the original bill made by respondent Whiteside in the state court, has been denied by that court. It is insisted that this court has no power or right to review, change, or modify the action of the state court as to this injunction; that the question is *res judicata*. If the decree of the chancellor, under a proper condition of the cause, had been for a perpetual injunction, the truth of the position would be undeniable. This court has no revisory power over the chancery court. It cannot reverse or change its judgments or decrees. The case stands here just as it would stand had it remained in the chancery court. The authority or power of this court over the case is no greater or less than that of the chancery court would be had this court never assumed jurisdiction of the cause. The injunction referred to was not perpetual or permanent, and does not profess to be; it is temporary and preliminary. The chancellor could have dissolved or modified it, whenever, in his opinion, equity demanded it. As the cause proceeded, the time must come when this preliminary injunction would have performed its office, and would have been swallowed by one perpetual in its character, or dissolved for want of merit. It has not the substantial elements or permanent qualities belonging to stable and unyielding judgments. If the chancellor had at any time concluded that the injunction had been improvidently granted, or had the subsequent proceedings developed to his satisfaction that the complainant was not entitled to the injunctive interference of the court, he could have modified or dissolved his injunction without awaiting the final hearing of the cause. Preliminary injunctions in the courts of this state are generally and essentially *ex parte*, and the fiat awarding them is not a decree. It is an order, and the fact that, upon the coming in of the answer, a motion to dissolve was overruled, does not make the order any more a decree; it simply in-

dicates that so far the court is satisfied with the injunction. It gives no decided assurance that it shall be permanent and perpetual. The same discretion and power the chancellor would have in his court I have in this.

This court would hesitate before it would disagree with the state court upon preliminary questions. It would dislike a disagreement exceedingly. If, however, its well-considered and deliberate judgment should differ from the action of the chancellor, the judge would be derelict in his duty and unworthy of confidence should he fail to declare the law and justice of the case as his judgment and conscience should dictate, from a sensitive regard for the action and opinion of his brother judge. Judges will disagree as well as doctors.

The vital inquiry at the threshold of the consideration of the motions before us is whether the injunction granted by the chancellor under the original bill should be maintained, or shall it be modified, or shall it be dissolved. In view of the unquestioned and admitted facts as developed by the pleadings, what should be done in this respect? The questions to be considered are questions of law and equity, rather than disputed facts. There is little disagreement as to the material, essential facts. As stated in the original bill, and admitted in the answer, respondent, Florence Whiteside, is the owner of a turnpike road running from the foot to the top of Lookout mountain, chartered by the state, and the people are charged toll fees for passing over it. It is a public turnpike road. The terminus of this road at the top of the mountain is about a mile and a quarter from what is known as the Point of Lookout mountain, a celebrated part of the mountain, which is visited by many for the fine view it affords of the surrounding country, and of several of the battle-fields of the late war. There is what is styled in the pleadings a dirt road between the end of the turnpike and the Point, which runs a great part of the way through the lands of respondent, Florence Whiteside. The mountain ends abruptly at the Point, and she owns the Point and the lands back of it for a considerable distance to both brows of the mountain, so that it is impossible for vehicles to reach the Point without traveling over or through her lands. She has erected a fence across the mountain a short distance from the Point, which extends across from brow to brow, and incloses the Point and the top of the mountain adjoining it, and a gate has been made for an entrance to this inclosure, and persons have been charged a fee of 25 cents for admission to this inclosure, which is called a park. There is no question but that Miss Whiteside, the respondent, has title to the Point and park. Complainant Sharp is the owner of and operates a livery stable, and has been accustomed to carry passengers to the Point for hire, and to do this is the most valuable part of the business in which he is engaged.

Before the filing of complainant's bill Miss Whiteside, through her agents, made a contract with Owen & Co., the owners of a livery

stable, by which they were to take all their passengers for Lookout mountain over her turnpike instead of a competing one, and no passengers using hired means of conveyance to the mountain were to be admitted to the park and Point unless they had been brought there by Owen & Co.'s vehicles or horses. Complainant could pay his toll and travel the pike, but he and his passengers could not enter the park and go to the Point, though the admission fee was tendered at the gate. This gives Owen & Co. the carrying business to the Point, and for the privilege it is said that Owen & Co. agree to pay \$5,000 annually.

It is also said that this arrangement is ruinous to complainant's business. He insists that as Miss Whiteside charges an admission fee to the park and Point, they become a public institution in such sense that she is bound to admit all persons of good repute who ask for admittance and tender the fee; that she cannot discriminate in favor of Owen & Co. and against complainant, but should award the same rights and privileges to both, and all like concerns. He avers his willingness to conduct his conveyances over respondent's turnpike, paying the usual toll, and to pay the admission fees for entrance into the park. An injunction was ordered and issued in accordance with the prayer of his bill. Its terms are that respondents, "each and every of them, their servants, agents, and counselors, are enjoined from discriminating against complainant in his business of carrying passengers over said turnpike road to the Point of Lookout mountain and into the park at the Point; also from refusing to admit the carriages and horses of complainant to pass over said road, and his passengers to enter the park and Point on the same terms as the horses, carriages, and passengers of Owen & Co. are permitted to pass over the road and into the park and Point; also enjoining them from refusing complainant's passengers to enter the park and Point upon their paying the customary fees, and from refusing to furnish complainant's passengers with tickets of admission to the Point at the toll-gate, as they have been doing heretofore under the contract of Owen & Co. with respondent, Whiteside, and as they continue to do the passengers of Owen & Co.; also enjoining them strictly from making or enforcing any contract with Owen & Co., or any other person, which will directly or indirectly discriminate against complainant's business, or which will secure to said Owen & Co., or any other person, any rights and privileges whatever in respect to said turnpike road, and to said park and Point, which are not accorded to complainant on the same terms."

The power of the court here invoked and exercised is a tremendous one. It appropriates the use of the respondent's property to complainant's use against her consent. It takes the property from her control in an important sense against her will. We are now discussing the case under the theory of the original bill, and without reference to the supplementary proceedings. The sovereign power of

the state, in the exercise of its right of eminent domain, may appropriate private property to the public use upon giving just compensation therefor, but this appropriation is made by some legislative act, general or special, when public necessity demands it. The court has no power to make the appropriation. It may be the instrument by and through which the details of the appropriation are defined, declared, and worked out. But its act must be by reason of and within the scope of legislative authority. There is no need of the elaboration of this question, since there is no claim predicated upon the right of eminent domain.

Aside from the right of eminent domain, there is an inherent power in the state, when necessary for the public good, to regulate the manner in which each person shall use his own property, but this power of regulation rests upon public necessity. See *Munn v. Illinois*, 94 U. S. 125.

Whether, like the right of eminent domain, some legislative act must confer on the court authority to declare and effectuate this use, it is, perhaps, unnecessary to determine. There is probably no question, but that in the case of a common carrier, when the legislature has not, in the charter or in the general law, regulated the prices to be charged upon its business, the courts may, by injunction, prevent extortion or discrimination therein to a certain extent; nor can it be questioned that the courts may compel a common carrier to receive and carry for every person such property or freights as it usually transports on its line, when the shipper has tendered the freight, and its proper costs and charges. The common carrier is granted power to do business for the public, and owing to the public nature of its business and contracts, the courts may control it to some extent, if the legislature has failed to make any provision in regard thereto, or may confine it within the legislative boundaries, if such have been provided. But in such instances the legislative department has impressed the property with a public character and interest; not that the legislative act could of itself make it so, but because the legislative power is the proper source of authority to determine when the public necessity exists. Then courts may regulate the fees and charges for the use, but the court cannot impress, declare, and enforce the use.

The control which courts may have over railroads and business incidental to and necessary for their conduct and operation, such as warehousing in our great railroad centers, is based upon public necessity. Railroads do nearly all the business of interior transportation. The public is compelled to use them exclusively. There is scarcely anything to compete with them where they operate. Hence, discriminations or extortion cannot be tolerated in their management. If they refuse like facilities to their shippers, or discriminate in rates or otherwise, courts may compel them to be just. The cases of *Munn v. Illinois* and *Adams Exp. Co. v. L. & N. R. R.*,

and other cases referred to, proceed on this theory. There is no such ground for jurisdiction in the case under consideration. There is no necessity, public or other, for people to visit Lookout Point. That is a mere matter of taste, pleasure, curiosity. Commerce, the public weal, social order, the public health or comfort, have nothing to do with it. Already the courts have gone "to the verge of the law" in the direction asked for here, and it is apprehended that no authoritative case can be found which will carry us as far as we are now asked to go.

Now, take the case in hand, Miss Whiteside, as the owner of the Point and park, or her privies in estate, at one time might have excluded all persons from entering upon either. It, to say the least, has been private property. No legislative act has declared a public use in it. If such use has been impressed upon it, it has been done by her. Holding the absolute title, she could control it as she liked, so long as she did not use it to the injury of others. She could have donated it to a public use generally and absolutely, or to such limited use as she might prescribe, or she could have preserved its private character. As her private property she had the right to inclose it; after its inclosure she had the right to admit as many or as few within the inclosure as she pleased. Because she saw fit to admit some persons upon payment of a given fee gave to others no right to be admitted on the tender of a like fee. They were in no worse or different position than before any admissions were made. No loss had been sustained by them; no consideration had passed from them. Nothing can be found on which to predicate an equity in their favor. The fact that people may have been admitted to such an extent as to make the business of carrying passengers to the Point profitable to complainant raises no equity in his favor. It was brought about by no use of his property or expenditure of his money. Respondent has as much right to require him to contribute such portion of profits as might be deemed equitable, which she has enabled him to make by the allowance of great numbers to go to the Point, as he has to demand of her the use of her property that his business may prosper. Neither he nor the public has any greater right to the property than she has given them. There is no greater obligation on her part to contribute to the public use, gratification, or pleasure than rests upon others. She holds her property subject to her control just as others hold theirs, until it is applied to the public use by an act of the sovereign power through methods known to the law, or until she appropriates it by her voluntary act to the use of the public. A court cannot appropriate it to such purpose against her consent. She can determine who shall be admitted within her premises and who shall be refused admission. Of course, this remark has no reference to officers of the law armed with process.

There is no explicit allegation that she does not allow complainant v.19,no.3—11

to take his conveyances over the turnpike. The contrary is to be inferred from the language used, and is established by the record. The *gravamen* of the averments are that she is owner of the Point and park, as well as turnpike, and that the use she makes of the park and Point is a discrimination in favor of one concern traveling the pike and against another. Her turnpike is authorized by legislative authority and is a public road, on which discriminations could not be tolerated. But because the owner of the pike may have other property under a totally distinct title from that of the pike, and of a different character, and applied to and appropriated for a different use, there is nothing in law or equity which compels the owner to subordinate the uses of the one to the purposes of the other. They are held as independently as though the title to each were in different persons. The law—the courts—cannot control the operations of private business. In a free government the people must be left to the control of their own business. Competition must be allowed, union and co-operations of interests must be permitted, so long as the law is not violated or private injuries done.

Complainant has engaged in a business in which he serves the public. He charges, as we will suppose, one customer three dollars for the use of a carriage and team, and another five dollars, and another still nothing for precisely the same service. Is there any law that will authorize the courts to control his action in thus discriminating? The pleadings show that another turnpike, St. Elmo, runs up Lookout mountain, (which may be traveled as well as respondent's in reaching the Point,) and yet complainant tells us in his bill that he is willing to carry all his vehicles and horses over respondent's pike if she will admit his passengers to the Point. Now, what rule of law or equity would allow complainant to discriminate against St. Elmo pike and in favor of respondent's, when it becomes his interest to do so, and yet not allow respondent to discriminate against complainant and in favor of Owen & Co. in the way of admission to the park and Point when she may think it to her interest to do so?

It is said that the state has imposed a tax on public parks, and that this is a legislative act, declaring the character and use of the park to be public. The taxation of the park indicates rather that the state considers it private property. It is not usual that public property, or property set apart for public uses, is taxed, and it does not seem that the imposition of the burden of a tax on the property should be construed as setting apart the property to public use. It would be strange if a citizen of the state were required by the state to pay a tax for the privilege of having his property placed beyond his control. On the contrary, it would seem that this taxation indicates that the state believed that the owner ought to pay a tax for the privilege of using her private property to raise money by charging the people for its use. So far from considering it an appropriation of her property to a public use, by which the public is benefited, and

through which it acquires to it such rights and equities as may be enforced by the courts, it is declared a privilege to allow the public to use it by the payment of a fee for admission thereto, for which the owner should be taxed. The benefit is to the owner and not to the public. Complainant is taxed for the privilege of charging his customers for his services, but that does not make his a public business. There is little question, probably, but that the public necessities may require, under the proper conditions, that private property may be taken for the use of the public for purposes of recreation and pleasure, but the courts cannot undertake so to appropriate and apply it without legislative authority. It follows from the views expressed that the conclusion is that the injunction granted under the original bill, especially with the light thrown upon the case by the subsequent proceedings, ought to be dissolved.

The first amended bill of complainant presents no features so different from the original bill as to demand additional consideration. The last amended bill of the complainant presents a case very different from the theory of the original bill. It has a twofold aspect: *First*. It alleges that respondent's turnpike road was chartered to run from the foot to the summit of Lookout mountain, and that the summit is not at the brow of the mountain, but is near the Point, and that the dirt road from the brow to the Point is a part of the turnpike, and was opened and used as such; that the park fence is built across the road and obstructs it, and is therefore a nuisance, by which complainant suffers irreparable injury. *Second*. It is alleged that if the dirt road is not a part of the turnpike, it was opened by the owners of the lands over which it passed, and dedicated to the public as a public road, and is obstructed as above shown.

The last position is strongly fortified and strengthened, to say the least, by the use of the road for a period of 30 years and more, and by the terms and declarations of deeds executed by the owners of the land for various lots of land bounded by this road. The Point, however, is not part of this road. The road does not quite reach it. If the road were thrown open from end to end to the public, every person might be excluded from the Point by its inclosure, or otherwise. The whole pleadings show that admission to the Point is what is wanted. This road leads to nothing but the Point. There is little or no value in the free and unobstructed use of the road by complainant, unless his passengers can be admitted to the Point after coming to the end of the road. This they cannot do without respondent's consent, and no case is made by which a court would be justified in forcing her assent. This obstruction of the road does not present such an instance of irreparable damage as would authorize the interference of a court of chancery by its injunction.

Miss Whiteside comes and files a bill in the nature of a cross-bill, in the cause, in which she gives a history of the case and recounts the steps taken in it. She asserts her right to the property and to

its absolute control, and asks that Sharp be enjoined from taking his vehicles and passengers into the park and Point. Substantially, she asks this court to enjoin the injunction of the state court, which could hardly be done. The disposition made of the injunction under the the original bill destroys the foundation for Miss Whiteside's application anyway, and no injunction will be granted her.

There remains the injunction on Miss Whiteside's cross-bill, filed in the state court. No action is invoked in regard to it, and therefore no order is made in reference to it. It appears to be innocent and harmless, anyway.

The reasons given by Judge KEY for the distinction taken by him in the text are so clearly and forcibly stated that they call for no further exposition. The question, however, of illegality of contracts in restraint of business is one of such growing interest that it may well claim a more minute and copious discussion than is consistent with the adjudication of a single contested issue, such as that more immediately before us. Contracts of this class may be ranged under the following heads:

(1) **RESTRICTION OF PUBLIC DUTIES.** Wherever a public duty is lawfully accepted or imposed, a contract by the party who should discharge it, to limit its efficiency to a particular class of persons, is invalid. No one who is bound to perform a public duty to a particular line of customers, clients, or dependants, can, by contract, give a preference to certain persons over others among the persons privileged. We may illustrate this position by cases in which, when public offices are by the law of the land open to competition, those having the disposal of such offices contract to sell them to particular aspirants. Aside from the objection that such contracts are void on the ground of corruption, they are void for the reason that they unduly restrict the disposal of public duties which should not be so restricted.¹ The same reason avoids contracts for the influencing legislatures to pass bills for the benefit of some of the parties contracting. This is not merely because "lobbying" contracts of this class are against the policy of the law, but it is also because agreements restricting the discharge of a public duty are in themselves invalid. And the reasons given for the rulings in this relation show that this distinction is generally recognized. Persons rendering professional services before committees of the legislature may recover compensation for these services from the parties employing them. It is otherwise, however, when personal influence is used to induce legislators to discriminate between claimants for particular privileges. "We have no doubt," says SWAYNE, J., in a case in which this question came up before the supreme court, "that in such cases, as under all circumstances, an agreement, express or implied, for purely professional services is valid. Within this category are included draughting the petition to set forth the claim, attending to the taking of testimony, collecting facts, preparing agreements, and submitting them orally or in writing to a committee or other proper authority, and other services of like character. All these things are intended to reach only the reason of those sought to be influenced. They rest on the same principle of ethics as professional services rendered by a court of justice, and are no more exceptionable. But such services are separated by a broad line of demarcation from personal solicitation, and the means and appliances

¹ Kingston v. Pierrepont, 1 Vern. 5; Blachford v. Preston, 8 T. R. 89; Card v. Hope, 2 Barn. & C. 661; Thomson v. Thomson, 7 Ves. 470; Waldo v. Martin,

4 Barn. & C. 319; Cardigan v. Page, 6 N. H. 183; Gray v. Hook, 4 N. Y. 449; Hunter v. Nolf, 71 Pa. St. 282; Grant v. McLestey, 8 Ga. 553.

which the correspondence shows were resorted to in this case."¹ These means were not payment of money, but application of social and political influence to obtain undue discrimination in legislation. And the same position has been subsequently repeatedly reaffirmed.² And, on the same principle, agreements to induce an executive to prefer particular parties in the distribution of patronage have been held invalid.³

(2) AGREEMENTS NOT TO DO BUSINESS OR WORK IN A PARTICULAR PLACE. The policy of law requires labor to be unrestricted; and even were it not so, it might be a serious question whether the enforcement of an agreement to labor permanently and exclusively for a particular person, at his absolute dictation, is not in conflict with that clause of the fourteenth amendment of the constitution of the United States which prohibits involuntary servitude. If an agreement to labor permanently and exclusively for a particular person, without discrimination as to the line of labor, is valid, and can be enforced, then an agreement for life service could be enforced. Aside from this difficulty, however, which will be considered more fully under the next head, the good of society requires that improvident bargains by laborers to work exclusively for certain employers should not, as permanent arrangements, be upheld. Hence, a special engagement to work for a particular employer for a particular time, will be sustained, but not a permanent and exclusive transfer of services.⁴ It is true that if a tradesman or a professional man agree, upon selling the good-will of his business, not to interfere with his vendee, this agreement will be sustained by the courts, supposing that the restraint is reasonable.⁵ But to be reasonable there must be a limit as to the space over which the exclusion is to operate, and a limit as to the particular kind of labor to be restricted. "When a limit of space is imposed, the public, on the one hand, do not lose altogether the services of the party in the particular trade; he will carry it on in the same way elsewhere; nor within the limited space will they be deprived of the benefits of the trade being carried on, because the party with whom the contract is made will probably, within those limits, exercise it himself. But where a general restriction, limited only as to time, is imposed, the public are altogether losers, for that time, of the services of the individual, and do not derive any benefit in return."⁶

¹ *Trist v. Child*, 21 Wall. 441.

² *Meguire v. Corwine*, 101 U. S. 111; *Oscanyon v. Arms Co.* 103 U. S. 261; *Powers v. Skinner*, 34 Vt. 274; *Bryan v. Reynolds*, 5 Wis. 200; *Gill v. Williams*, 12 La. Ann. 219.

³ *Wakefield Co. v. Normanton*, 44 Law T. (N. S.) 697; *Tool Co. v. Norris*, 2 Wall. 45; *Pingry v. Washburn*, 1 Atk. 264.

⁴ *Collins v. Locke*, L. R. 4 App. Cas. 674; *Farrer v. Close*, L. R. 4 Q. B. 612; *Spinning Co. v. Riley*, L. R. 6 Eq. 551.

⁵ *Ronsillon v. Ronsillon*, L. R. 14 Ch. Div. 351; *Vickery v. Welch*, 19 Pick. 523; *Taylor v. Blanchard*, 13 Allen, 370; *Keller v. Taylor*, 53 Pa. St. 467.

⁶ *Wood v. Byrne*, 5 Mees. & W. 562.

Since the publication of my book on Contracts, in 1882, there have been several cases affirming the general principle there stated and repeated in this note. Thus, in *Smith v. Martin*, 80 Ind. 260, it was held that an agreement by a milkman not to sell milk at a particular town was good as to sales in such town, but did not prevent him from selling milk at his farm, out of town. In *Jacoby v. Whitmore*, (July,

1883,) reported in 49 Law T. (N. S.) 335, it was held that an agreement by a person employed by another not to carry on a business such as that of the employment at any time thereafter within a certain area, is, in the absence of a specific covenant or stipulation to the contrary, to be understood to continue during the whole of the employee's life-time, notwithstanding the employee has removed his business to another place, and assigned it to a third person. The defendant, the suit being for an injunction, on entering upon an employment as shopman to C., an Italian warehouseman, agreed with C. (there being no mention of assigns) not to carry on a similar business within a mile of C.'s then shop. C. afterwards moved his business to other premises, 450 yards distant, the defendant continuing with him as shopman. The defendant gave up his situation shortly after his removal, and then, some additional time elapsing, C. sold his interest and good-will in the business to J. It was held (BRETT, M. R., and COLTON and BOWEN, JJ., reversing BACON, V. C.) that the defendant should be enjoined, on

(3) AGREEMENTS TO LABOR EXCLUSIVELY FOR PARTICULAR PERSONS. In cases of this class two conflicting principles are to be reconciled. One of these principles is that no agreement is to be sustained when the effect of it would be to draw permanently and absolutely from the market any specific quota of labor by which the market would be improved. The other is that freedom of contract should not be impaired. These two principles are reconciled, in the relation here noticed, by the position that freedom to contract to withdraw from labor is to be sustained in all cases in which the withdrawal is limited to a particular place and to a particular line of business. The same distinction is applicable to agreements by parties to deal exclusively with each other in particular lines of business. The law of partnership assumes that such an agreement, when either for a limited time, or when dissoluble at the will of the parties, is promotive of the public good as well as of the good of those immediately concerned; and hence partnership articles, when so conditioned, have been sustained in all jurisprudences. Still more marked illustrations of the principle before us are to be found in the well-known English rulings in which it is held not to be against the policy of the law for a purchaser or lessee of land from a brewer to covenant that in case he opens a public house he will buy all his beer from such brewer.¹ It has even been held that a contract by an author to write exclusively for a particular publisher will be sustained;² though this must be on the supposition that the contract is reasonable, and does not put the author in a position in which his productive powers would be limited, or his services secured on an inadequate remuneration. And in *McCaull v. Benham*,³ which was an application for an injunction to prevent an opera singer from violating an agreement to sing exclusively for the plaintiff, Brown, J. said: "Contracts for the services of artists or authors of special merit are personal and peculiar; and when they contain negative covenants, which are essential parts of

the application of J., from setting up a similar business at a spot within a mile from both of C's places of business. "Apart," said BOWEN, L. J., "from the question as to restraint of trade, a man may bargain as he chooses. Sometimes it is said that contracts as to personal service cease with the employment; but there is no doubt that a man may bind himself by a contract with a master so long as he is in trade; otherwise it could be said that the contract was that Cheek was only to have the benefit of it so long as he carried on business. The assigns are not mentioned in this agreement, but, reading it in the plainest way, it is that Whitmore (the defendant) was at no time thereafter to carry on business within a certain distance of this shop. Then how does the doctrine as to restraint of trade prevent that construction? If that construction would show that the contract was unreasonable, as being in restraint of trade, the agreement should not be so read. The only way other cases affect the point is that, if being construed in a particular way, the contract would be in restraint of trade, that construction should not be put upon it. What is restraint of trade? All contracts in restraint of trade are not void,—that is conclusively settled on the authority of cases in the exchequer chamber and other courts. It is not against

public policy for a person entering an employment to enter into a covenant, restricted as to space, not to carry on the same business on his own account, even if his employer should leave the business. The employer wishes to have security given to the business not only while he is carrying it on himself, but in favor of his successors, and during the whole life of the covenantor; and, if reasonable when made, subsequent circumstances do not affect the operation of the contract under the rule as to contracts in restraint of trade. Therefore, the obvious reading of this contract does not make it unreasonable. Then is such a contract assignable? If it is for all time, it may, of course, be enforced after Cheek (the employer) has left the business. Another question is, whether the benefit of the contract was assigned or not. I think it was. It is part of the beneficial interest, and it is part of the good-will. If it is said that the agreement did not bring customers to the shop, but it prevented them from being taken away."

¹ Cooper v. Twibill, 3 Camp. 286n; Gale v. Reed, 8 East, 80; Catt v. Tourle, L. R. 4 Ch. 664.

² Morris v. Colman, 18 Ves. 437.

³ 16 Fed. Rep. 37, (U. S. Cir. Ct. N. Y. 1883.)

the agreement, as in this case, that the artist will not perform elsewhere, and the damages, in case of violation, are incapable of definite measurement, they are to be observed in good faith and specially enforced in equity." To this effect are cited *Howard v. Hopkyns*,¹ *Fow v. Seard*,² *Jones v. Heavens*,³ *Barnes v. McAllister*,⁴ *Nessie v. Reese*,⁵ *Trener v. Jackson*.⁶ Contracts, therefore, by which a particular artist is bound to give his services for a specified season to a particular manager are valid and will be enforced, the reason being that the artist is not bound to render his services to all applicants indiscriminately, and that these services are in a special voluntary line. The same rule applies to contracts with physicians; though there can be no question that if a hospital or dispensary should be chartered for the express purpose of affording relief to all patients without discrimination, contracts made by it to confine its benefits to a particular line of applicants would be held invalid. But in any view contracts of this class will not, if oppressive, be enforced in equity. Thus, in a Pennsylvania case,⁷ the evidence was that Keeler agreed to instruct Taylor in the art of making platform scales, and to employ him in that business. Taylor engaged to pay Keeler, or his legal representative, \$50 for each and every scale he should thereafter make for any other person than Keeler, or which should be made by imparting his information to others. This was held to be an unreasonable restriction upon Taylor's labor, and therefore void as in restraint of trade and legitimate competition. The case being an application to a court of equity to enforce a bargain, it was held that, though "contracts for partial restraints may be good at law, equity is loath even then to enforce them, and will not do so if the terms be at all hard or even complex." It was added that, if it were not void, however, a chancellor would regard the hardships of the bargain, and the prejudice to the public, and would withhold his hand from enforcing it."

(4) AGREEMENTS ONLY TO PRODUCE OR LABOR FOR A PARTICULAR MARKET. An interesting distinction is here to be observed. It may be that a party owning particular staples, or having the control of labor to any large amount, is under no duty to offer these staples or labor to the community at large. If this is the case, agreements made by him, on a sufficient consideration, to give these staples or this labor exclusively to particular persons are valid. It is otherwise when the agreement is to give a monopoly to a particular party of a commodity which should be open to purchase to the community at large.⁸

(5) AGREEMENTS BY A COMMON CARRIER TO DISCRIMINATE AGAINST PARTICULAR PARTIES ENTITLED TO BE ACCEPTED AS CUSTOMERS. A common carrier is bound to afford equal facilities to all customers paying him a reasonable fare. A recent illustration of this rule is to be found in *Wells v. Oregon R. R.*⁹ In this case, which was a bill in equity before FIELD, J., asking for an injunction, the plaintiff claimed to be a corporation under the laws of Colorado, engaged in the express business on the Pacific coast. The defendants were corporations under the laws of Oregon, owning steam-vessels on the Pacific waters and tributaries, and railroads on the Pacific coast. The plaintiff's business was that of a carrier of parcels under the direct supervision of agents accompanying them from the office of the owner or shipper, and delivering them at the office of the consignee. The plaintiffs, in other words, were express agents; the defendants proprietors of a steam-boat and railroad line; and the question presented, to adopt the language of FIELD, J.,

¹ 2 Atk. 371.² 33 Beav. 321.³ 4 Ch. Div. 636.⁴ 18 Hcw. Pr. 534.⁵ 29 How. Pr. 382.⁶ 46 How. Pr. 389.⁷ Keeler v. Taylor, 53 Pa. St. 468.⁸ See Whart. Cont. § 442.⁹ 18 Fed. Rep. 518.

was: "Shall the railway companies and steam-ship companies engaged in that trade be required to furnish facilities to the express companies in the transaction of this business? The business would entirely fail, and come to an end, if certain facilities for its transaction were not afforded them, such as allowing to them special cars or apartments, or definite spaces in them, for the transportation of such articles, with a messenger in charge thereof, having sufficient room for the assortment of the articles by him while in transit, so as to facilitate their delivery at the different stations to which they may be destined. It may be difficult to define with accuracy what should be deemed proper facilities in each case. That will depend very much upon the extent of the business, and the character of the articles carried by the express companies. In the present cases it is not necessary to designate what those facilities should be. The object of the two suits is to restrain the defendants from denying to the plaintiff the facilities which have heretofore been furnished to it." He proceeds to say: "The question is one of much difficulty, and its correct solution will be far-reaching in its consequences. It has been before different circuit courts of the United States in some cases, but has never been brought before the supreme court. In the case of *Southern Exp. Co. v. St. Louis, I. M. & S. R. Co.*, in the eighth circuit, it was considered by Mr. Justice MILLER of that court, sitting with Judge McCRARY in holding the circuit court. 10 FED. REP. 210. The railroad company in that case was enjoined by them from refusing or withholding the usual express facilities from the plaintiff. In giving his conclusions, Mr Justice MILLER, among other things, held that the express business is a branch of the carrying trade, which, by the necessities of commerce and the usages of persons engaged in transportation, has become known and recognized so as to require the court to take notice of it as distinct from the transportation of the large mass of freight usually carried on steam-boats and railroads; that the object of this express business is to carry small and valuable packages rapidly, in such manner as not to subject them to the danger of loss and damage, which, to a greater or less degree, attend the transportation of heavy or bulky articles of commerce; that it is one of the necessities of this business that the packages should be in the immediate charge of an agent or messenger of the company, or parties engaged in it, without any right on the part of the railway company to open and inspect them; that it is the duty of every railroad company to provide such conveyance, by special car or otherwise, attached to their freight or passenger trains, as are required for the safe and proper transportation of this express matter on their roads; that the use of these facilities should be extended on equal terms to all who are actually engaged in the express business, at fair and reasonable rates of compensation, to be determined by the court when the parties cannot agree thereon; and that a court of equity has authority to compel the railroad companies to carry this express matter, and to perform the duties in that respect. The same question has been decided substantially in the same way in other cases. From the decisions rendered in some of them, appeals have been taken to the supreme court, and the cases are now on its calendar. Under these circumstances I have come to the conclusion to follow the view expressed in them, rather than to go into an extended consideration of the question. The following cases are now pending in the supreme court: *Memphis & L. R. R. Co. v. Southern Exp. Co.*, *St. Louis, I. M. & S. R. Co. v. Southern Exp. Co.*, and *Missouri, K. & T. R. Co. v. Dinsmore, President of Adams Express Company*. In their determination the question presented will be definitely and authoritatively settled."

For the reasons above given, the supreme court of Connecticut held invalid a contract by which the Hartford & New Haven Railroad agreed to deliver to the New York & New Haven Railroad at New Haven all passengers by

its line for New York; and the New York & New Haven Railroad was to prevent the construction of a railroad which would be a rival and a competitor of the Hartford & New Haven Railroad. This was declared by the court to be a contract void as against public policy.¹

It has been held in New York² that a contract precluding one of the contracting railroads from building branches was void as an infringement of the rights of travel. The court says: "It is a compact between the parties intended to affect the facilities for public travel over a route of railroad which had been or might be authorized by law. * * * Such an arrangement was intended to prevent the extension of the New Haven & Northampton Railroad to any point north of its terminus at Granby, and to prevent any competition in travel detrimental to the interests of plaintiff's road, which had a monopoly of the carrying trade from Springfield, and points north of Springfield, via the Northampton & Springfield Railroad, which such extension might affect. The completion of the New Haven & Northampton Railroad to Northampton would open a new line for travel southward, which would be a competitive rival of the road of the plaintiffs. Such competition and rivalry it was not lawful for these parties to prevent, or attempt to prevent, and any contract to effectuate such a purpose is void. Public policy is opposed to any infringement of the rights of travel, or of any of the facilities which competition may furnish; and the law will not uphold any agreement which does or may injuriously affect such rights or facilities;" citing *Doolin v. Ward*,³ *Hooker v. Vandewater*,⁴ and *Hood v. N. Y. & N. H. R. R.*⁵

In *Hooker v. Vandewater*⁶ the proprietors of five several lines of boats, engaged in the business of transporting persons and freights on the Erie and Oswego canals, entered into an agreement among themselves to run for the remainder of the season for certain rates of freight and passage, then agreed upon, and to divide the net earnings among themselves, according to certain proportions fixed in the articles. This agreement was declared illegal. "It is a familiar maxim," said the court, "that competition is the life of trade. It follows that whatever destroys or even relaxes competition in trade is injurious, if not fatal, to it."

In *Denver R. R. v. Atchison, Topeka, etc., R. R.*,⁷ it was held by the circuit court for Colorado that a contract between two railroad corporations, by which they agreed to exchange their traffic, and not to "connect with or take business from or give business to any railroad" which might be constructed in Colorado or New Mexico after the date of the agreement, is void as against public policy. This ruling is sustained by an instructive note by Mr. Adelbert Hamilton, citing *Charlton v. R. R.*,⁸ *Salt Co. v. Guthrie*,⁹ *Central R. R. v. Collins*,¹⁰ though it is admitted that the point is decided differently in *Hare v. R. R.*,¹¹ *Southsee Co. v. London R. R.*,¹² and *Eclipse Co. v. R. R.*¹³

In *Twells v. Penn. R. R.*¹⁴ it was decided by the supreme court of Pennsylvania in 1863, that, though A., a railroad company, may have power to discriminate between "local" and other freights, it cannot make such a discrimination on the ground that the freight discriminated against is to be carried to its place of final delivery by another company after reaching the terminus of A.'s route. "The defendants," said STRONG, J., (afterwards a judge

¹State v. Hartford & N. H. R. Co. 29 Conn. 533.

²Hartford R. R. v. N. Y. & N. H. R. R. 3 Rob. 411.

³6 Johns. 194.

⁴4 Denio, 349; 29 Conn. 533.

⁵22 Conn. 502.

⁶4 Denio, 349.

⁷15 Fed. Rep. 650.

⁸5 Jur. (N. S.) 1100.

⁹35 Ohio St. 672.

¹⁰40 Ga. 582.

¹¹2 Johns. & H. 80.

¹²2 Nev. & Man. 341.

¹³24 La. Ann. 1.

¹⁴12 Amer. Law Reg. (O. S.) 723; 3 Amer. Law Reg. (N. S.) 723; 21 Leg. Int. 180.

of the supreme court of the United States,) giving the opinion of the supreme court of Pennsylvania, "are authorized by their charter to be common carriers on their railroad from Pittsburgh to Philadelphia, with power to establish, demand, and receive such rates of toll, or other compensation, for the transportation of merchandise and commodities as to the president and directors shall seem reasonable. It is admitted that, in the exercise of these powers, they must treat all customers alike. Now, it is clear that if they receive coal oil at Pittsburgh to be carried to Philadelphia, it can make no difference to them, either in the risk or cost of transportation, whether Philadelphia is the point of ultimate destination of the oil, or whether the consignee intends that it shall afterwards be started anew on another line, and forwarded from Philadelphia to New York. The point of final destination of the freight is a matter in which they have no interest as carriers over their own road. If it be admitted that they may contract to carry freight to points beyond Philadelphia or Pittsburgh, over connecting lines, it is still true that as to all carriage beyond the *termini* of their own road they stand in the position of third parties, and they can no more secure to themselves an advantage over other carriers on the connecting lines by discriminating in tolls on their own, than they could secure similar advantages to one shipper over another in the same way; yet this is the practical effect of the regulation which the defendants are seeking to enforce against the complainant, and we cannot doubt that such is their object in making it. They in reality say to him: 'Employ us to carry your oil, not only over our road to Philadelphia, but thence to New York. If you do not, we will exact from you for its carriage to Philadelphia six cents per hundred pounds more than we demand from all others who employ us to transport similar freight only to Philadelphia.' Or, if you employ us to carry it to New York after it shall have reached Philadelphia, we will carry it to Philadelphia for six cents less per hundred pounds than we are accustomed to charge others for similar transportation.' No one will maintain that they can lawfully make such a stipulation for the benefit of a third party, *e. g.*, one of two other carriers. They cannot say to a shipper at Pittsburgh, of any domestic product, 'You have freight destined to New York. You must send it over our road to Philadelphia. If, when it arrives there, you will forward it by A. to New York, we will carry it over our line at certain rates. If you send it by any other than A. our charges will be higher.' This is a discrimination that cannot be allowed. Conceding it, would put in the power of the defendants a monopoly of the carriage of all articles which pass over their road from either terminus to every place of final delivery. The oppressive effects of such a rule are the same, whether its motive be to benefit third parties, or the railroad company itself. Of transportation along the line of their road the defendants practically have a monopoly. It is not consistent with the public interests, or with the common right, that they should be permitted so to use it as to secure to themselves superior and exclusive advantages on other lines of transportation beyond the ends of their road. If they contract to carry freight to distant points in other states and countries, they should stand on the same footing with other carriers, over other roads and lines than their own. If they may use their exclusive powers over their road so as to force into their own hands all external carrying trade, and do this at the expense of a shipper or class of shippers, it is quite possible for them to exclude one domestic product from all foreign markets. Shippers of such products might be compelled to seek a final market in Philadelphia, under penalty of such increased rates of toll beyond as to make it impossible for them to find any other place of sale. These consequences, more or less aggravated, according to the will of the defendants, and according to interests

they may have distinct from those which belong to them as owners of their road, flow naturally from permitting the destination or use to be made of freight, after it has left the road, to affect the price of carriage over it.

"In *Bazendale v. Great Western R. Co.* (14 C. B. N. S. 1; 16 C. B. N. S. 187) it was held that the company could not secure to themselves a monopoly of the delivery of goods beyond the termination of their road by a general regulation charging a gross price for carriage on the road, including the cost of such delivery, to all persons, whether they receive their goods at the station or beyond. In other words, they were not allowed to make use of their rights over their road to secure to themselves advantages beyond it. That there are special privileges to individuals or classes of men, makes no difference, for they are but declaratory of the common law. *Sanford v. Catawissa R. Co.* 12 Harris, 378. We hold, then, that the rule of the defendants, of which the complainant complains, is unreasonable, and such as they have no legal right to enforce. The apology set up for it is not sufficient. That the imposition of higher rates for carrying the complainant's oil to Philadelphia, because it is afterwards to be forwarded in some way to New York, is necessary to prevent his having an advantage in the New York market over those who employ the defendants to transport all the way, or over those who send oil from Pittsburgh to New York with through bills of lading, is a matter outside of their control. It has no proper relation to them as carriers."

Two points are worthy of notice in reference to this remarkable case. The first is that, though reported in two current Philadelphia periodicals, above noticed, it is not to be found in the regular Pennsylvania reports. The second point is that at the same term of the supreme court of Pennsylvania was decided, Judge STRONG also giving his opinion, the case of *Shipper v. Pennsylvania R. R.*, (reported in 47 Pa. St. 338,) in which it was held that the Pennsylvania Railroad Company had a right, under its charter, to charge a higher freight on goods coming to it from beyond the state than it had for freight delivered to it in the state. "There is nothing," so Judge STRONG closes his opinion, "in the constitution of the United States that prohibits a discrimination between local freight and that which is extraterritorial, when it commences its transit. Such a discrimination denies to no citizen of another state any privilege or immunity which it does not deny to our own citizens."

On the same reasoning it has been held that an agreement whereby a railroad corporation grants to a telegraph company the exclusive right to put on the railroad track a telegraph line, cannot be sustained. The reasons given are twofold: *First*, such a monopoly cripples competition, and is therefore in restraint of trade; *secondly*, telegraph companies are by act of congress authorized to operate telegraph lines on all roads used as post-roads.¹ On the question of the right of a railroad corporation to give the exclusive use of its track to a particular telegraph company, the supreme court of Illinois says: "The objection to the contract on the ground of public policy is that it gives to the appellant, the Western Union Telegraph Company, the monopoly of the telegraph business along the line of the railroad. However it may be as to the provision of the contract in this respect, taking in its full extent of an exclusive right of way and the discouragement of competition, in so far as it goes only to the exclusion of competitors from the line of poles occupied by a complainant, when direct injury to the actual working of complainant's line of wire might result, it is, in our view, not liable to this objection. So long as any other company is left free to erect another line of poles, we see no just ground of complaint on the score of monopoly

¹ *Western U. Tel. Co. v. Burlington R. Co.* 11 Fed. Rep. 1; *Pensacola Tel. Co. v. Western U. Co.* 98 U. S. 1. See *Atlanta Tel. Co. v. Railroad*, 1 McCrary, 541; *Western U. Tel. Co. v. Railroad*, Id. 565.

or the repression of competition." *Western U. Tel. Co. v. Chicago & P. R. R. and Atlantic & P. Tel. Co.* 86 Ill. 246.

In *Western U. Tel. Co. v. Atlantic, etc., Tel. Co.*, in the court of common pleas of Columbus, Ohio, Judge GREEN gave an opinion from which the following extracts are taken: "This contract embraces other provisions which, as it is alleged, the defendants propose to interfere with. It will be observed that it is not averred in the petition that the defendants propose to remove any but the one wire,—the railroad wire,—nor to prevent the plaintiff from using or continue to use, for the transaction of its business as a telegraph company, the other wires on the poles erected under the contract. The complaint is that the railroad company proposes to violate a term or covenant of the contract by permitting a competing line of telegraph to be erected on its right of way by a rival company, by which its profits will be greatly diminished. The covenant referred to will be found in the sixth clause of the contract, and is in these words: 'The railroad company is not to permit any other telegraph company or individual to build or operate a line of telegraph along its road or any part thereof.' The clause of this contract now under consideration, if it shall receive the construction claimed by the plaintiff, is, in my opinion, against public policy.

"In the case of *St. Joseph & D. C. R. Co. v. Ryan*, reported in 11 Kan. 602, a railroad company, in consideration of a grant of a right of way through certain lands, agreed with the owners to erect and maintain a depot upon said lands, and not to have any other within three miles thereof. It was held that the contract was against public policy. See, also, 24 Pa. St. 378. The public have a deep interest in the operation and establishment of lines of telegraphic communication; it would be inequitable that the rights of the community should be sacrificed to insure the alleged privileges of the plaintiff from all possible damages. In view of the facts of the case, showing that these corporations are not the only parties interested in the contract, and that the public at large have a deep interest in it, it would in my opinion be an unwarrantable exercise of power in a court of chancery to grant an injunction." This case, so it was stated in the argument in *Western U. Tel. Co. v. Baltimore & O. R. Co.*, was decided in 1876, and a competing line of telegraph has been operated upon the Central Ohio Railroad ever since.

In *Western U. Tel. Co. v. Union Pacific R. R.*,¹ Judge MILLER thus speaks: "It was one of the provisions of this contract that the railroad company should not send over its wire any commercial messages, or any paid messages, or messages for any other person than for its own business, the purposes of which evidently was to leave the exclusive right to convey such messages to the telegraph company. And it was to enforce this clause of the contract that the injunction was obtained by the Western Union Telegraph Company in the state court. And it is to get rid of this provision and permit the railroad company to convey such messages, and to unite the wires of the telegraph company with the American Union Telegraph Company that messages may be conveyed brought by the American Union Telegraph Company over the wires of the Western Union Telegraph Company, that the present motion is made. * * * We are both [McCRARY and MILLER, JJ.] of opinion that the railroad company has the right, as it always had, to the exclusive use of the first wire on the telegraph poles, and we are of the opinion that, as the matter stands at this stage of the proceedings, that company should have the right, pending the further litigation of the case, to use that wire, not only for the ordinary business of the road, but for the purpose of transmitting commercial and paid messages for the public in general."

¹ McCrary, 585, 597; [S. C. 3 Fed. Rep. 725, 734.]

(6) WHEN THERE IS NO PUBLIC DUTY THEN THERE MAY BE DISCRIMINATION. The distinction between the cases rests on the question of public duty. When a party is bound to perform a public duty without discrimination, then an agreement to give preferences to particular persons is invalid. When, however, as in the case in the text, there is no such duty, then there may be a discrimination for the reasons given with much ability by Judge KEY. Had the defendant, Miss Whitesides, been under any public duty to permit no discrimination in the reception of persons visiting her estate, then a contract by her to admit only such persons as should come in a particular line of travel would be invalid. This would unquestionably be the case did she undertake to receive guests as at a public inn; since, as is pointed out by Mr. Justice BRADLEY in his opinions in the civil rights questions,¹ the proprietor of an inn or a hotel is not permitted to discriminate arbitrarily between different classes of guests. But Miss Whitesides was not in this position. A visit to her estate was not a necessity, as is the case with the accommodations obtained by travelers from hotel or common carrier. The visit was a matter of luxury, and on the enjoyment of this luxury she was entitled to impose whatever restrictions she chose. It is true that the line between the two classes of cases may sometimes be shadowy. When, however, we apply the criterion of public duty, the two classes of cases become readily distinguishable. We have this illustrated in some recent rulings as to contracts by which certain telephone companies agree to deal exclusively with certain telegraph companies. In Connecticut such a contract has been held to be valid.² On the other hand, a similar contract has been held to be invalid in Ohio; and the reason of this ruling may be found in the fact that in Ohio a statute exists prescribing the impartial transmission of all dispatches. A similar statute no doubt exists in Connecticut; but it was not regarded by the court as binding the telephone company. But, whatever we may think of this distinction, we may regard it as settled that the only cases in which a party is prevented from discriminating between persons seeking to do business with him are the following: (1) Where he has the monopoly of some staple whose use is essential to the community: (2) Where, as is the case with common carriers and innkeepers, he is required by law to place all applicants, not subject to exclusion on police grounds, on the same footing.

FRANCIS WHARTON.

¹3 Sup. Ct. Rep. 18.

²Amer. Rapid Tel. Co. v. Telephone Co. 13 Reporter, 329.

BENEDICT and others v. ST. JOSEPH & W. R. Co. and others.

(Circuit Court, D. Kansas. November 30, 1883.)

1. MORTGAGE OF RAILROAD PROPERTY—FORECLOSURE—WAIVER OF APPRAISEMENT—LAWS OF KANSAS.

Under section 3983 of the Compiled Laws of Kansas no order for the sale of railroad property mortgaged with a waiver of appraisal can be made by the court until the expiration of six months after the decree of foreclosure. This statute regulates the transfer of land within the state, and is therefore binding upon the federal courts.

2. SAME—APPOINTMENT OF RECEIVER.

After such foreclosure the income of the road, being the property of the bondholders for the liquidation of their claims, should be received by a dis-

terested trustee until the time of the sale; and the fact that certain of the bondholders are in possession, to the exclusion of others, is a sufficient reason for the appointment of a receiver, unless the interval between the decree and the sale is very brief.

In Equity.

John F. Dillon, J. P. Usher, and A. J. Pappleton, for Union Pacific Railroad Company.

Wager Swayne, John Doniphan, and Melville Egleston, for St. Joseph & Western Railroad Company.

Winslow Judson, for complainant.

Woodson, Green & Burnes, for receiver.

McCRARY, J. In this case a decree of foreclosure will be entered. We have carefully considered the motion for the appointment of a receiver. We are entirely satisfied that the St. Joseph & Western Railroad Company is insolvent, and that the property covered by the mortgages is inadequate security for the bonds secured thereby. The facts that no interest has ever been paid, that the debt is over \$6,000,000, and that the current expenses have, until recently, about equaled the earnings, are sufficient upon this point. We are also clearly of the opinion that the road should not remain in the custody of the present management, which is in fact, if not in name, the Union Pacific Railway Company, unless a sale under the foreclosure can be had at an early day. The objection to continuing the present management for any protracted period of time is to be found in the fact that to do so would be to leave the mortgaged property in the hands of one set of bondholders, to be by them managed and controlled for themselves and another and hostile set of bondholders. The proof is satisfactory that there are two sets of bondholders,—the majority represented by the Union Pacific Railway Company, and a large minority whom that company does not represent. If a considerable time must inevitably elapse before a sale can be made and confirmed, we think the minority have a clear right to insist that the property shall, in the mean time, be in the hands of a disinterested party. It is not necessary to determine at present whether the charges of mismanagement made against the Union Pacific Company are sustained. It is enough to say that the holders of the minority of the bonds have a right to insist that the road shall not remain in the hands of an interest hostile to them.

This court is very reluctant to appoint a receiver, and we have considered very carefully the question whether, in justice to the interests in hostility to the present management, we can refuse to do so. If the time to elapse before the property can be transferred to a purchaser under a decree to be now rendered was not more than 60 or 90 days, we should not be willing to appoint a receiver for so short a period, and when the argument closed we were under the impression that there was nothing in the way of closing the sale and transfer within that period. But upon looking into the statutes of this state we find

a provision which seems to require in a case of this character a stay of execution for six months. The provision referred to is section 3983 of the Compiled Laws of Kansas, 1881, and is as follows:

"That if the words 'appraisement waived,' or other words of similar import, shall be inserted in any deed, mortgage, bond, note, bill, or written contract hereafter made, any court rendering judgment thereon shall order, as part of the judgment, that the same and any process issued thereon shall be enforced, and sales of lands and tenements made thereunder without any appraisement or valuation made of the property to be sold: provided, that no order of sale or execution shall be issued upon such judgment until the expiration of six months from the time of the rendition of said judgment."

Here the mortgages contain a waiver of appraisement, so that the case seems to fall clearly within the terms of the statute. This statute, in our opinion, confers upon mortgagors a substantial right, and if so, it must, we think, be respected and enforced by this court. It is the settled practice of this court to follow this provision of the statute in foreclosure cases. If the question were at all doubtful we should not be willing to take the chances of ordering the sale of property of the great value of that now in controversy, without following the statute and ordering the stay of six months which it requires.

It is contended that this statute has no application to a mortgage of railroad property, and *Hammock v. Loan & Trust Co.* 105 U. S. 86, is cited as supporting this condition. That case undoubtedly holds that the statute of Illinois providing for the redemption of real estate sold under a decree of mortgage foreclosure will not be followed by the federal courts of equity in that state in cases of the foreclosure of mortgages upon property, real, personal, and mixed, of a railroad company. The reason given for this ruling is that the property of such a company, consisting of real estate, personal property, and a corporate franchise, must be treated as a unit, and sold altogether, because, to attempt to divide it, and sell the real estate separately from the personal estate, would destroy its value. It is held that to apply the statute to such a case would leave the court with "no discretion, if the corporation or its judgment creditors so demand, except to order the sale of the real estate separately in parcels, when susceptible of division and subject to redemption, leaving the franchises and personal property to be sold absolutely and without redemption. Thus one person might become the purchaser of the real estate, another of the franchise, and still others of the personal property." Such a result, the court held, could not have been contemplated by the legislature. It was shown that among other consequences one person might acquire title to the real estate, another to the personality, and still another to the corporate franchise, each being practically valueless without the other. It is evident that no such serious results will follow from a compliance with the statute of Kansas now under consideration. It relates only to the time when an execution or order of sale shall issue. It is always within the power of a court of equity, in foreclosure cases, to fix a time when a sale of the mortgaged prop-

erty may be had. The complainants in the present case have no absolute right to an immediate sale even of the personal property and corporate franchises. It is not, therefore, necessary, in order to follow the statute, that we divide and dismember the mortgaged railroad property. The stay can be ordered as to the entire property and its unity thereby be preserved, and the statute at the same time enforced, and all rights under it maintained.

We are bound to follow the statute, since it is clearly a statute regulating the transfer of title to property in the state; unless, upon some such ground as that stated in *Hammock v. Loan & Trust Co.*, we can hold that it was not intended to apply to such a case as that now before us. *McGoon v. Scales*, 9 Wall. 23; *Brine v. Ins. Co.* 96 U. S. 627. Compliance with this statute must postpone the sale until it will probably be too late to obtain confirmation at the next June term. If that term is passed a delay of one year is inevitable. For reasons already suggested we cannot see our way clear to leave the property so long after default and decree of foreclosure in the hands of one portion of the bondholders, acting in hostility to another portion having equal equities.

The net income of the road, from this date, at least, (we decide nothing now as to past earnings,) is the property of the bondholders, and must be applied to the liquidation of their claims. Whoever controls the property, and collects and disburses the earnings, from this date, must do so as a trustee of the bondholders. The bondholders out of possession have a right to object to the collection and disbursement of this increase by other bondholders in possession and hostile in interest to them. They have a right to insist that a disinterested representative of all the bondholders shall perform that duty. The party to be left in possession and authorized to collect, care for, and pay over the income, being a trustee, and acting in a fiduciary relation, should have no personal interest in hostility to that of any of the *cestuis que trust*. The amount of the net increase to be divided among bondholders will depend upon the amount of expenditures, what improvements and repairs are made, and the like. Many questions must arise in the course of administration which should be decided by an unbiased representative of all the interests concerned, or by the court. It might be to the interest of the bondholders in possession to make extensive improvements. To this the bondholders out of possession might object. If a receiver is appointed, the court can direct and control these matters. As at least a year must probably elapse before a sale can be made and confirmed, we are constrained, most reluctantly, to appoint a receiver; but we give notice now that no delay that is not unavoidable shall be allowed in closing the receivership and delivering the property to the purchaser at the foreclosure sale; and, if possible, the sale shall be made and confirmed, and the property turned over, before the end of the year.

FOSTER, J., concurs.

CHICAGO, M. & ST. P. RY. CO. v. CITY OF SABULA and another.

(Circuit Court, N. D. Iowa, E. D. January 3, 1884.)

RAILROAD BRIDGE—TAXATION—LAWS OF IOWA.

The constitution of Iowa requires the property of all corporations for pecuniary profit to be taxed in the same way as that of individuals. In 1872 the legislature passed an act providing that railroad property within the state should be assessed for taxation by a special board appointed by the state, and not by the local authorities. This statute was held by the courts to be constitutional, on the ground that it applied to all railroad property whether owned by corporations or by individuals. Section 10 of the act of 1872 declared that no provisions of the act should apply to any railroad bridge across the Mississippi or Missouri river, but that such bridges should be taxed as individual property. At the time the act was passed none of the bridges over those rivers were owned by railroad companies, but the companies paid rent or toll for the use of them. In 1880 the Chicago, Milwaukee & St. Paul Railroad built a bridge of its own across the Mississippi at Sabula. *Held*, that the nature of the property and not the ownership determined whether it fell within section 10 of the act, and that the bridge was therefore subject to be taxed by the local taxing district.

Bill in Equity. Motion for temporary injunction.

W. J. Knight and J. W. Cary, for complainant.

Fouke & Lyon, W. C. Gregory, and J. Hilsinger, for defendants.

SHIRAS, J. The bill in this cause sets forth that the complainant is a corporation organized under the laws of the state of Wisconsin, and is the owner and lessee of about 5,000 miles of railroad in the states of Wisconsin, Illinois, and Iowa; that, among others, it operates a line running from Chicago, Illinois, to Council Bluffs, Iowa, which crosses the Mississippi river at the town of Sabula, by means of a bridge constructed by complainant under the authority of the act of congress, approved April 1, 1872, the said bridge being used solely for the passage of the trains of complainant, and being owned solely by complainant, the same as other portions of its track. The bill further alleges that in the years 1881, 1882, and 1883, the general manager of complainant made a statement of the number of miles of railroad operated by complainant in the state of Iowa, with the number of cars, and the amount of earnings, as required by the statute of Iowa, and furnished the same to the executive council, which statement included the length of so much of said railroad bridge at Sabula, Iowa, as is within the state of Iowa, and that the executive council, as required by law, assessed the total valuation of complainant's property, including so much of said bridge as is within the state of Iowa, and apportioned the same over the entire road of complainant, in accordance with the requirements of the statutes of Iowa, regulating the assessment and taxation of railroad property. The bill further charges that the town of Sabula, and county of Jackson, have each assessed the bridge in question and levied taxes thereon for the years 1881, 1882, and 1883, and are threatening to enforce the payment

thereof, by seizure and sale of complainant's property, to prevent which the court is asked to issue a temporary injunction.

The question presented is, therefore, whether, for the purposes of taxation, the bridge, owned and used by complainant across the Mississippi river at Sabula, Iowa, is to be deemed and taken to be a component part of the entire line of road owned by complainant, the same as the bridges across the Des Moines, the Iowa, and other streams within the state of Iowa, and, as such, to be valued and assessed by the executive council of the state, or whether it is to be deemed and taken to be a railway bridge within the meaning of section 808 of the Code of Iowa, and as such to be assessed and taxed the same as the property of individuals in the same county; that is, by the local assessors and the board of equalization. Previous to the year 1872, the property of railroads in Iowa was taxed through the gross earnings of the companies, 1 per cent. being levied upon such earnings, one-half of which tax was paid to the state, and the other half to the respective counties through which the roads were operated. In 1872 an act was passed by the legislature, providing for the assessment to be made by the census board or executive council. The act required the officers of each railroad company to furnish to the census board a statement showing the whole number of miles operated by the company within the state, and within each county in the state, with a detailed statement of the number of engines, cars, and other property used in operating the railroad within the state, and of the gross earnings of the entire road and of so much thereof as is situated within the state.

Section 1 of the act declares it to be the duty of the census board, on the first Monday of March in each year, "to assess all the property of each railroad company in this state excepting the lands, lots, and other real estate of a railroad company not used in the operation of their respective roads."

In section 3, it is provided that "the assessment shall be made upon the entire road within the state, and shall include the right of way, road-bed, bridges, culverts, rolling stock, depots, station grounds, shops, buildings, gravel-beds, and all other property, real and personal, exclusively used in the operation of said railroad."

Having ascertained the total valuation, the value per mile is ascertained by dividing the total value by the number of miles, and this valuation, with the number of miles situated in each county, is transmitted to the board of supervisors of each county, by whom the length of the track, and the assessed value of the same within each city, town, township, and lesser taxing district within the county is determined.

By section 10 of the act it is declared that "no provision of this act shall be held to apply to any railroad bridge across the Mississippi or Missouri rivers, but such bridges shall be assessed and taxed on the same basis as the property of individuals."

When this act of 1872 was adopted there were several bridges across the Mississippi and Missouri rivers, but these were, save the Rock Island bridge, which was owned by the United States, owned by bridge companies, by whom the bridges were constructed, and the use thereof was leased or otherwise contracted to the railroad companies, who paid a rental or toll for crossing the same. In 1880 the complainant constructed its bridge over the Mississippi river at Sabula, for the purpose of making a continuous line of road from Milwaukee and Chicago to Council Bluffs. The bridge is used only for the passage of the cars of the complainant's trains, and no rental or toll is paid for crossing the same by any shipper of freight or passenger upon complainant's road. In other words, this bridge forms part of complainant's line of railway, the same as any of the other bridges spanning the streams, great or small, that are crossed in going from Sabula, on the Mississippi, to Council Bluffs, on the Missouri.

On part of complainant it is claimed that as this bridge forms part of its continuous line of road, it comes within the enumeration of the property to be taxed by the census board, as found in section 3 of the act of 1872, and that section 10 does not take it out of this enumeration, that section being intended to cover the bridges across the Mississippi and Missouri rivers which are owned by bridge companies, and for the use of which the railroad companies pay a rental or toll. On part of the defendants it is claimed that the provisions of section 10 must be held applicable to all bridges across the rivers named, which are used for railroad purposes in the crossing of trains over the same; that it is the use made thereof, and not the ownership, which makes the structure a railroad bridge within the meaning of this section.

In the case of *City of Dubuque v. C., D. & M. R. Co.* 47 Iowa, 196, the question of the constitutionality of this act of 1872 came before the supreme court of Iowa, it being claimed that the act was in contravention of section 2, art. 8, of the state constitution, which provides that "the property of all corporations for pecuniary profit shall be subject to taxation, the same as that of individuals." The majority of the court held the act to be constitutional upon the theory that the mode of assessment and taxation provided in the act applied to all property of the character named, without reference to whether it was owned by a corporation, a partnership, or an individual. That the act does not provide a special manner of assessing the property of railroad companies as such, but rather of railroad property, and that such property would be properly taxable under its provisions, whether owned by an incorporated company, a partnership, or an individual. In other words, the court holds that the general provisions of the act were intended to apply to all property used for railroad purposes, and not solely to property owned by railroad corporations, the use, and not the ownership, determining the question whether the act was applicable thereto.

Under this construction of the act it follows that, as a general rule, all property used in the operation of a railroad, no matter whether the same is owned by a corporation or individuals, is to be assessed by the census board in the mode pointed out in the act in question. Section 10 of the act, however, provides for an exception to the general rule thus laid down, by enacting that the provisions of the act shall not "apply to any railroad bridge across the Mississippi or Missouri river, but such bridges shall be assessed and taxed on the same basis as the property of individuals."

As already stated, the question at issue between the parties to these proceedings is whether this section shall be held to apply to all bridges used for railroad purposes, without regard to the ownership thereof, or shall be confined to bridges owned by bridge companies. In the latter case, the assessment of the bridge at Sabula would be made solely by the census board; but in the former case, the bridge would be assessed and taxed the same as any other structure erected in the town of Sabula. If it be true that the general provisions of the act of 1872 are intended to apply to property used in the business of railroading, without reference to the question of the same being owned by a corporation, partnership, or by individuals, then it would seem only consistent to hold that the same rule should be applied in construing section 10 of the act, and that therefore, when it is stated that "no provision of the act shall apply to any railroad bridge across the Mississippi and Missouri rivers," the meaning is that that particular species of railroad property is excepted from the operation of the act, without reference to whether it is owned by a railroad corporation, a company, or an individual. Within the meaning of this act, a railroad bridge is a structure used for the purpose of the passage of locomotives and cars over the same, by means of rails laid along the structure. If the structure is used for that purpose, it is a railroad bridge, no matter by whom it was built and is owned.

Under this construction of the act all bridges over the Mississippi and Missouri rivers used for the passage of railway trains will be assessed and taxed under one and the same statute. If it be held, however, that a bridge used solely for the passage of railway trains is to be taxed by the census board, if owned by a railway company, but if owned by an individual, is to be assessed and taxed by the local assessors, then we would have different modes of assessment and taxation, applied to similar property, used for a like purpose, and differing only in the ownership. It can hardly be supposed that the legislature intended to enact such a law, in view of the constitutional provision already quoted. As an illustration, take the bridge over the Mississippi river at Dubuque. It is owned by a bridge company, but is used solely for the passage of railway trains over the same. It is always spoken of as a railroad bridge, and is assessed and taxed, not by the census board, but by the local assessors, the same as other realty in the city and county of Dubuque. If the Illinois Central Rail-

road Company should purchase this bridge from its present owners, and continue the running of their trains over the same, it would then constitute a part of the main line of the company, connecting Cairo and Chicago with Sioux City, just as the Sabula bridge constitutes part of the line of the Chicago, Milwaukee & St. Paul Railroad Company, and, according to the contention of complainant, a change in the ownership of the bridge in the supposed case would be followed by a change in the mode of assessment and taxation of the bridge, although the structure and the use made thereof remains unchanged.

It is urged in argument that there is a difference between a bridge owned by a company, such as the one at Dubuque, and one owned by a railway company, as is the one at Sabula, in that a toll is charged by the bridge company and paid by the railway company for each car and passenger that passes over the bridge; whereas, in the latter case, the railway company treats the bridge as part of its continuous line, and makes no special charge for carrying freight and passengers over the same, in distinction from any other part of its line. This difference, however, so far as it affects the question under consideration, is more apparent than real. In both cases the companies use the bridges for the same purpose. In the one case the railway company meets the cost of transporting its trains over the river by paying for the use of the bridge, while in the other, the company meets the cost by paying for the erection of the bridge, and the current expenses of maintaining it. It is nevertheless true that the structures and the uses to which they are put are the same in both instances, and the mode of their construction, and the use to which they are put, show them to be alike railroad bridges, and no good reason is perceived why the modes of assessment and taxation should be varied by reason of a difference in the ownership.

The act of 1872, as construed by the supreme court of Iowa, is intended to provide for the taxation of property used in the operations of railroading, without regard to its ownership by a corporation, a partnership, or individuals. If there were no exceptions in the act, all railroad bridges crossing the Mississippi and Missouri rivers, being structures used in the operation of railways, would fall within the provisions of the act, and in that case would be assessable by the census board, and in no other manner. But by section 10 of the act, one kind of property used in the operation of railways is specially excepted, to-wit, all railway bridges across the Mississippi and Missouri rivers, it being declared that "such bridges shall be assessed and taxed on the same basis as the property of individuals." Under this section the census board have no right or authority to assess any railroad bridges spanning the rivers named, because the first clause of the section expressly declares that no provision of the act shall be held applicable to such bridges, and it is only by virtue of the provisions of this act that the census board have the right to assess any railroad property for taxation. The first clause, therefore, of section

10 negatives the claim that railroad bridges over the Mississippi and Missouri rivers are assessable by the census board, and the latter clause of the section expressly declares that these bridges shall be assessed and taxed on the same basis as the property of individuals, by which is meant that these bridges shall be assessed in the same mode as is pursued in regard to other property situated in the same taxing district, or, in other words, these bridges are to be assessed and taxed through the agency of the local assessors.

In considering the construction to be given to the act of 1872, I have viewed it in the form in which it was passed by the legislature, and not as it is now found incorporated in the Code of 1873. An examination of the Code shows that section 1 of the act of 1872 forms section 1317 of the Code, and sections 2, 3, 4, 5, 6, and 11 of the act of 1872 are condensed into sections 1318, 1319, 1320, 1321, and 1322 of the Code. Sections 8 and 10 of the act of 1872 are found incorporated together as section 808 of the Code. The changes thus made in the language used, and in the relative positions of these sections, do not change the legal effect thereof, so far as the question under consideration is concerned. These sections, 808 and 1318 to 1322, inclusive, deal with the same subject, and are therefore to be construed together. While section 1317 declares that the executive council shall assess all the property of each railway corporation in the state, "excepting the lands, lots, and other real estate belonging thereto not used in the operations of any railway," yet, section 808 declares that "lands, lots, and other real estate belonging to any railway company not exclusively used in the operation of the several roads, and all railway bridges across the Mississippi and Missouri rivers, shall be subject to taxation on the same basis as the property of individuals in the several counties where situated." Being *in pari materia*, the two sections must be construed together; and it follows that the general declaration in section 1317, that all the property of each railway corporation is to be assessed by the executive council, must be held to mean all property not excepted in some other section of the statutes dealing with the same subject-matter.

It is a familiar rule of construction that general statements or provisions in statutes may be restricted or qualified by special clauses found therein. Therefore, when we find that section 1317 declares, generally, that all the property of railway companies used in the operation of their roads is to be taxed by the executive council, and that section 808 provides for the taxation of lands, lots, and other property not used in the operation of the roads, and of railroad bridges, by the local assessors, we must hold that the special exceptions named in section 808 qualifies and restricts the general language used in section 1317. By this rule both sections are harmonized, and neither abrogates the other. That this construction effectuates the true intent of the legislature, is shown by a reference to the act of 1872, wherein, as already stated, we find the general de-

claration as now set forth in section 1817 of the Code, but with the proviso found in section 10, declaring that the provisions of the act should not apply to any railroad bridge across the Mississippi and Missouri rivers. To give this section the construction claimed for it on behalf of complainant would require the interpolation of the words, "unless owned by a railroad corporation," or the equivalent thereof, so as to make the section read, "that no provision of this act should be held to apply to any railroad bridge across the Mississippi or Missouri rivers, unless owned by a railroad corporation."

It is argued that this must have been the intent of the legislature, in effect, because, when the act of 1872 was passed there were no bridges across these rivers that were owned by the railway companies, and hence that the exception contained in section 10 could not have been intended to apply to such bridges when they were afterwards built. The act of 1872 was prospective in its operation. It was intended to provide a mode for the taxation of railway property in the future, and was intended to, and does apply to, all railways in the state, whether then built or not. While it may be true that in 1872 there were no railway bridges across the Mississippi or Missouri rivers owned by the railroad companies using the same, still it cannot be fairly claimed that the improbability of such bridges being built and owned by the railroad companies was so great that it must be presumed that the legislature did not contemplate such bridges being built, and therefore did not intend to include them within the general term of railroad bridges, as found in section 10 of the act of 1872.

It was certainly known to the legislature that railroad companies, both in Iowa and other states, were frequently in the habit of building and owning bridges across rivers of very considerable magnitude, and that there was no special reason why in the future some railway company might not build and own a bridge across the Mississippi. It was also undoubtedly known to the legislature, when the act of 1872 was passed, that congress had, in 1866, authorized the Chicago, Burlington & Quincy Railroad Company to construct and maintain a railroad bridge across the Mississippi river, connecting its lines in Illinois and Iowa, and in the same act had authorized the Winona & St. Peter Railroad Company to construct and maintain a railroad bridge across the Mississippi river at Winona, Minnesota, and that in 1870 had authorized the St. Joseph & Denver City Railroad Company to construct and maintain a railroad bridge across the Missouri river at St. Joseph, Missouri, and in 1871, had authorized the Louisiana & Missouri Railroad Company to construct and maintain a railroad bridge across the Mississippi river at Louisiana, Missouri, and in 1872, but a few days before the passage of the act of the legislature in question, had authorized the Western Union, and Sabula, Ackley & Dakota Railroad companies to construct and maintain a railroad bridge across the Mississippi at some point in Clinton or

Jackson counties, in Iowa,—the bridge in question at Sabula being afterwards built under the authority of this act of congress, by the present complainant, as the assignee of the rights of said Western Union, and Sabula, Ackley & Dakota companies. Under these circumstances, the claim made in argument, that the legislature could not have contemplated the possibility of the construction of any railroad bridges across the Mississippi and Missouri rivers by a railroad company, and hence, did not intend the exception found in section 10 of the act of 1872 to apply to such bridges, cannot be sustained, in view of the broad terms used in that section.

If the views herein stated are correct, it follows that the executive council of the state have no authority to include the bridge at Sabula in the enumeration of the property owned by complainant to be assessed by such council. Being a railroad bridge, it is to be assessed and taxed on the same basis and by the same modes that are applicable to other realty situated in the same taxing district; and, as a necessary consequence, it follows that the application for a temporary injunction must be overruled.

Recognizing the importance of the question presented in this case, I have given as much time to its investigation as was possible, since its submission, but its importance demands that it should not be left dependent upon the conclusions of a single judge reached upon an argument upon a motion for a temporary injunction, and it is the desire of the court that, upon the final hearing of the case upon its merits, the question may be presented to a full bench.

In re TUNG YEONG.

(*District Court, D. California.* February 1, 1884.)

1. **CHINESE IMMIGRATION—CUSTOM-HOUSE CERTIFICATES.**

By the treaty of 1860, Chinese laborers then in the United States were accorded the privilege of coming and going at pleasure. The restriction act of 1882 extends this liberty to all who arrive before the expiration of 90 days after the passage of the act. This law also requires incoming Chinamen to produce custom-house certificates. The language of the act is ambiguous and might be so construed as to require the certificate from those who left the country between the adoption of the treaty and the passage of the restriction act, but as no provisions existed during that period for the issue of such certificates, this construction would be clearly repugnant to the treaty. The court, therefore, holds that Chinese laborers who were in the United States at the date of the treaty, and who departed before the act took effect, are entitled to land without producing custom-house certificates.

2. **SAME—MERCHANTS.**

Only Chinese laborers are excluded. Those who come to engage, in good faith, in mercantile occupations are *held* to be entitled to land, and their Canton certificates are *prima facie* evidence of their mercantile character.

3. **SAME—CHILDREN.**

Nothing in the law is held to prevent parents living here from sending for their children who are two young to be classed as laborers.

On Habeas Corpus.

S. G. Hilborn, U. S. Atty. for California, and *Carroll Cook*, Asst. U. S. Atty. for California, for the United States.

Lyman J. Mowry, for the detained.

Milton Andros, for Williams, Dimond & Co., agents Pacific Mail S. S. Co., who held petitioners.

HOFFMAN, J. The very great number of cases in which writs of *habeas corpus* have been sued out of this court by Chinese persons claiming to be illegally restrained of their liberty, and which were of necessity summarily investigated and disposed of, has rendered it impossible for the court to deliver a written opinion in each case. The evidence in the various cases and the rulings of the court have been very imperfectly reported by the press, and the latter, though much criticised, have not, it is believed, been thoroughly understood. It is deemed proper to set forth in an opinion, as succinctly as may be, the general nature of these cases, of the evidence upon which the decision of the court has been based, and its rulings upon the more important of the questions which have been presented for its determination.

The applications for discharge from a restraint claimed to be illegal may be divided into three classes:

First. Applications on the ground of previous residence. By the second article of the treaty it is provided that "Chinese laborers now in the United States shall be allowed to go and come of their own free will and accord, and shall be accorded all the rights, privileges, immunities, and exemptions which are accorded to the citizens and subjects of the most favored nations." 22 St. 827. By the third section of the law, known as the restriction act, the same privilege is indirectly extended to laborers "who shall have come into the United States before the expiration of ninety days next after the passage of this act." The date of this treaty is November 17, 1880. The date of the passage of the law is May 6, 1882. During this interval large numbers of Chinese laborers, who were protected by the treaty, have left the country, of course, unprovided with custom-house certificates, for there was no law then existing which required them to obtain them or authorized the custom-house authorities to furnish them.

The language of the law is ambiguous, and perhaps admits the construction that the laborers who left this country during the interval I have mentioned should be required to produce the custom-house certificate provided for in the act. It was not doubted by the court that if the treaty and the law were irreconcilably conflicting, the duty of the court was to obey the requirements of the law, but it was considered that no construction should be given to the law which would violate the provisions of the treaty, if such construction could be avoided. It was therefore held that a Chinese laborer who was here at the date of the treaty, and who left the country before the law went into operation, might be admitted without producing a cus-

tom-house certificate, which it would be impossible for him to obtain, and that it was inadmissible, if not indecent, to impute to congress, when legislating to carry into effect our treaty with China, the intention to deprive laborers of the right to come and go of their own free will and accord, which was explicitly recognized and secured by the treaty, by exacting as a condition of its exercise the production of a certificate which it was out of their own power to obtain. *In re Chin A On*, 18 FED. REP. 506. It was also held that Chinese who were not in the country at the date of the treaty were not embraced within the provisions of the second article, and also that a Chinese laborer who, although in the country at the date of the treaty, had left after the law went into practical operation, and who neglected to procure a certificate, was not entitled to return. As to the soundness of the last ruling, doubts may be entertained. It is understood that the question will shortly be submitted to the circuit court.

If there be error in these rulings it is assuredly not in favor of the Chinese. The right of laborers who can prove they were in the country at the date of the treaty, and had left before the law went into effect, to be allowed to land without the production of a custom-house certificate, being thus recognized, the court held that the burden of proof was on them, and that satisfactory evidence of the facts would be rigorously exacted. In some cases this evidence was such as to establish the facts beyond all reasonable doubt; as, for instance, the former residence and departure of the petitioner was in one case proved by the testimony of the reverend gentlemen at the head of the Chinese mission in this city, who swore not only to his personal recollection of the fact, but produced a record of the proceedings of the sessions of his church, in which the departure of the petitioner and his resignation of the office of deacon, which he held, and the appointment of his successor, are recorded. These records, he testified, were in his own handwriting, and were made at the date which they bore. In another case a young lady connected with the mission proved the departure of the petitioner, (who was a convert and her pupil,) not merely by her own testimony as to the fact, but by the production of a religious book which she gave him at the time of his departure, on the fly-leaf of which were inscribed, in her own handwriting, and signed by herself, some expressions of regard, together with some texts of scripture. This book, she testified, was handed to him on board the vessel at the date of the inscription on the fly-leaf, with the injunction to keep it and bring it back on his return. It was accordingly brought back and produced in court. On proofs such as these no rational doubt could be entertained, and the petitioners were discharged.

But in the large majority of cases proofs hardly less satisfactory were exacted and furnished. The Chinese, on returning to their country, almost invariably procure permits from the companies of which they are members, and which are furnished them on payment

of their dues. The departure of the members and the payment of their dues are recorded in the books of the company. These books the court invariably required to be produced. It also appears that, in most cases, their savings, accumulated in this country, are remitted to China for their account by mercantile firms in this city, and also that their tickets are, in many cases, purchased through the agency of those firms. The production of the firm books showing these transactions was, in like manner, required, and they, together with the books of the companies, were subjected to the critical scrutiny of Mr. Vrooman, the very intelligent, competent, and entirely reliable Chinese interpreter.

In very many cases all these books were produced in court, and, in some instances, the evidence they afforded was corroborated by testimony of white persons in whose employ the petitioner had been, and who testified to the time of his departure. It is, of course, possible that, in some instances, the court has been deceived, but considering that in no case has a person been allowed to land on the plea of previous residence on unsupported Chinese oral testimony, the number of such instances cannot be large. The proofs were in all cases sufficient to satisfy any candid and unbiased mind. Of the whole number thus far discharged by the order of the court, it is believed that those discharged on the grounds stated constitute nearly one-half. In justice to the six companies I should add that their presidents have spontaneously offered to the court to cause copies of their books, with records of departures of their members during the interval I have mentioned, to be made at their own charges, such copies to be verified by Mr. Vrooman, by comparison with the original records, and then to be deposited with the court. When this is done no means will any longer exist of interpolating or adding new names on the books of the companies. It will still remain possible for a Chinese laborer to assume the name, and personate the character of some one whose name appears on the records; but this mode of deception it seems impossible wholly to prevent.

Secondly. Applications founded on the productions of Canton certificates. The investigation of this class of cases proved exceedingly embarrassing to the court, and is attended with difficulties almost insuperable. The certificates furnished at Canton by the agent of the Chinese government, the law declares, shall be *prima facie* evidence of a right to land. This provision of the law, whatever distrust might be felt as the reliability of these certificates, the court could not disregard. The counsel for the petitioner usually presented a Canton certificate to the court and rested his case. The district attorney was necessarily without the means of disproving the truth of the certificate except by such admissions as he might extract from the petitioner himself when placed on the stand, or had been gathered from him upon his examination by the custom-house officials.

The district attorney was therefore allowed to call the petitioner, and cross-examine him in a most searching manner, and contradict, if he could, his statements; in short, to treat him as an adverse witness called by the opposite side. This method, though somewhat irregular, seemed to be the only one to be adopted with any hope of arriving at the truth. Another embarrassment under which the court labored was the inability to attach any distinct and definite signification to the term "merchant;" but, inasmuch as the treaty expressly declares that the only class to be excluded are "laborers," and that no other class is within the prohibition of the treaty, it was held by the court that the inquiry was not so much whether the person was a merchant as whether he was a "laborer," and that that inquiry should relate, not to his occupation or *status* in China, but to the occupation in which he was to be engaged in in this country; as the intention and object of the law was to protect our own laborers from the competition and rivalry of Chinese laborers here.

At first sight it would seem that the production of the books of a respectable mercantile firm, in which the name of the petitioner was inscribed as a partner, would be sufficient to establish his *status* as a merchant. It was soon found, however, that this mode of proof was, to a great extent, unreliable; for, *first*, the books might be falsified, and the entry made to meet the exigencies of the case; and, *secondly*, it appeared that the Chinese are in the habit of placing their earnings in stores or mercantile establishments, and in virtue of this investment they are admitted to a share of the profits. It might, therefore, often happen that a Chinese laborer would appear on the books of the company as holding an interest to the amount of a few hundred dollars in the concern, while he himself remained a laborer, and could in no sense of the term be called a merchant or a trader. The books above spoken of were in all cases subjected to a rigid scrutiny, with a view of detecting interpolations and falsifications. I am satisfied that in spite of the efforts of the court, which in almost all cases itself subjected the petitioner to a rigid cross-examination, and, in spite of the efforts of the district attorney, some persons have been admitted on Canton certificates who have no right to land, in what numbers it is impossible to say, but this result seemed to be the necessary consequence of the fact that the law made the certificate *prima facie* evidence of the petitioner's right, and of the difficulty of ascertaining the facts. A considerable number of cases were also presented to the court, where the petitioner claimed to be about to enter some mercantile establishment in which his brother or his uncle or his father was interested. The existence of the establishment was usually proved beyond a doubt, but the court was at the mercy of oral testimony as to the intended adoption of the petitioner as a partner. In some instances letters were produced from his relatives in this city, addressed to him in Hong Kong, inviting him to come to

this country to be admitted to the business, but the genuineness of these letters was often doubtful, and no obstacle existed to their manufacture in this city after the arrival of the steamer.

In several cases it appeared by the petitioner's own admission that he was a laborer in China; that he came to this country wholly unprovided with money; and that he expected to enter the store of his brother, or uncle, or other relative, as a porter. In such cases he was remanded to the ship; but even in those cases where the petitioner, or his uncle, or other relatives declared that he was to be admitted to the business, the court became aware that it might be the victim of gross imposition if, on such testimony, any Chinese person engaged in mercantile pursuits here could import as many laborers as he might declare to be brothers, sons, or nephews, and testify that he proposed to admit them to the business. In some instances pretensions of this kind have been summarily rejected. In other instances the court has felt compelled to discharge the petitioner on a preponderance of proof, though not without serious misgivings as to the facts of the case.

Third. Children brought to or sent for by their parents or guardians in this city. In almost all these cases the petitions were filed on behalf of children of from 10 to 15 years of age. Their fathers or other relatives testified that they had sent for them to be brought to the United States with a view of placing them at school to learn the English language, and later to adopt them into their business. The parents who thus claimed to exercise the natural right to the custody and care of their children were, in almost every instance, Chinese merchants; sometimes of considerable substance, resident here, and entitled, under the provisions of the treaty, to all the rights, privileges, and immunities of subjects and citizens of the most favored nation. Absurdly enough, these children, in many instances, were provided with Canton certificates, but, though they were in no sense merchants, many of them being much too young to earn their living, they were certainly not laborers; and it was not without satisfaction that I found there was no requirement of the law which would oblige me to deny to a parent the custody of his child, and to send the latter back across the ocean to the country from which he came.

The foregoing presents a general, but I think sufficient, statement of the various questions which have arisen in these cases, and of the rulings of the court upon them. If there be error in those rulings I am unable to discern it. It will be cheerfully corrected when found to exist by the judgment of a higher court, or even when pointed out by any one who shall first have taken the pains to ascertain what rulings of this court have actually been, a natural, and one would think necessary, preliminary which has hitherto been largely dispensed with by the more vehement of those by whom the action of the court has been assailed. That some persons have been suffered to land under Canton certificates who were in fact within the pro-

hibited class there is great reason to fear. How this could have been prevented by the action of any court, honestly and fearlessly discharging its duty under the law and the evidence, has not been pointed out.

By the constitution and laws of the United States, Chinese persons, in common with all others, have the right "to the equal protection of the laws," and this includes the right "to give evidence" in courts. A Chinese person is therefore a competent witness. To reject his testimony when consistent with itself, and wholly uncontradicted by other proofs, on the sole ground that he is a Chinese person, would be an evasion, or rather violation, of the constitution and law which every one who sets a just value upon the uprightness and independence of the judiciary, would deeply deplore. But while according to Chinese witnesses the right to testify secured to them by the constitution and the law, no means of arriving at the truth within the power of the court have been neglected, and the ingenuity of the district attorney and the court has been taxed in the attempt to elicit the truth by minute, rigorous, and protracted cross-examinations. That it has frequently been baffled was naturally to be expected. But notwithstanding these unavoidable evasions, the practical operations of the act has been by no means unsatisfactory.

Returns obtained from the custom-house show that from the fourth of August, 1882, to the fifteenth of January, 1884, a period of nearly 16 months, there have arrived in this port 3,415 Chinese persons. During the same period there have departed no less than 17,088. It thus appears that not only has the flood of Chinese immigration, with which we were menaced, been stayed, but a process of depletion has been going on which could not be considerably increased without serious disturbance to the established industries of the state. It is stated that the wages of Chinese laborers have advanced from \$1 to \$1.75 *per diem*,—a fact of much significance, if true. It is much to be regretted that the notion that the law has, through its own defects, or the fault of the courts, proved practically inoperative, has been so widely and persistently disseminated. Such a misapprehension cannot have failed to be injurious to the state by preventing the immigration of white persons from the east to replace the Chinese who are departing.

Another circumstance which, though not contemplated by the law, has incidentally attended its enforcement, may be mentioned. The costs, the attorneys' fees, and the inconvenience and expense of attending upon the courts until their cases can be heard, must, in effect, have imposed upon the Chinese arriving here charges nearly or quite equal to the capitation tax, which in Australia has been found, it is said, sufficient to secure their practical exclusion. On this point I have no accurate information. But the liability to the charges I have mentioned cannot fail to exercise a strong deterring influence upon the lower classes of Chinese laborers.

In the case at bar the proofs establish beyond a rational doubt

that the petitioner was in the United States at the date of the treaty, and that he left the United States before the passage of the law which enabled or required Chinese laborers to procure custom-house certificates. He is therefore, in my judgment, entitled to be discharged.

MISSISSIPPI MILLS Co. v. RANLETT and others.¹

(Circuit Court, E. D. Louisiana. December, 1883.)

INSOLVENT LAWS OF LOUISIANA.

The insolvent laws of Louisiana do not, by their declatory force solely, without any other investiture of title, the possession remaining in the debtor, remove the property of the debtor beyond the reach of a creditor who is a resident of another state, and who proceeds in the circuit court.

Ogden v. Saunders, 12 Wheat. 213, followed.

Bank of Tennessee v. Horn, 17 How. 159, distinguished.

On Rule to Dissolve Attachment.

E. H. Farrar, for plaintiff.

The court is asked to let go its jurisdiction over and its possession of the defendant's property, and to surrender the same to the state court and its appointed officer, to be there and by him administered under the state insolvent laws. Neither the state court nor its officer, the syndic, ever had any *actual* custody of the property. It was seized by the marshal in the hands of the defendants.

It is contended by the syndic that the cession made by the debtor and accepted by the state court *ipso facto* vested the creditors and the court with the title and the *constructive* possession of the property, so as to place it from that moment *in gremio legis*, and beyond the jurisdiction and control of this court.

The plaintiff contends—

(1) That the insolvent laws of Louisiana are not operative against the plaintiff, who is a citizen of another state, either in whole or in part; in other words, that those laws are to be considered as *not written*, either in a state or in a federal court. The syndic admits that they are inoperative *in part*, but not as a whole. For instance, he admits that they are powerless to stay proceedings in this court. He admits that a discharge of the debtor is inoperative here. But he contends that in one respect they are *operative*, and that one respect is that they have the effect *proprio vigore* to transfer to the state tribunals *sole* jurisdiction over the property of the insolvent, with the *sole* power to sell and distribute the same among his creditors.

The authorities repudiate specifically such a distinction. 5 Gill, 426; 4 Gill & J. 509; 2 Md. 457; 5 Md. 1; *Poe v. Suck*, quoted by the

¹Reported by Joseph P. Hornor, Esq., of the New Orleans bar.

supreme court of the United States in 1 Wall. 234; Judge TANEY's opinion, 8 Gill. 499; 1 Wall. 234; 4 Wall. 409; 5 La. Ann. 271; 10 La. Ann. 145; 14 La. Ann. 261; 1 Bald. 301; 14 Pet. 67; 5 Blatchf. 279; 3 N. Y. 500. The effect of such a construction of the law would be to *compel* foreign creditors to subject themselves *voluntarily* to the jurisdiction of the state courts, and thus be bound by the insolvent's discharge. The state courts would thus hold all the insolvent's property in constructive possession and say to the foreign creditors: "Come in and take your dividend and *have your debt discharged* or get nothing."

(2) If the insolvent laws, *qua* laws, are inoperative in all respects as against foreign creditors, this case presents nothing but a question of the conflict of jurisdiction between two tribunals of concurrent jurisdiction, each having power to bind the goods of the defendant by its process. The rule in such cases is that *where the parties are not the same, nor the cause of action the same in both counts, i. e., to the extent of constituting lis pendens*, that court holds the property which first obtained physical custody of it. In other words, in such cases there is no such thing as a constructive possession of property which is capable of actual possession—of *physical prehension*. The term *in gremio legis* is then, and under such circumstances, equivalent to *in manu ministres curiæ*. *Payne v. Drewe*, 4 East, 523; *Taylor v. Carryl*, 20 How. 594; *Freeman v. Howe*, 24 How. 450; *Wilmer v. Atlantic, etc., Air-line R. R.* 2 Woods, 409, opinion of Judges BRADLEY and ERSKINE.

It is clear that this court will not surrender its possession of and jurisdiction over *the property of the defendant* to a syndic, or officer of a state court, who had no legal existence when the jurisdiction of this court attached. That the property seized *belongs to the defendant*, notwithstanding the cession, is incontestable. The Code so declares in the most emphatic terms. Articles 2171, 2178, 2180, 2182. These articles of the Code, and the apparently conflicting section of the *subordinate Revised Statutes*, which declares that the cession "fully vests the property in the creditors," have been interpreted authoritatively. *Smalley v. Creditors*, 3 La. Ann. 387; *Nouvet v. Bollinger*, 15 La. Ann. 293. The contrary decision—the mere *dictum* of Judge PORTER, unbacked by the quotation of authority—in *Schroeder's Syndics v. Nicholson*, 2 La. 354, is directly in the teeth of the law. The decision of *Bank of Tenn. v. Horn*, 17 How. 517, is equally without foundation. The authority of that case is further weakened by the fact that the seizure was made after the appointment and confirmation of the syndic, and after his actual custody of the property had begun.

The case of *Crapo v. Kelly*, 16 Wall. 610, does not apply to this case, because the assignment made by the court under the Massachusetts insolvent law transferred the *absolute title* of the property to the assignee, and also operated as a tradition and delivery of the property to such assignee. Under the law of Louisiana the *cessio bonorum*

leaves the title in the insolvent, and simply transfers to the creditors a right to administer and sell the property ceded under the orders of this court; and it is admitted that if, under the insolvent law of Louisiana, the *cessio bonorum* divested the title of the insolvent, vested such title *ipso facto* in the syndic, and operated a tradition and delivery of the property into the possession of such officer, then there would be an end of their attachment. But, inasmuch as such *cessio bonorum* is simply equivalent to an application to appoint a receiver to administer the property of the insolvent under the orders of the court for the benefit of his creditors,—the absolute title remaining all the time in the insolvent, coupled with the express right to terminate the whole proceeding at any time by coming forward and paying the debts and costs of administration,—this court's rights to lay its hands on the property of the debtor cannot be ousted, unless by the previous actual possession of such property by a state court through its duly-appointed officer.

Thomas L. Bayne and George Denegre, for provisional syndic.

The surrender made by the insolvents under the laws of the state of Louisiana, and the acceptance of the same by the court under a judgment duly signed, vested the property in the creditors, and gave to the state court and the creditors complete control of said assets, and they were not subject to seizure by process from any other court, state or federal. Such is the language of the law:

Rev. St. § 1791. "*From and after such cession and acceptance all the property of the insolvent debtor mentioned in the schedule shall be fully vested in his creditors.*"

No other conveyance is ever made by the insolvents than that which is made at the time of the cession and acceptance as above.

The decisions of the supreme court of the state of Louisiana are uniform in declaring that all of the property of the insolvents passes to the creditors for the payment of their debts, at the moment of the cession and acceptance by the court, by mere operation of the law, *proprio vigore*. *Schroeder's Syndics v. Nicholson*, 2 La. 350. "By the laws of Louisiana, when an insolvent debtor makes a cession of his goods and they accept it, there is a transfer of his property,—it ceases to be his and becomes theirs;" or, as stated in *Orr v. Lisso*, 33 La. Ann. 478, "the final surrender of the property and the regular acceptance of the cession vested the title in the creditors." This is reiterated in all of the intervening cases. 4 La. 83; 7 La. 62; 12 La. Ann. 182; 4 La. Ann. 493; 19 La. Ann. 497; 23 La. Ann. 478; 6 La. Ann. 391.

The acceptance of the cession by the judge is "a judgment which can only be set aside by an action of nullity." *Sterling v. Sterling*, 34 La. Ann. 1029; 14 La. Ann. 424; 17 La. Ann. 88; 7 How. 624; 16 N. B. R. 303.

The law of Louisiana thus providing for the cession of the property by insolvents to all of their creditors, has been declared by the

v.19,no.3—13

supreme court of the United States to be constitutional, and this law, and its interpretation by the state courts, is declared to be a rule of property, effectual against all parties and in every forum. *Bank of Tennessee v. Horn*, 17 How. 159. And in this case it is said "that the surrender in the Second district court of New Orleans divested Conrey of all his rights of property and vested these in the creditors; * * * the right and title had, by operation of the law of the state, vested in the creditors." In *Crapo v. Kelly*, 16 Wall. 610, this is declared to be the effect of the insolvent law of Massachusetts, and Mr. Justice BRADLEY, who dissents on the ground that the property referred to was not within the limits of the state, says, (page 643:)

"In the case now decided the force and effect of the judicial assignment would have been regarded as conclusive in Massachusetts, had the ship, the subject of it, returned there, and become subjected to its local jurisdiction. * * * I do not deny that, if the property had been within Massachusetts jurisdiction when the assignment passed, the property would have been *ipso facto* transferred to the assignee by the laws of Massachusetts *proprio vigore*, and, being actually transferred and vested, would have been respected the world over." *Yonley v. Lavender*, 21 Wall. 279; 14 How. 34, 39; 8 How. 107; 3 Pet. 303; 10 Wheat. 165; 5 How. 72; 18 How. 502, 507; 2 Wall. 216; 91 U. S. 497; 3 Woods. 720; 93 U. S. 207; *Levi v. Columbia Ins. Co.* 1 FED. REP. 209; *Torrens v. Hammond*, 10 FED. REP. 900.

Under the state insolvent laws all writs of attachment are dissolved by the cession made by the debtor. Hennen, Dig. *verbo*, "Attachment, XI." p. 148, No. 1; 12 Martin, 32; 7 La. Ann. 39; 3 Rob. 457; 6 La. Ann. 444. Section 933 of the Revised Statutes declares:

"An attachment of property upon process instituted in any court of the United States to satisfy such judgment as may be recovered by the plaintiff thereon, except in the cases mentioned in the preceding nine sections, shall be dissolved when any contingency occurs by which, according to the law of the state where said court is held, such attachment would be dissolved in the court of said state." *Mather v. Nesbit*, 13 FED. REP. 872.

The cession was made by the insolvents and accepted by the court on the twenty-seventh of November; the attachment issued and seizure was made next day. The property had vested in the creditors and was not subject to seizure, and possession should be given to the syndic, their legal representative, and the attachment should be dissolved, as provided by section 933 of the Revised Statutes. The attachment issued by virtue of a state law, and falls under the above section of the law of the United States.

BILLINGS, J. The facts necessary to be considered are these: Messrs. Ranlett & Co., the defendants, had made a *cessio bonorum* under the insolvent law of the state of Louisiana, which had been accepted by the court before which the proceeding was pending, but no syndic had been appointed and no possession taken in behalf of the creditors. At this stage of the proceeding the plaintiff, who is a citizen of the state of Mississippi, sued out a writ of attachment in the circuit court of the United States in this state, and under his writ the marshal seized the property, the same being in the possession of

the defendants. The matter comes up on a motion of the syndic to release the seizure, on the ground that, inasmuch as the cession had been accepted by the court, according to the provisions of the insolvent law of the state, the property had vested in the creditors. Those provisions are as follows: "From and after such cession and acceptance all the property of the insolvent debtor mentioned in the schedule shall fully vest in his creditors." Rev. St. La. § 1791. So far as actual possession affects the question, the facts are with the plaintiff, for the marshal found the property in the possession of the defendant, seized it and holds it. The case is, therefore, free from any embarrassment arising from any possible disputed possession between the officers of this court and the court in which the insolvent case is pending. It is to be further observed that the law of the state of Louisiana, exclusive of the insolvent law of the state, requires tradition or delivery of personal property in order to transfer title. So that the sole point to be decided is whether the insolvent law, in and of itself, without any other investiture of title, the possession remaining in the debtor, removes the property beyond the reach of a creditor who is a citizen of another state. If that law operates upon such a creditor, the property, by the court's mere acceptance of the cession, was completely vested, though no possession had been taken, and must be surrendered to the syndic now appointed, to be administered under the insolvent law; if, on the other hand, that law is not operative upon such a creditor, there is nothing to prevent, and it becomes a manifest duty that this court should hold the property seized, and subject it to the payment of the debt of the attaching creditor.

The cases upon the general subject are numerous, but for the most part they deal with questions remote from the one before the court. The solution of this question stands with but little advance since the decision of *Ogden v. Saunders*, 12 Wheat. 213, which as late as *Baldwin v. Hale*, 1 Wall. 223, after an elaborate discussion, was, so far as relates to this matter, reiterated without qualification. The principle stated in both these cases, and in the last recognized as unqualified and unquestioned law, is: "When, in the exercise of their power to enact insolvent laws, states pass beyond their own limits and the rights of their own citizens, and act upon the rights of citizens of other states, there arises a conflict of sovereign power and a collision with the judicial powers granted to the United States, which render the exercise of such a power incompatible with the rights of other states and with the constitution of the United States." I am unable to perceive how there should be doubt or hesitation in deducing the law of this case from the principle thus enunciated and adhered to. If any attempt on the part of a state "to act upon the rights of a foreign citizen be so opposed to the sovereign and the judicial powers of the United States as to be incompatible with the rights of other states and with the constitution of the United States,"

then it must follow that, so long as the insolvent court relies exclusively upon the words of the insolvent law, at any stage of its procedure, short of actual, physical possession, or such a state of facts as by the general law of the state are tantamount to physical possession, as against the process of the United States court, issued at the instance of a foreign creditor, the title of the syndic must be nugatory.

Mr. Justice WOODBURY, in *Towne v. Smith*, 1 Wood. & M. 136, with reference to this very question, says: "The actual seizure of the property of the bankrupt in another government or country, before his assignees take possession of it, creates a lien upon it in favor of a foreign creditor, which will be sustained;" and again upon the same page, says: The circuit court of the United States, sitting in Massachusetts, "is as different a tribunal from those belonging to Massachusetts alone as the court of any other state." Nor do we obtain any qualification of this rigid doctrine from the federal statute, that the rules of property in the several states control the courts of the United States sitting therein, for that statute contains an exception which removes this whole question from its dominion. That statute is as follows: "The laws of the several states, except when the *constitution, treaties, or statutes of the United States otherwise require* or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States where they apply." Rev. St. § 721. Indeed, the statute, by its exception, declares that all state laws—be they insolvent laws, or laws prescribing rules of property, or of any other character—cease to be binding upon the federal courts whenever the constitution of the United States otherwise requires or provides.

The leading cases have arisen where only the validity of the debtor's discharge was involved. But the conclusion that until the state insolvent court has possession, its proceedings cannot affect the non-resident creditor, follows as conclusively with respect to exemption from process, or respite, or stay, or any intermediate action. In *Haydel v. Girod*, 10 Pet. 283, where the plaintiff, a resident creditor, had not been notified, and a respite and stay had been granted and were pleaded, the court say: "The plaintiff was in no sense made a party to the proceedings, and, consequently, his rights are in no respect affected by them." *A fortiori* must this be true where, as here, with reference to a party, the court had no authority to decree or proceed; for in *Gilman v. Lockwood*, 4 Wall. 411, the court say, "unless in cases where a citizen of another state voluntarily becomes a party to the proceedings, the state tribunal has no jurisdiction of the case."

Many cases have been cited by the counsel for the defendant, but they cannot avail to shake the settled law as thus explicitly declared by the supreme tribunal of the land.

There are numerous cases where the settlement of the estates of insolvent deceased persons has, by the same tribunal, been declared

to be exclusively vested in the appropriate state courts. It seems to me this large class of cases only affirm what is the universal law, and necessarily so, that the estates of the dead must be settled by the local mortuary courts, and that this is equally true whether they be solvent or insolvent. The jurisdiction in these cases springs not from the insolvency, but from the death, and the law which regulates is not an insolvent law, but a law controlling the administration of successions.

The case of *Bank of Tennessee v. Horn*, 17 How. 159, I have carefully considered. The point presented and decided seems to have been that a misdescription of real estate in the schedule of the insolvent debtor did not prevent its passing to the creditors by the cession. The contest was between a purchaser from the syndic under a sale ordered by the court of insolvency and those claiming title by a purchase under a judgment rendered in the United States circuit court after the cession. When we observe that the chief justice in giving the opinion of the court says, "the validity of the insolvent law of Louisiana has been fully recognized in the case of *Peale v. Phipps*, 14 How. 368," and further, that that case is placed upon the ground (page 374) that "while the property remained in the *custody and possession* of one court no other court had the right to interfere with it," it seems that it should be inferred that in the case of *Bank v. Horn* the syndic had possession at the time of the rendition of the judgment in the circuit court, and prior to any attempt to seize under it.

In the case presented here the plaintiff is in possession, and both as respects title and possession his right is absolute but for a right which, if it exists at all, comes from the inherent force of a state insolvent law, which, unaccompanied by possession, is, as to this plaintiff, like an extraterritorial bankrupt or insolvent law, and according to the summary of authorities in *Booth v. Clark*, 17 How. 322, (decided at the same term with the case of *Horn v. Bank*, *supra*), gives to the foreign assignee no title as against local creditors who attach. The constitution of the United States operates within as well as without the state which enacts insolvent laws. No state laws in conflict with it can be rules of property. The doctrine of comity between the federal and state courts has been constantly extending in recognition and clear and rigid enforcement; but the rules of law as expounded in *Ogden v. Saunders*, *supra*, are, as it seems to me, unchanged. In accordance with that case, in this forum at least, the possession of a foreign citizen under an attachment must prevail against the syndic who claims merely by the declaratory force of a state insolvent law. A mere declaration in a statute, which is by the settled adjudications inoperative against a party domiciled as is the plaintiff, cannot oust this court of administration of the property, which is, consistently with all the rules of judicial comity, in its possession.

The rule must be denied.

KUFKE v. KEHLOB.¹

(Circuit Court, E. D. Missouri. December 3, 1883.)

COMMISSION MERCHANTS—ADVANCES—BILL OF LADING—INSURANCE.

The consignee of goods, who advances on the faith of the bill of lading and insurance certificate attached, can recover from the shipper an amount sufficient to reimburse him for the advance, if there should be an error in the bill of lading and insurance certificate, by which the insurance could not be recovered for goods lost in transit.

At Law. Motion for judgment *non obstante*.

This is a suit for a balance due plaintiff on account of a bill of exchange drawn on him by defendant and duly paid at maturity. The case was tried before a jury. The facts appeared from the evidence to be substantially as follows: On the twenty-eighth of November, 1879, in compliance with a promise previously made to an agent of plaintiff, the defendant consigned to plaintiff at Glasgow, Scotland, for sale on commission, 750 barrels of flour,—500 branded "Yours, Truly," and 250 "Olive Branch." The carrier from St. Louis to Glasgow was the Merchants' Dispatch Transportation Company, which, on the twenty-sixth of November, 1879, issued its bill of lading, agreeing to carry the flour from St. Louis to New York by rail, and from New York to Glasgow by sailing vessel. At the time the bill of lading was issued, the name of the particular sailing vessel which was to carry the flour from New York was not known to the agent of the Merchants' Dispatch Transportation Company in St. Louis, and it was accordingly agreed between it and the defendant that the carrier should notify the defendant, through its agent at St. Louis, by wire from New York, of the name of the vessel, so that the consignor could insure the flour on board such vessel. The bill of lading required that the flour be delivered to the defendant in good order, and also contained the words, "Notify Anton Kufke." Accordingly, on the second day of December, 1879, the consignor was notified by the agent of the carrier at St. Louis that the flour would go from New York to Glasgow by the bark *Cypres*, a sailing vessel, and that on the strength of that information the consignor on that day insured the flour for the voyage as on board that vessel. The defendant thereupon advised the plaintiff by letter, dated December 5, 1878, of this consignment, and of the name of the vessel by which the flour would be shipped from New York to Glasgow, and that he had drawn on him at 60 days' sight, with bill of lading and insurance certificate attached, for £600. The defendant did draw as stated, the draft being dated November 28, 1878, indorsing the bill of lading and insurance certificate. The letter of advice, and also the draft and attached documents, reached Glasgow in due time, so that on the

¹Reported by Benj. F. Rex, Esq., of the St. Louis bar.

eighteenth of December, 1878, the plaintiff accepted the draft, of which he duly advised the defendant. On the second of January the bark Cypres arrived at the port of Glasgow, but had none of the flour on board. There was no evidence that plaintiff or defendant knew of the arrival before May 15, 1879. Plaintiff notified defendant of the above fact by a letter dated May 15, 1879. On the sixteenth of January, 1879, the steamer State of Georgia arrived at Glasgow, having on board 259 barrels of the flour, of which the defendant had no knowledge. Thereupon the plaintiff paid said draft and received the flour then on board said steamer, but did not notify defendant of its arrival by that vessel. On the thirtieth of January, 1879, the plaintiff learned in Glasgow that the steamer Zanzibar, having on board the remainder of the flour, was overdue, and on that day he cabled the fact to defendant, and asked him to insure for the benefit of all concerned. The Zanzibar sailed from New York about January 14, 1879. This was the first information that defendant had that the flour did not go forward by the Cypres. Defendant endeavored to insure, as requested by the plaintiff, but was unable to do so, as the Zanzibar was already reported lost. The Zanzibar was lost, as reported, and the balance of the flour was never delivered to plaintiff. Defendant gave no permission to ship by any other vessel than the Cypres, and did not know of the shipment by another vessel until he received the cable dispatch from the plaintiff of January 30, 1879.

The court directed a verdict for plaintiff, subject to a motion for judgment *non obstante*. The defendant now moves for a judgment *non obstante*.

H. E. Mills, for plaintiff.

George M. Stewart, for defendant.

TREAT, J. As intimated at the trial, there is nothing in the facts shown to take the case out of the general rule. The authorities cited in defendant's brief establish no doctrine, whereby defendant could be relieved of his liability to plaintiff. The common carrier is liable to the defendant, and whether the plaintiff could, under some contingencies, have maintained an action against the carrier does not change the aspects of this case. Primarily, the defendant was bound to respond to the plaintiff; and the plaintiff had the right to rely on the accuracy of the papers forwarded by defendant on the faith of which the draft was accepted and paid. What was done by plaintiff on receipt of some portion of the shipment in the Georgia, and in cabling news concerning the Zanzibar, did not change the obligations or contract, but was merely for defendant's benefit, of which he cannot be heard to complain. The general rule is based on sound principles and should be enforced. Resort to commercial paper in foreign or domestic commerce carries therewith what the law-merchant exacts. A bill of exchange, with bill of lading and an insurance certificate annexed, does not compel the acceptor of the bill to rely for reim-

bursement on false bills of lading and certificates without recourse upon the drawer. True, the acceptor having received the bill of lading and acting as consignee, must do what the rules of agency require as to the receipt and sale of the shipments actually made as designated. In this case the bill of lading did not cover the shipment, and as to the certificate of insurance, the plaintiff had nothing to do,—that is, he was not bound to insure,—for the flour went forward on defendant's account, to whom, in the event of loss, the insurance money would have gone, or been applied on his draft.

The motion is querruled, and judgment will be entered according to the verdict.

KROPFF v. POTH.

(Circuit Court, D. New Jersey. December 11, 1883.)

DEATH OF PLAINTIFF—REV. ST. § 955—FOREIGN ADMINISTRATOR CONTINUING SUIT.

Under the provisions of section 955 of the Revised Statutes of the United States, when an alien sues in the circuit court and dies, the suit cannot be continued to final judgment by his executor or administrator, unless such executor or administrator has taken out letters testamentary or of administration on the estate in the state where the suit is brought.

In Debt.

A. Q. Keasbey & Sons, for plaintiff.

Sheppard & Lentz, for defendant.

NIXON, J. This is a personal action at law, brought by an alien against a citizen. On October 26, 1883, the death of the plaintiff was suggested upon the record, and an order entered that the suit proceed to final judgment in the name of his executor. A motion is now made to vacate said order as improvidently entered.

The executor of the deceased plaintiff is an alien, residing in the same country as the testator, to-wit, at Nordhausen, in the empire of Germany. There have been no letters testamentary or of administration on the estate taken out in New Jersey. It is well settled that such a person, whether administrator or executor, cannot begin a suit in the courts of the United States to enforce an obligation due his intestate or testator. See *Dixon's Ex'rs v. Ramsay's Ex'rs*, 3 Cranch, 319; *Noonan v. Bradley*, 9 Wall. 394. The counsel for the plaintiff concedes this, but claims that, under the provisions of section 955 of the Revised Statutes, when an alien sues and dies the suit may be continued to final judgment by his executor, whether foreign or resident. That section, which is section 31 of the judiciary act, was doubtless enacted to avoid the inconvenience of the common-law rule that all actions, personal as well as real, abated by the death of either of the parties before judgment. It expressly saves

all personal suits from abatement in cases when the cause of action survives by law. But it would be anomalous to allow a person to continue a suit which he is not authorized to begin. It is a more reasonable construction of the section to hold that when congress authorized the continuance of a pending suit in the name of the executor or administrator, it meant to refer to an executor or administrator who was competent to begin the action.

The present suit is saved from abatement by the statute. The death of the alien plaintiff suspends further proceedings until another lawful plaintiff be substituted. The order is vacated, but the personal representative of the plaintiff is allowed a reasonable time, to-wit, 60 days, in which to procure in New Jersey letters testamentary or of administration.

EGGLESTON and others v. CENTENNIAL MUT. L. ASS'N OF IOWA.¹

(Circuit Court, E. D. Missouri. December 3, 1883.)

INSURANCE—MUTUAL ASSOCIATION POLICY—CONTRACT AS TO ENFORCEMENT.

Where a clause of a policy issued by a mutual insurance company provided that the only action maintainable on the policy should be to compel the association to levy the assessments agreed upon, and that if a levy were ordered by the court the association should only be liable for the sum collected, *held* that the provision was valid, and that the only mode of enforcing the policy in the first instance was by proceedings in chancery.

Lueders' Ex'r v. Hartford L. & A. Ins. Co. 12 FED. REP. 465, distinguished.

At Law. Suit upon a policy of insurance issued by defendant. Motion to strike out that part of defendant's answer in which it pleads in bar of the action the following clause of the policy sued on, viz.: "The only action maintainable on this policy shall be to compel the association to levy the assessments herein agreed upon, and if a levy is ordered by the court, the association shall be liable under this policy only for the sum collected under an assessment so made." The other material facts are sufficiently stated in the opinion. For opinion on demurrer to the petition see 18 FED. REP. 14.

George D. Reynolds, for plaintiffs.

(1) The clause set up as a bar is void, as an attempt to oust the courts of law of all jurisdiction, and as an attempt by contract to control the courts of law in applying a remedy for the breach of the obligations of the contract. *Cooley*, Const. Lim. (3d. Ed.) §§ 288, 361; 1 Story, Eq. Jur. § 670; 2 Story, Eq. Jur. § 1457; *Stephenson v. Piscataqua F. & M. Ins. Co.* 54 Me. 55, and cases there cited; *Schollenberger v. Phoenix Ins. Co.* 6 Reporter, 43; *Yeomans v. Girard F. &*

¹Reported by Benj. F. Rex, Esq., of the St. Louis bar.

M. Ins. Co. 5 Ins. Law J. 858; *Smith v. Lloyd*, 26 Beav. 507; *Trott v. City Ins. Co.* 1 Cliff. 439; *Millaadon v. Atlantic Ins. Co.* 8 La. 557; *Nute v. Hamilton Mut. Ins. Co.* 6 Gray, 174; *Cobb v. New Eng. M. M. Ins. Co.* Id. 192; *Amesbury v. Bowditch M. F. Ins. Co.* Id. 596; *Allegro v. Ins. Co.* 6 Har. & J. (Md.) 413.

(2) The condition at most is a collateral condition, not a condition precedent. Cases *supra*; also, *U. S. v. Robeson*, 9 Pet. 826; *Dawson v. Fitzgerald*, 24 W. R. 773, (also 3 Cent. Law J. 477;) *Scott v. Avery*, 5 H. L. Cas. 811.

(3) A plea setting up an agreement to arbitrate is bad in an action at law. *Tscheider v. Biddle*, 4 Dill. 55. See, further, *Liverpool, L. & G. Ins. Co. v. Creighton*, 51 Ga. 95; *Kill v. Hollister*, 1 Wils. 129; *Goldstone v. Osborn*, 2 Car. & P. 550; *Roper v. London*, 28 Law J. Q. B. 260; *Alexander v. Campbell*, 41 Law. J. Ch. 478; *Robinson v. George's Ins. Co.* 17 Me. 131; *Tobey v. Co. of Bristol*, 3 Story, C. C. 800.

(4) In a case like this, where the company refuses to make an assessment, the amount of recovery is the maximum amount named in the certificate. *Lueders' Ex'r v. Hartford L. & A. Ins. Co.* 12 Fed. Rep. 471. And the averments are made in the amended petition sufficiently distinct to bring it within the rule announced in *Curtis v. M. B. L. Co.* 48 Conn. 98.

(5) The *prospectus* is a part of the policy and both are to be construed together. *Bliss, Life Ins.* §§ 397-400; *May, Ins.* §§ 355, 356; *Ruse v. Mut. L. Ins. Co.* 24 N. Y. 653; *Cent. Ry. Co. v. Kisch*, L. R. 2 H. L. Cas. 99; *Wheelton v. Hardisty*, 8 El. & Bl. 282; *Wood v. Dwarries*, 11 Exch. 493.

Davis & Davis and *Newman & Blake*, for defendant.

TREAT, J. A motion has been filed to strike out parts of the answer to this amended petition, which motion raises the same question heretofore decided, varied, it is contended, by new averments. It is stated in the amended petition that defendant "guarantied" payment of the maximum stated in the policy; but there is nothing to sustain such an allegation; indeed, the whole tenor and scope of the policy is to the contrary. It is further averred that the defendant refused, as agreed, to make the stipulated assessments on policy-holders, whereby it became liable for the maximum amount, despite the positive terms of the contract; and liable also, in an action at law, regardless of the express agreement that resort should be had only to proceedings in equity to enforce assessments. In deciding the demurrer to the original petition, leave was given to the plaintiff to file a bill to compel an assessment; but, instead of filing a bill for that purpose, he has filed an amended petition at law, which leaves the case just as it was before, so far as legal propositions are involved. The contract of insurance was peculiar, as under its terms the respective persons insured were bound to contribute to death losses according to the shifting provisions mentioned; and the defendant bound itself merely

to pay over what should be assessed and collected—nothing more; and to make it certain and definite that its obligation was not to extend further, it was expressly agreed that it should be liable only to the stipulated proceedings in equity.

It is contended that the restrictive clause as to the remedy is void, and many cases are cited in support thereof, supposed to be analogous. That question was previously before this court and involved in its decision on the demurrer, wherein an adverse conclusion was reached; from which there is no reason to depart. Indeed, if the subject were driven to a full analysis it would appear that a different conclusion would involve many strange absurdities. The parties agreed, one with the other, to many rules for determining their respective obligations and liabilities, dependent on the number of persons assured, the amounts for which they were respectively assured, etc., and to make sure as to the obligations of the defendant, and the means of enforcing the same in the only just, feasible, and equitable manner, stipulated that only a suit in equity should be resorted to. How else could it be ascertained what was done to the plaintiffs? An assessment must be made, dependent on the shifting conditions mentioned in the policy, collections enforced, etc.; defendant being liable only for the amount of assessments collected. It did not agree to pay any fixed sum, but merely to pay the amount collected from assessments, not exceeding the sum limited; and therefore provided for appropriate proceedings in equity to adjust the dispute, if any, between the parties. It is not for the court to comment on the wisdom or folly of such contracts. If parties choose to enter into them, they are bound by their terms, in the absence of fraud, unless they are *contra bonos mores*. There is nothing shown to void the agreement the parties voluntarily entered into, and hence this court adheres to the decision heretofore made in this case, viz., that redress must be sought in equity alone.

The views of this court in a case somewhat like that under consideration were limited, and suggestively, in the published opinion then given. *Lueders' Ex'r v. Hartford L. & A. Ins. Co.* 12 FED. REP. 465. It is not held that there may not be cases where resort can be had to a common-law remedy under contracts like that in question, but it is held, as expressed on demurrer in this case, that the clause in the contract as to the mode of ascertaining the rights of the parties is obligatory, (18 FED. REP. 14,) with the possible exceptions suggested.

Suppose there was not a valid defense, as in the *Lueders Case*, and it was ascertained that a mortuary loss had occurred, how could the amount to be recovered be ascertained? It was hinted that under the facts and circumstances of that case certain rules might obtain; but there was no question there raised as to a contract limitation with respect to the mode of ascertaining the *amount* of the liability. The mode prescribed in this case by the contract between the parties, considering their relations to each other, was the most practicable and

equitable that could be adopted, and does not fall within any of the prohibitory rules stated in the many cases cited, as to ousting courts of jurisdiction, and enforcing or refusing to enforce agreements for arbitration. The answer sets up as a defense the clause in the contract commented upon, which this court has heretofore held, and still holds, to be a valid defense to this action at law.

The motion to strike out is overruled, and the plaintiff left, as heretofore held, to the remedy in equity to which he agreed sole resort should be had.

McCRARY, J., concurs.

BLAKE and others v. HAWKINS and others.¹

(Circuit Court, E. D. North Carolina. . November Term, 1883.)

1. CLERK—AGENT OF THE LAW.

Where money is paid to a clerk, under a judgment of court, he receives it, not as the agent of either party, but as the agent of the law.

2. JUDGMENT—ORDER OF COURT.

A judgment is an order of court, within the meaning of section 828 of the Revised Statutes of the United States.

3. CLERK'S COMMISSIONS—COSTS—REV. ST. § 828.

A clerk who receives, keeps, and pays out money under a judgment is entitled to a commission of 1 per cent. on the amount so received, (Rev. St. § 828,) to be paid by the defendant as part of the costs.

— At June term, 1883, the complainants recovered a judgment against the defendants for \$29,355, and costs. Thereupon, before an execution was issued, the defendants paid into the clerk's office the amount of the judgment and costs, except a commission of 1 per cent., which the clerk claimed under Rev. St. § 828; the defendants denying the right of the clerk to any commission, and claiming that, in any view, they were not liable for it.

E. G. Haywood, D. G. Fowle, Reade, Busbee & Busbee, Hinsdale & Devereux, for complainants.

Merrimon & Fuller, for defendants.

SEYMOUR, J. At June term a final judgment was rendered in the above case in favor of the plaintiffs and against the defendants. The defendants have paid the amount of the judgment to the clerk of this court, who has paid said amount to the plaintiffs; reserving, however, the question of his commissions, and the amount claimed by him, \$293.55, which is retained by the plaintiff's attorneys, to await the decision of this court upon the question whether these commissions ought to be paid out of the recovery, or by the de-

¹ Reported by John W. Hinsdale, Esq., of the Raleigh, N. C., bar.

fendants. The question depends upon the construction to be put by the court upon section 828 of the Revised Statutes. The clause of the section in controversy reads:

"Clerk's Fees. * * * For receiving, keeping, and paying out money, in pursuance of any statute or order of court, one per centum on the amount so received, kept, and paid."

There is no question but that the clerk received, kept, and paid out the sum upon which he claims his 1 per cent. It is, however, contended by the defendants that he did not do so "in pursuance of any statute or order of the court." The controversy depends upon whether or not the clerk received the money under an order of this court. This seems too plain for discussion. The order of the court was its judgment. That was, that the defendants pay to the plaintiffs the amount to which they were entitled. It was under that order that the defendants paid the sum recovered to the clerk. They might have awaited an execution, or, if the money were in the hands of a trustee or officer who would be controlled by the order of the court, an order directing such officer or trustee to pay as should be ordered. But it was safe for them to pay the clerk. The judgment and his official bond, one or both, were their protection. Had there been no "order of the court," they could not have safely paid him. He would have been only their agent, or the agent of the plaintiffs. The judgment under which, and under which alone, they paid the money, made him the agent of the law, and threw around the payment the security of the bond which the statute requires. If the clerk had failed to pay the amount of the judgment to the plaintiffs, it could not have been again collected from the defendants.

The question, then, becomes simply one of who shall pay the costs. That has been already determined; the costs, which include those of the execution, or whatever means of collecting the amount of the judgment take its place, must be paid by the defendants. This opinion has the support of that of Judge DILLON in the eighth circuit, (*In re Goodrich*, 4 Dill. 230,) and of Judge DICK in the fourth circuit, (*Kitchen v. Woodfin*, 1 Hughes, 340.) If the amount paid is not sufficient to satisfy the decree and the commissions of the clerk, the judgment opens to include such commissions. *Peyton v. Brooke*, 3 Cranch, 92; *Kitchen v. Woodfin*, *supra*.

ROEMER v. HEADLEY.

(Circuit Court, D. New Jersey. December 15, 1883.)

PATENTS FOR INVENTIONS—ANTICIPATION—PUBLIC USE—INFRINGEMENT.

Letters patent No. 208,541, granted to William Roemer, October 1, 1878, for "improvement in locks for satchels," held valid, and infringed by the lock-case sold by defendant.

In Equity. On bill, etc.

F. C. Lowthorp, Jr., for complainant.

A. Q. Keasbey & Sons, for defendant.

NIXON, J. The bill is filed against the defendant for infringing letters patent No. 208,541, granted to complainant, October 1, 1878, for "improvement in locks for satchels." The answer denies (1) the infringement, and (2) that the complainant was the original and first inventor of the improvements claimed in said letters patent. The patentee, in his specification, states that the principal object of the invention is to reduce the expense of the lock-case, and to render the same more practical in form and construction, and that it consists principally in forming the body of the lock-case into open ends, and in combining the same with cast blocks or end-pieces, which are separately made.

(1) A satchel marked Exhibit D, for complainant, was produced, and also a witness who swore that he purchased the same at defendant's store in Broadway, New York. The slightest inspection shows that the lock-case thereon infringes the claims of the complainant's patent. (2) A number of exhibits are put in by the defendant to prove that the claims of the complainant's patent were anticipated.

After a careful examination of these I deem it necessary to advert to only two of them, to-wit, Exhibit D 1 and Exhibit D 3. There is nothing in the patent sued on which is not fairly embraced in these, and if the defendant has shown that they were in public use before the date of the complainant's invention, the patent must be held void for want of novelty. The testimony is very meager. The defendant offered only one witness to prove their prior use. Charles Kupper testified that he was a manufacturer of bag frames and locks; that he had made locks like Exhibit D 3, and had sold them to defendant; that the first he sold to him was on March 31, 1878, and that the first he ever made was a month or two before Christmas, in the year 1877.

When asked about locks like Exhibit D 1, he replied: "I made them a long time after Exhibit D 3, but I cannot say when."

There was no other testimony on the subject of public prior use. The complainant's patent was issued October 1, 1878. He was called to prove the date of his invention, and was asked:

Question. "When did you first conceive this lock in its present practical form?" *Answer.* "I made the invention in the early part of 1876, but made the first model in January, 1878, after which I constructed the lock. My idea was to make a lock that would, when finished, resemble a lock I invented a few months before, and which I would be able to make of cheaper material." *Q.* "Was that model of which you speak similar to the lock patented by you?" *A.* "It was the same thing."

Such are his statements, and his only statements, on the subject. They are not clear, but they show that the invention antedates the proof of the time of any prior use. There was no cross-examination

of the witness, and as the defendant seems willing to accept the account of this date without question, the court will do the same.

It must be held that the complainant was the first and original inventor of the improvements claimed in this patent. Let there be entered a decree for an injunction and an account.

THE ULLOOK.

(District Court, D. Oregon. February 7, 1884.)

1. OFFER OF PILOT SERVICE BY SIGNAL.

The pilot commissioners of Oregon, under the pilot act of 1882, are authorized and required to declare by rule what shall constitute a valid offer of pilot service on the Columbia river bar pilot grounds, by a signal addressed to the eye, and in so doing may prescribe the distance within which such signal must be made from the vessel signaled.

2. SIGNAL FOR AN OFFER OF PILOT SERVICE.

The statute of the United States does not prescribe any signal to be used on a pilot boat in making an offer of pilot service; and the light required by section 4233 of the Revised Statutes, to be carried by a sailing pilot vessel at night, is only used to prevent collision and incidentally to give notice of the character of such craft; but the usual signal by which an offer of pilot service is made, is the jack set at the main truck in the day-time, and "flare-ups" at night, and this jack is usually the ensign of the country in which the service is offered. In the United States it is a blue flag charged with a star for every state then in the Union, and called the "Union Jack."

3. THE TERM "STATE" CONSTRUED TO INCLUDE A "TERRITORY."

The term "state" in the act of March 2, 1837, (5 St. 153; section 4236, Rev. St.,) regulating the taking of pilots on a water forming the boundary between two states, construed to include an organized "territory" of the United States.

In Admiralty.

Frederick R. Strong, for libellant.

Erasmus D. Shattuck and Robert L. McKee, for claimant.

DEADY, J. The libellant, George W. Wood, of the pilot schooner *J. C. Cozzens*, brings this suit to enforce a claim for pilotage against the British bark *Ullook* of \$76, growing out of an offer to pilot said bark in and over the Columbia river bar on March 24, 1883, and a refusal to receive the same by the master and claimant, Alexander Swietoslawski. It appears that the alleged offer was made between 4 and 5 o'clock in the afternoon, at a distance of some 25 miles from the bar, and consisted in the schooner's setting her jack at the main truck until dark, when she set her mast headlight and burned "flare-ups" over the side. The bark was approaching the bar from the south-west. The schooner, which was lying to, north-west of the bar, on observing her, ran down before the wind across the course of the bark. The bark paid no attention to the schooner, but kept on her course about E. N. E., until half-past 7 o'clock, when she had the Cape Hancock light on her port bow, and was hailed by the steam-

tug Brenham and took therefrom a pilot. The schooner, in her run down the coast, passed astern of the bark, and then jibed sails and followed her. Between 9 and 10 o'clock the bark tacked and stood off shore, and soon after met the schooner with the libelant on board, who offered his services as pilot, which were declined by the pilot on board, the master being below.

In the testimony of the crews of the bark and schooner there is the usual amount of flat contradiction concerning the disputed circumstances of the case. The libelant swears that when the fog lifted and he first sighted the bark she was in plain sight, and not more than two or three miles distant, when he put the schooner before the wind and made sail to cut her off, and that when he came within a mile of her he expected the bark to lie to until he could go aboard, but that she kept on her course, and the schooner had to jibe her sails to follow, whereby the latter fell astern, and that thereafter he kept within from one to three-quarters of a mile of the bark until they met. The master of the bark swears that when he first sighted the schooner she was seven or eight miles away, and when night set in she was still four or five miles distant, and he did not see her afterwards until they met as above stated. But the master admits that he saw the schooner, and that he knew she was a pilot-boat from the flag at her mainmast, and that he did not lie to or signal for a pilot because he did not know certainly how far he was from the bar, and he did not want to take a pilot so far out as to incur the payment of "distance" or "off-shore" pilotage.

It is admitted that the master of the Ullock had been in the river four times; that the Cozzens is the only pilot-schooner that had been on the bar for about two years before this time; and that she put a pilot on the Ullock under the same master in 1882; that the libelant was a duly-qualified bar-pilot under the laws of Oregon; and that the pilot from the tug who brought in the bark was a duly-qualified one under the laws of Washington territory.

By section 30 of the Oregon "pilot act of 1882" (Sess. Laws 20) it is provided that "the pilot who first speaks a vessel * * * or duly offers his services thereto, as a pilot, on or without the bar pilot ground, is entitled to pilot such vessel over the same;" but the master may decline the offer, in which case he shall pay, if inward-bound, full pilotage. And section 34 provides that the pilot commissioners "must declare by rule what constitutes a speaking of a vessel or an offer of pilot service on the bar pilot grounds," within the meaning of the act.

By rule 9, adopted by the commissioners in pursuance of this authority, on November 17, 1882, it is provided that "the term, 'speaking a vessel for pilot service,' shall be construed to mean either by the usual form of hailing, or, if out of hailing distance, and within one-half mile, then the usual *code of signal* shall be made use of." This rule preserves the distinction that is made in the pilot act be-

tween "speaking" or "hailing" a vessel and a mere "offer" of pilot service. The former implies that the parties are within speaking distance, and can only be done by word of mouth, supplemented, it may be, by some such device for projecting the sound of the voice as a speaking trumpet, or even personal gesticulation. *Com. v. Ricketson*, 5 Metc. 412; 2 Pars. Shipp. & Adm. 109. But an "offer" of pilot service may also be made by some arbitrary but established sign or demonstration, made from beyond ear-shot and addressed exclusively to the eye. And this offer, according to the rule, must be made with "the usual code of signal," whatever that is.

It is unfortunate that the commissioners did not declare definitely what signal constitutes an offer of pilotage, as required by the act. Declaring that the offer should be made by "the usual code of signal" has thrown no light on the subject, and may be darkened it. The expert witnesses, including one of the commissioners, do not seem to be very clear as to what this "usual code of signal" is; though the apparent confusion in their testimony may arise from the want of knowledge on the part of counsel who examined them. For instance, the commissioner having testified that an offer of service was customarily made by the pilot-boat putting her "head down toward the ship and showing her blue flag," her number being on her mainsail, "and at night by burning a flare," counsel for the liabelant said: "Then I understand you to mean the use of the usual signals prescribed by the Revised Statutes of the United States to be used on board pilot-boats?" to which the witness answered, "Yes." Now, there are no signals prescribed by the statutes of the United States for the use of pilot-boats in making an offer of pilot services, nor had the witness in any way indicated that that was what he meant when he said that the pilot-boat must "show her blue flag." The question was based upon an erroneous assumption, both as to the statute and the previous statement of the witness, while the answer was apparently made upon a total misapprehension of both.

The rule assumes that there is a usual and well-understood signal by which a pilot-boat can make an offer of pilot service to a vessel not within hailing distance and be understood. But whether that signal is known throughout the civilized world, or whether its use is confined to this coast, or even this port, does not clearly appear from the evidence, or at all from the rule. But this is a subject concerning which I think the court may supplement the evidence by its judicial knowledge. And, first, the use of the word "code" in the rules is misleading. I think there is no "code" of pilot signals; although there may be, and doubtless is, a signal for "a pilot wanted" in the international code of signals, or that of any country. The usual signal by which an offer of pilot service is made in the day-time is a flag at the masthead. This, of course, will be the flag of the country in which the offer is made, or that modification or portion of it called the "Jack." In the United States it is a blue flag charged

v.19,no.3—14

with a star for every state in the Union, and called the "Union Jack."

By section 4233, subd. 11, Rev. St., a sailing pilot-vessel is required to carry a white light at her mast-head during the night, and "exhibit a flare-up light every fifteen minutes." But neither of these lights, thus required to be carried, are signals that indicate an offer of pilot service, for they must be carried although all the pilots on the boat have been distributed. Evidently the statute requires these lights to be burned for the purpose of making known the whereabouts and character of the boat in order to prevent collision, and incidentally to advise any one in need of or desiring the service of a pilot where to apply. But the burning of "flare-ups," or a flashing light, over the side of the boat, at short intervals, is also the customary method of making an offer of pilot service at night. It follows that the libelant made a proper tender of his service as a pilot to the Ullock, both in the day-time and after night, provided he did so within the distance prescribed by the ninth pilot rule. Without saying so directly, the necessary effect of this rule seems to be to require that an offer of pilot service made otherwise than by hailing, as by signal, shall be made within a half-mile of the vessel signaled.

Counsel for the libelant contends, however, that the power of the commissioners does not extend to prescribing the distance within which such offer must be made. But in my judgment it does; and for manifest reasons. They are expressly authorized and required to declare what shall constitute a valid offer of pilot service; and when this may be done by a signal, as by setting a blue flag at the main-truck, the distance at which the pilot-boat is from the vessel signaled is a material element in the transaction. And, *first*, it ought not to be so far away as to leave any room for dispute as to whether the signal was made or seen; and, *second*, a vessel ought not to be compelled to wait for a pilot from a boat that signals her a great way off, when, in all probability, she can get one much sooner and nearer in shore if she is allowed to proceed on her way. And what distance is suitable and convenient for both the party making and receiving the signal is a matter committed by the pilot act to the judgment of the commissioners. It is urged that a half mile is a very short limit, and that it might well be a mile or two. But the commissioners are probably better judges of this matter than counsel; and if it is thought they have erred in this respect they must be asked to correct it. It is not in the power of the court to disregard or modify their action thereabout.

As to whether the offer of the libelant was made within a half mile of the Ullock, the testimony of the two crews is widely divergent. The reason given by the master of the Ullock for declining the offer is evidently not ingenuous, and ought to have some effect upon his general credibility. He says that he preferred to take a pilot from the schooner, because he knew the charges were less than those of the tug pilots; and at the same time, as a reason for not taking this

cheaper one when it was offered him, he says that he did not want to take a pilot so far from the bar and thereby incur the additional expense of "distance" or "off-shore" pilotage. But he knew very well that there is no such thing as "distance" or "off-shore" pilotage at the mouth of the Columbia river, and that the charge for piloting a vessel in and over the bar is all one, whether the pilot boards her at the outermost buoy or at any distance beyond. He had run his reckoning for the Columbia river, and been unable to take an observation for some days on account of the fog, and would naturally be glad to avail himself of the services of the first pilot that offered, unless there was some special and cogent reason to the contrary. It is certain that the reason assigned was not the true one. And probably the fact is that the master really desired to take a pilot from the tug so as to facilitate a deal for towage, which is a much weightier matter than the cost of pilotage. But I doubt, even on the evidence of the libelant and others of the crew of the schooner, if she was ever within a half mile of the Ullock on that occasion before the pilot of the tug boarded her. The burden of proof in this respect is on the libelant; and he cannot prevail unless it appears from the evidence that his offer was made to the Ullock within the legal distance. The strongest statement which the libelant is willing to make on this point is that he was within from one to three-quarters of a mile of the Ullock; and this being taken as it should be most strongly against himself, amounts to no more than that he was within three-quarters of a mile of said vessel.

But there is another point made in the case by the claimant, upon which, I think, the decision must be against the libelant. By the act of March 2, 1837, (5 St. 153; section 4236, Rev. St.,) it is provided that "the master of any vessel coming in or going out of any port situate upon waters which are the boundary between two states, may employ any pilot duly licensed or authorized by the laws of either of the states bounded on such waters to pilot the vessel to or from such port." This act was passed, as is well known, on account of the conflicting legislation and the strife between New York and New Jersey and their pilots, for the pilotage of vessels entering the Hudson river and bound to New York or other ports thereon. It may be admitted that the Columbia river is not a boundary between two "states" in the sense in which the word is used in the constitution, but it is the boundary between one such state and an organized territory of the United States. The case is within the mischief intended to be remedied by the act of 1837. The subject is wholly within the power of congress, and it may apply the rule contained in the act to the case of a water forming the boundary between a state and territory, as well as between two states of this Union. The territory of Washington is an organized political body,—a state in the general and unqualified sense of the word,—with power to legislate on all rightful subjects of legislation, except as otherwise provided in its constitu-

tion, one of which is pilots and pilotage on the Columbia river bar. *The Panama*, 1 Deady, 31. True, this power is derived for the time being from congress. But the power of a state of the Union to legislate on this subject only exists until congress sees proper to exercise it. There being no constitutional limitation upon the power of congress in this respect, and it having the same right to regulate the taking of a pilot on a water that forms the boundary between a state and territory as it has between two states proper, I think the word "state" in the act of 1837 ought to be construed to include any organized body politic or community within the territorial jurisdiction of the United States, having the power to legislate on the subject of pilots and pilotage on a water forming a boundary between itself and a state of this Union.

In the case of *The Panama*, *supra*, in speaking of this act in 1861, I said:

"Whether the word 'state' as used in this act should be construed so as to include a territory, is a question not free from doubt. The case is within the *mischief* intended to be remedied by the act, and, it seems to me, might be held to come within its spirit and purview, without any violation of principle. I do not think it comes within the reasoning or considerations that controlled the court in *Hepburn v. Ellzey*, 2 Cranch, 445, in which it was held that under the judiciary act, giving the national courts jurisdiction of controversies between citizens of different states, that a citizen of the District of Columbia could not sue in such courts as a citizen of a state, because such District was not a member of the Union."

The ruling in *Hepburn v. Ellzey*, *supra*, was afterwards applied in *New Orleans v. Winter*, 1 Wheat. 91, to the case of a territory, when it was said that although the district and the territory are both states, —political societies,—in the larger and primary sense of the word, neither of them is such in the sense in which the term is used in the constitution, in the grant of judicial power to the national government on account of the citizenship or residence of the parties to a controversy, when it is understood to comprehend only "members of the American confederacy." In *Barney v. Baltimore*, 6 Wall. 287, these rulings were followed without question, upon the principle of *stare decisis*.

In *Watson v. Brooks*, 8 Sawy, 321, [S. C. 13 FED. REP. 540,] it was said even of this construction:

"It is very doubtful if this ruling would now be made if the question was one of first impression; and it is to be hoped it may yet be reviewed and overthrown. By it, and upon a narrow and technical construction of the word 'state,' unsupported by any argument worthy of the able and distinguished judge who announced the opinion of the court, the large and growing population of American citizens resident in the District of Columbia and the eight territories of the United States are deprived of privileges accorded to all other American citizens, as well as aliens, of going into the national courts when obliged to assert or defend their legal rights away from home."

But the special reason for this narrow construction of the word "state" does not apply in this case. Congress had the power to ex-

tend the act of 1837 over a water constituting the boundary between the state of Oregon and the territory of Washington. The language actually used in the act may reasonably be construed so as to accomplish this object; and the case is within the mischief intended to be remedied thereby. The master of the Ullock being then entitled, upon this construction of the law, to take a pilot from either Oregon or Washington, without reference to which made the first offer of his services, the libellant is not entitled to recover as for an offer and refusal of pilot services, even though such offer was duly made.

There must be a decree dismissing the libel, and for costs to the claimant.

THE SCOTS GREYS v: THE SANTIAGO DE CUBA.¹

THE SANTIAGO DE CUBA v: THE SCOTS GREYS.¹

(Circuit Court, E. D. Pennsylvania. October 30, 1883.)

1. COLLISION—MEETING OF VESSELS IN NARROW CHANNEL—LIGHT AND HEAVY STEAMERS—DUTY ARISING FROM SPECIAL CIRCUMSTANCES.

Where, in a narrow, dangerous channel, a light steamer stemming the tide, having her movements completely under command, observed a steamer of greater draught, deeply laden, coming with the tide, it was the duty of the light steamer to slow down or stop until the positions and courses of each should become known.

2. CROSSING COURSES—MANEUVER IN EXTREMIS.

The light steamer having failed to do either, but having ported her helm and attempted to run across the track of the heavy vessel, when the vessels were in dangerous proximity and the heavy vessel near a shoal, in consequence of which maneuver a collision occurred, the light vessel was in fault.

In Admiralty.

Appeal from the decree of the district court sustaining the libel of the Scots Greys, and dismissing the libel of the Santiago de Cuba. The facts are set forth in the following opinion, and also in the report of the same case in the district court, 5 FED. REP. 369.

Curtis Tilton and *Henry Flanders*, for the Scots Greys.

John G. Johnson, for the Santiago de Cuba.

McKENNAN, J. These are cross-libels, in which the district court adjudged the Santiago de Cuba in fault, in a collision between her and the Scots Greys, and decreed damages against her accordingly. The evidence touching the position, course, and government of the vessels before and about the time of the collision is of unusual volume, and consists chiefly of the testimony of the officers and crews of the respective vessels. Hence, as is almost always the case under such circumstances, it is conflicting and contradictory, and any attempt to

¹Reported by Albert B. Guilbert, Esq., of the Philadelphia bar.

reconcile it would not advance the decision of the case. It can only be dealt with by adopting such conclusions of fact of material import as may seem to be supported by a preponderance of the probabilities of their truth.

FINDING OF FACTS.

(1) About midday on the nineteenth of July, 1879, a collision occurred between the steamer Scots Greys and the steamer Santiago de Cuba, in the Delaware river, a short distance above the Horseshoe buoy, on the western side of the channel, by which considerable injury was caused to both vessels.

(2) The Scots Greys was an iron steamer, about 300 feet in length, was loaded, and drew 21 feet of water, and was ascending the river towards the port of Philadelphia.

(3) The Santiago de Cuba was a wooden steamer, was light, and drew $13\frac{1}{2}$ feet of water, and was descending the river.

(4) The tide was flood, and the current, deflected by the Horseshoe shoal, tended strongly to the eastern or New Jersey shore of the river.

(5) This shoal was somewhat in the shape of a horseshoe, with its base on the Pennsylvania or western shore and its apex in the river, leaving a channel about 400 yards in width between it and the New Jersey shore. Near this apex, on the eastern edge of the shoal, a buoy is anchored to indicate the turn of channel.

(6) Both vessels were in sight of each other for such a distance before they met as to involve no danger of collision, if they had been carefully and skillfully navigated.

(7) The Scots Greys first reached the buoy, and put her helm to starboard to make the turn of the channel, and when she rounded the buoy straightened up to proceed on the western side of the channel.

(8) At this time the Santiago de Cuba was several hundred yards above the Scots Greys, on the western side of the channel, but her course was eastward of that of the Scots Greys, and to her starboard.

(9) At the Horseshoe shoal the narrowness and shape of the channel and the tendency of the tide impose upon vessels sailing in opposite directions the duty of observing special caution as a necessary condition of their safety in passing each other.

(10) In starboarding her wheel to carry her past the buoy, and in straightening up after she rounded it that she might pursue the western line of the channel, the Scots Greys did what was proper for her under the circumstances.

(11) When the vessels were several hundred yards apart, the Santiago de Cuba sounded a signal with her whistle and put her helm hard a-port, indicating an intention to pass the Scots Greys on her port bow, and which gave her a direction across the track of the Scots Greys.

(12) Whether this signal was or was not heard on the Scots Greys, it was not answered, but she kept her course up the western side of the channel.

(13) The speed of the Santiago de Cuba was not diminished; at least, not soon enough. If she had stopped or slowed down when the Scots Greys was rounding the buoy and straightening up, the collision would not have occurred, because the Scots Greys would have passed the place of the collision before the Santiago de Cuba reached it. Nor would it have occurred if the Santiago de Cuba had not hard ported her helm and sought to pass the Scots Greys on her port side.

(14) If, in response to the Santiago de Cuba's movement, the Scots Greys had hard ported her helm, the vessels would probably have been brought together head on, with more disastrous consequences. But the impact of the former's bow was upon the starboard side of the latter, about 30 feet from her bow, thus indicating that if she had kept her course the vessels would have passed in safety.

CONCLUSIONS OF LAW.

Considering the condition of navigation at the locality in question, the size and depth in the water of the Scots Greys, the direction in which she was sailing, and the difficulty of controlling her movements, she was not in fault in adopting a course up the western side of the channel and in pursuing it without deviation.

In view of the same considerations, of the size and draught of the Santiago de Cuba, that she was light, that she was descending the river with the tide towards her head, and her movements completely under command, and that the passage of vessels such as the two in question at the Horseshoe buoy is attended with risk of collision, it was incautious in the Santiago de Cuba to pass the Scots Greys at that point, if she could avoid it. It was the duty of the Santiago de Cuba to stop or slow down when she observed the Scots Greys rounding the buoy. Failing to do either, and in porting her helm and attempting to run across the track of the Scots Greys, when the vessels were in such proximity to each other, she was in fault and must be held responsible for the collision.

There must, therefore, be a decree dismissing the libel of the Santiago de Cuba, with costs, and a decree in favor of the Scots Greys for the amount of damages sustained by her, and costs.

THE PEER OF THE REALM.¹*(Circuit Court, E. D. Louisiana. December, 1883.)*

CHARTER-PARTY—BILLS OF LADING.

A charter-party contained the following stipulations: "The captain shall sign bills of lading at any rate of freight as presented, without prejudice to this charter-party; any difference between the amount of freight by the bills of lading and this charter-party to be settled at port of loading, in cash, before sailing. * * * The owners or master of the steamer shall have an absolute charge and lien upon the cargo and goods laden on board for the recovery and payment of all freight, dead freight, demurrage, and all other charges whatsoever." The master refused to sign bills of lading unless there was stipulated or expressed therein, "other conditions as per charter-party." *Held* that the master had the right to insist upon such stipulation.

The Ibis, 3 Woods, 28, distinguished.

Admiralty Appeal.

Charles B. Singleton and Richard H. Browne, for libelants.

James McConnell, for claimants.

PARDEE, J. The libelants sue for a breach or a charter of the British steam-ship *Peer of the Realm*, made in Liverpool, England, September 28, 1878. The charter-party contains among others, the following stipulations:

"The captain shall sign bills of lading at any rate of freight as presented without prejudice to this charter-party; any difference between the amount of freight by the bills of lading and this charter-party to be settled at port of loading, in cash, before sailing. If the steamer be not sooner dispatched, twenty working days (Sundays excepted) shall be allowed the charterers for loading, etc. And it shall be at the discretion of the said charterers or their agents to detain the steamer a further period not exceeding ten like days, for the purposes aforesaid; the charterers or their agents paying demurrage at the rate of 50 pounds per day. The owner or master of the steamer shall have an absolute charge and lien upon the cargo and goods laden on board for the recovery and payment of all freight, dead freight, demurrage, and all other charges whatsoever.

The breach and violation of the charter-party alleged is that the master refused to sign bills of lading unless there was stipulated or expressed thereon, "other conditions as per charter-party." The question for decision is whether the master had the right to insist upon such stipulation. The charter-party, so far as it speaks within the law, furnishes the rule of conduct to the parties. It provides for a lien upon the cargo and goods laden, for the freight, dead freight, and demurrage. This is lawful and binding between the parties and as to all shippers with notice. According to the English authorities, which are clear upon the subject, "a lien may be created by contract between the parties, not only for freight, but for dead freight, demurrage, and as many more of the usual claims of the ship-owner as they choose to name." *Macl. Merc. Shipp.* (3d Ed.) 512. See

¹Reported by Joseph P. Hornor, Esq., of the New Orleans bar.

note 7, for authorities. And that shippers with notice of stipulations of charter-party are bound. See *Sandeman v. Scurr*, L. R. 2 Q. B. 86, quoted in Macl. 351. *Peek v. Larsen*, L. R. 12 Eq. 378. See, also, Macl. 514.

In 1 Pars. Shipp. 302, 303, it is said:

"We have seen that the charter-party usually provides expressly that the owner binds the ship and the freight to the performance of his part of the bargain, and the shipper binds the cargo to the ship for his performance. But without these expressions the law-merchant creates or implies this mutual obligation in every case of a contract of affreightment whether by bill of lading or charter-party. *If, however, the parties choose to stipulate otherwise, as that there shall be no lien, or that the lien shall be other than it usually is, they may do so.*"

My attention has been called to no American case that holds to the contrary, and I have examined the following, cited by proctors: *The Volunteer and Cargo*, 1 Sumn. 551; *The Bird of Paradise*, 5 Wall. 559; *The Salem's Cargo*, 1 Spr. 389; *Perkins v. Hill*, Id. 124; 406 *Hogsheads of Molasses*, 4 Blatchf. 319; *A Quantity of Timber and Lumber*, 8 Ben. 214. All are to the purport that the owners and charterers may make their own stipulations as to the terms of the charter-party, and all imply, though not expressly so deciding, that shippers with notice will be bound by such stipulations.

The case of *The Ibis*, 3 Woods, 28, relied upon by proctor for libelants, would be exactly in point, and partly support their pretensions, but for the fact that therein the shipper had no notice of the terms of the charter until after shipment. The case of *Kerford v. Mondel*, 5 Hurl. & N. (Ex.) 931, relied upon in *The Ibis Case*, was a case where a clean bill of lading was given which contained no lien for dead freight, and where the contract for shipment did not show notice of any charter-party. It may be that there is some conflict of authority as to the effect to be given against outside shippers of freight on a chartered vessel, so far as liens are concerned, even with notice of the stipulations of the charter-party, but I can see no reason why the rule as laid down in Maclachlan, *supra*, should not be taken as the correct one. If a shipper has notice, let him submit to the contract that furnishes the ship, or take his freight elsewhere. Neither he nor the charterer has the right to complain; the latter because he has pleased to bind himself, and the shipper because if his eyes are open he need not bind himself nor his goods unless he pleases.

It may be conceded for this case that a shipper, without notice of the terms of a charter-party, is not bound, nor his goods, for any liens not given by the law.

In *Gracie v. Palmer*, 8 Wheat. 605, it was held that the charterer and master could not, by a contract made with a shipper who acted in good faith, i. e., without knowledge of the charter, destroy the lien of the owner on the goods shipped for the freight due under the charter-party. See, also, *The Schooner Freeman*, 18 How, 182. From all

of which it seems clear that the owner had a clear right to stipulate for a lien on the entire cargo for freight, dead freight, and demurrage; that such stipulation was good against the charterer, and probably good against all shippers with notice; that the master had no right to derogate from the charter-party or jeopardize the liens stipulated therein; and that the ship was not bound to take any cargo furnished by charterer, except according to the terms of the charter-party.

It is clear that if the master had given clean bills of lading, and shippers had been given no notice, the lien given by the charter-party might have been entirely defeated. It follows, therefore, that the master of the *Peer of the Realm* was not only justified in refusing to sign bills of lading, without adding, "other conditions as per charter-party," but he was pursuing the exact line of his duty in order to protect the owners' interest.

The master's conduct was no breach of the charter-party on the part of the ship, and therefore the libelants have no case. It is urged that they should recover certain advances made as per charter-party. I am unable to see why. The evidence shows great loss to the ship because the charterer failed, without sufficient cause, to furnish cargo. Argument has been made that shippers of cotton cannot, and will not, ship goods without what is called a clean bill of lading. This may be; but I do not see what the court has to do with the matter. If charterers of ships rely on outsiders to furnish a cargo, and such outside shippers require clean bills of lading, let charter-parties be made accordingly. Nothing would be easier, if the parties agree, than that the charter-party should stipulate that the master should give clean bills of lading for all cargo not furnished by charterer, or that the master should give bills of lading as presented, and the courts would undoubtedly enforce such stipulation.

A decree will be entered dismissing libel, with costs.

THE CHARLOTTE VANDERBILT.

(District Court, S. D. New York. January 4, 1884.

SHIPPING—SUPPLIES—MARITIME LIEN—MORTGAGE—PRIORITY—SECTION 4192.

For necessary supplies furnished a vessel in a state not that of her owner's residence, a maritime lien presumptively arises, and this lien will take precedence of a prior mortgage, duly registered, under section 4192 of the Revised Statutes. The mortgagee, by assenting to the use and possession of the vessel by the mortgagor for the purposes of navigation, without restriction, assents by implication to the creation of such maritime liens as by law arise incidentally in the ordinary business of the ship.

This libel was filed to recover a balance of \$468.30, with interest, for coal furnished to the steam-boat Charlotte Vanderbilt, at Philadelphia, in July and August, 1880. The steam-boat was at that time owned by a New Jersey corporation, which purchased the boat on May 10, 1880, and gave a consideration mortgage of \$25,500 to secure various promissory notes for the purchase price. The mortgage was duly recorded in the New York custom-house, and also in the custom-house at Camden, New Jersey, where the vessel was also enrolled by the corporation purchaser. The mortgage provided that the mortgagees should have possession of the ship until a default in its terms, and that, upon such default, the mortgagee might take possession. The bill of supplies for coal was incurred while the mortgagor was in possession and running the steam-boat, and before any default in the mortgage. This libel was filed on the second of September, 1880. On the thirtieth of August prior thereto, the mortgagee took possession of the steam-boat for a default in the terms of the mortgage, and advertised her for sale on the fifteenth of September, when she was sold for \$12,000, the mortgagee having intervened as claimant in this suit, and given the usual bond for the release of the vessel.

Marsh, Wilson & Wallis, for libelants.

Ten Broeck & Van Orden, for claimant.

BROWN, J. The boat in question was running as an excursion boat. The coal was furnished upon 22 different days, and was evidently necessary for the prosecution of her voyages. Being furnished in the port of another state from that of her owner's residence, under the ordinary maritime law of this country, the coal was presumptively furnished upon the credit of the ship as well as of her owners; and the testimony corroborates this fact. The libelants acquired, therefore, presumptively, a maritime lien upon the vessel for the coal thus supplied. *The Neversink*, 5 Blatchf. 539; *The Lulu*, 10 Wall. 192; *The Eliza Jane*, 1 Spr. 152; *The New Champion*, 17 FED. REP. 816, and cases cited.

It is urged that as the mortgage was duly recorded, as required by section 4192 of the Revised Statutes, prior to the time when these

supplies were furnished, the mortgage was a notice to all persons; and the mortgagees contend that all ports of the country, as regards them, were home ports, and that no lien could be thereafter acquired against them which would take precedence of the mortgage. The section of the Revised Statutes in question gives constructive notice to all persons of the existence of the mortgage. That its purpose is, however, only to give such constructive notice, is apparent from its excepting persons who have actual notice thereof from the effect of its provisions. In providing, as this mortgage did, that the mortgagor might have the possession and use of the vessel for the purposes of navigation, without restriction, the mortgagee necessarily assented by implication to the creation of such maritime charges and liens on the vessel as by law arise incidentally in the course of the business and navigation to which the mortgagee assented; and maritime liens for supplies thus arising take precedence, therefore, of the prior mortgage. That rule was laid down in this district in the case of *The E. M. McChesney*, 8 Ben. 150, and the same rule has been elsewhere sustained. *The Granite State*, 1 Spr. 277; *The Henrich Hudson*, 7 L. R. (N. S.) 93. See, also, *The Lulu*, 10 Wall. 192, 193; *The May Queen*, 1 Spr. 588.

The libellant is entitled to a decree for \$582.75, with costs.

THE MAGGIE ELLEN.¹

(District Court, E. D. New York. December 3, 1883.)

SALVAGE—COMPENSATION—COSTS TO NEITHER PARTY.

A schooner grounded on Brigantine shoal, a dangerous shoal in the Atlantic ocean, in fair weather, with the wind light, the sea smooth, and the tide young flood. The bottom was smooth, she did not pound, nor leak, nor suffer any damage, nor set a distress signal. The value of the schooner was \$4,000. A tug, which came by, offered to tow her off for \$500 and her master offered to pay \$200, but neither offer was accepted, and the tug towed her off the shoal to an anchorage three miles distant, being employed some three-quarters of an hour, on the understanding that underwriters should fix the amount of compensation. On their refusal to do so, this suit was brought. The owners of the tug claimed \$1,000. *Held*, that there was no room to deny that this was a salvage service; that the service was worth \$200, and the offer of that sum should have been accepted. Costs were not given the libellant, because the efforts of the owners of the schooner to agree on an amount before the suit were not met in a proper spirit, and there was some reason to suppose there was the intention to compel payment of more than was just by pressure of legal proceedings. Costs were not given the claimant, as no amount was tendered, and the ground was taken that the service was towage, not salvage.

In Admiralty.

Owen & Gray, for libellant.*Beebe & Wilcox*, for claimant.

BENEDICT, J. This action is to recover salvage for services rendered in towing the schooner *Maggie Ellen* off the Brigantine shoal. Brigantine shoal is a dangerous shoal in the Atlantic ocean, just above Absecom. On the afternoon of April 23, 1882, between 5 and 6 o'clock p. m., the schooner *Maggie Ellen*, laden with ice and bound to the southward, grounded upon this shoal. The wind at the time was light from the north-west, and the weather fair. The sea was smooth and the tide was young flood. The vessel herself was sound and stanch. The bottom was smooth; she did not pound; made no water, and suffered no damage whatever by reason of the grounding. No signal of distress was set. As the wind and sea were, and continued to be until about midnight, there is no reason to doubt that the schooner would have got off the shoal by means of her windlass and kedge. She was within reach of assistance from a life-saving station, and a life-saving crew was on the way to her relief when the tug *Argus*, also bound to the south, came within hail and tendered her aid for a compensation of \$500. The master of the schooner offered \$200, and after the master of the schooner had, by sounding, shown the master of the tug that he could approach the schooner without danger, the tug took hold of the schooner, upon the understanding that the amount of her compensation should be left to the underwriters at Philadelphia. Upon this understanding the tug towed the schooner off the shoal, and took her to a place of anchorage some

¹ Reported by R. D. & Wyllys Benedict, of the New York bar.

three miles distant, being employed some three-quarters of an hour in performing the service. The underwriters refused to determine the amount, and, the parties being unable to agree, this suit is the result.

There is no room to deny that the service rendered was a salvage service. A vessel aground on Brigantine shoals, in the Atlantic ocean, is always in peril, but not necessarily in immediate peril. The service rendered by the tug was not a towage service. No tug could be expected to render a service of the character in question for ordinary towage compensation. The service was salvage, and the only question upon which there can be dispute is as to what will be a proper salvage compensation therefor. The difference between the parties is wide. One thousand dollars was demanded by the tug after the service had been performed. Two hundred dollars was offered by the schooner at the time of the service. On the trial \$750 was the least sum suggested in behalf of the libellant; \$100 the greatest suggested in behalf of the claimant. Upon considering all the circumstances, and considering that the value of the schooner does not exceed \$4,000, I am of the opinion that the offer of \$200, made by the master of the schooner at the time the service was rendered, was a liberal one, and should have been accepted. That sum is in my opinion the proper compensation to be awarded now. I give no costs to the libellant, because I consider that the endeavors of the owners of the schooner to agree upon an amount, made before suit brought, were not met in a proper spirit, and there is some reason to suppose that there was the intention to compel payment of a larger amount than was just by the pressure of legal proceedings. I cannot give the claimant his costs, for no tender of any amount whatever was made in the answer, nor was any sum paid into court. On the contrary, the ground was taken in the answer that the service rendered was towage, not salvage.

Let a decree be entered in favor of the libellants for the sum of \$200, without costs.

THE PONCA

(District Court, E. D. New York. November 23, 1883.)

LIABILITY OF STEAMER FOR DAMAGE TO CANAL-BOAT BY STEAMER'S CAREENING

Where a canal-boat, employed in coaling a steamer, was, when nearly discharged, hauled by the steamer to a position where she lay wedged in between the steamer and other boats in the slip, and when the tide fell the steamer took bottom and careened over and crushed the canal-boat, which could not extricate herself, and the liability of the steamer to careen when the tide fell was known to those in charge of the steamer, *held*, that the obligation to remove the canal-boat from the dangerous position before the tide fell attached to those in charge of the steamer, and, that obligation not having been discharged, the steamer was liable for the damage that resulted.

In Admiralty.

E. D. McCarthy, for libellant.

Ullo & Davison, (*Chas. E. Le Barbier*,) for claimant.

BENEDICT, J. In this case the following facts appear: The canal-boat Orville Dean was employed in coaling the steam-ship Ponca. The latter vessel was at the time lying in a slip, and the canal-boat along-side. When the canal-boat was nearly discharged, she was hauled by the steamer to a position where she lay wedged in between the side of the steamer and other boats in the slip, and there she was left until the tide fell. When the tide fell, the steamer took the bottom and careened over towards and upon the canal-boat, whereby the canal-boat was crushed between the boat on the outside of her and the steamer. In the condition of the slip it was not possible for the canal-boat to extricate herself from the position where she had been placed by those in charge of the steamer. The liability of the steamer to careen over when the tide fell, was known to those in charge of the steamer. Upon these facts the steam-ship must be held responsible for the injury done to the canal-boat. When those in charge of the steamer, for their own convenience, hauled the canal-boat into a position where she was in danger of being injured by the careening of the steam-ship when the tide fell, and from which the canal-boat could not extricate herself, the obligation to remove her from that position before the tide fell attached to those in charge of the steam-ship. That obligation not having been discharged, the steam-ship is liable for the damages that resulted.

Let a decree be entered in favor of the libellants, with an order of reference to ascertain the amount.

¹Reported by R. D. & Wylls Benedict, of the New York bar.

SCOBEL v. GILES.¹

(District Court, E. D. New York. September 21, 1883.)

INTERROGATORIES — TIME FOR PROPOUNDING — ADMIRALTY RULES 23 AND 32 — RULES 99 AND 100 OF THE SOUTHERN DISTRICT OF NEW YORK.

In the eastern district of New York, interrogatories to a party are not permitted in admiralty unless propounded in accordance with the admiralty rules of the supreme court. Rules 99 and 100 of the southern district of New York have never been adopted by this court.

In Admiralty.

The libelant propounded certain interrogatories to be answered by the claimant. These interrogatories were not attached to the libel, and were not propounded until after the claimant had filed his answer.

H. D. Hotchkiss, for libelant.

Benedict, Taft & Benedict, for claimant.

BENEDICT, J. The time for propounding interrogatories on the part of a libelant is fixed by the twenty-third admiralty rule of the United States supreme court, according to which rule interrogatories are required to be put at the close or conclusion of the libel. See, also, rule 27. So, interrogatories propounded by the claimant are by the thirty-second rule required to be made at the close of the answer. The admiralty rules promulgated by the United States supreme court supersede any rule of a district court fixing a different time for propounding interrogatories; and for this reason the 99th and 100th rules of the district court of the southern district of New York, adopted many years prior to the promulgation of the admiralty rules by the United States supreme court, have never been adopted as rules of this court. In this court, interrogatories are not permitted unless propounded in accordance with the admiralty rules of the United States supreme court.

¹Reported by R. D. & Wyllys Benedict, of the New York bar.

BELL v. NOONAN and others.

(Circuit Court, N. D. Iowa, C. D. January Term, 1884.)

REMOVAL OF CAUSE—ACTION BY ASSIGNEE.

Though the assignee of a chose in action cannot sue originally in the federal courts unless his assignor could have done so, he can accomplish the same result by bringing his action in the state court and removing it thence to the federal court.

Motion to Remand.

Duncombe & Clarke and Harrison & Jenswold, for plaintiff.

Soper, Crawford & Carr and Geo. E. Clark, for defendants.

SHIRAS, J. On the twenty-seventh of December, 1882, the defendants M. F. Noonan and Patrick Nolan entered into a written contract with one W. H. Godair, whereby defendants agreed to deliver to the order of said Godair, on the second or third day of April 1883, 300 head of cattle, at Emmetsburg, Iowa. The cattle were not delivered and Godair sold and assigned the contract to James Bell, the present plaintiff, who was then and is now a citizen of the state of Illinois. Godair, the assignor, and the defendants were at the date of the contract, and are now, citizens of Iowa. Bell brought an action against the defendants in the district court of Palo Alto county, Iowa, to recover the damages alleged to have been caused by the failure to deliver the cattle according to the terms of the contract. Defendants filed an answer denying that there had been a breach of contract upon their part, and averring that Godair had failed to perform the conditions of the contract upon his part, and that thereby they were excused from performance upon their part. Thereupon plaintiff filed a petition for the removal of the case into this court, upon the ground that he was a citizen of Illinois and the defendants were citizens of Iowa, and that by reason of local prejudice he could not obtain a fair trial in the state court. The proper petition, affidavit, and bond conforming to the requirements of the act of 1867 were filed, and the state court ordered the case to be removed. The record having been filed in this court, the defendants move to remand the same to the state court, on the ground that the plaintiff is seeking to maintain an action upon a contract as an assignee thereof, and that as his assignor, Godair, could not himself have brought the action originally or by removal into the federal court, therefore his assignee could not do so, and in support of this position defendants cite the case of *Berger v. Co. Com'rs*, 2 McCrary 483; [S. C. 5 FED. REP. 23.] In that case the right of removal was asserted under the act of 1875, and his honor, the circuit judge, held that the provision found in the first section of the act, which declares that neither the circuit nor district court shall "have cognizance of any suit founded on contract in favor of an assignee, unless a suit might be prosecuted in such court to recover thereon, in case no assignment had been made, ex-
v.19,no.4—15

cept in cases of promissory notes negotiable by the law-merchant and bills of exchange," should be read in connection with the second section providing for removal of cases; and so, construing the same, the result was that a removal could not be had under that act in a case where a plaintiff was an assignee, unless his assignor might have brought suit in the federal court.

The removal in the present case was sought, not under the provisions of the act of 1875, but under the act of 1867, as embodied in subdivision 3 of section 639 of the Revised Statutes. This subdivision was not repealed by the passage of the act of March 3, 1875. *Miller v. C., B. & Q. R. Co.* 3 McCrary, 460; [S. C. 17 FED. REP. 97.] It remains in full force; and the question now presented and to be decided is whether, under its provisions, an assignee of a contract who is a citizen of a state other than that of which the defendants are citizens, and who has brought an action upon the contract for a sum exceeding \$500, in a state court, can remove the same into the federal court when it appears that plaintiff's assignor is and has been from the date of the contract a citizen of the same state with defendants.

In the case of *City of Lexington v. Butler*, 14 Wall. 282, the supreme court held that the act of 1867 was not controlled or restricted by the provision found in the eleventh section of the judiciary act, to the effect "that no circuit court shall have cognizance of any suit to recover the contents of any promissory note or other chose in action, in favor of an assignee, unless such suit may have been prosecuted in such court to recover the said contents, if no assignment had been made, except in cases of foreign bills of exchange." The court ruled that "suits may properly be removed from a state court into the circuit court, in cases where the jurisdiction of the circuit court, if the suit had been originally commenced there, could not have been sustained, as the twelfth section of the judiciary act does not contain any such restriction as that contained in the eleventh section of the act defining the original jurisdiction of the circuit courts. Since the decision in the case of *Bushnell v. Kennedy*, 9 Wall. 387, all doubt upon the subject is removed, as it is there expressly determined that the restriction incorporated in the eleventh section of the judiciary act, has no application to cases removed into the circuit court from a state court; and it is quite clear that the same rule must be applied in the construction of the subsequent acts of congress extending that privilege to other suitors not embraced in twelfth section of the judiciary act. Such a privilege was extended by the twelfth section of the judiciary act only to an alien defendant and to a defendant, citizen of another state, when sued by a citizen of the state in which the suit was brought; but the privilege was much enlarged by subsequent acts, and the act in question extends it to a plaintiff as well as to a defendant," etc. The court held that under the act of 1867 the case was properly removable, even though plaintiffs therein should

be held to be the assignee of the Lexington and Big Sandy Railroad Company, the payee and original owner of the bonds sued on; the said railroad company and the defendant, the city of Lexington, being both corporations created under the laws of the state of Kentucky.

If then, as is held in that case, the restriction in the judiciary act, declaring that the circuit court shall not have cognizance of any suit on a *chose in action*, in favor of an assignee, unless the assignor could have maintained the action, is not applicable to the removal act of 1867, but, under its provisions, an assignee might remove a cause, although his assignor was a citizen of the same state as was the defendant, no good reason is perceived why the same rule should not apply to the present case. The first section of the act of 1875 is almost identical in point of language with the judiciary act, and, if the latter act did not control or restrict a removal under the act of 1867, I do not see how it can be well held that the act of 1875 has that effect.

Under the rule laid down in *City of Lexington v. Butler*, it follows that the case was properly removed, and the motion to remand must be overruled.

Since the foregoing opinion was written the decision of the supreme court in case of *Clafin v. Ins. Co.* has been announced, wherein it is held that the provisions of the first section of the act of 1875 does not limit or control the right of removal conferred by the second section of the act; and that an assignee of a *chose in action* might remove a cause from the state court, although he could not have originally sustained an action in the United States court. See *Clafin v. Ins. Co.* 3 Sup. Ct. Rep. 507.

FREIDLER v. CHOTARD and Husband.¹

(Circuit Court, W. D. Louisiana. October, 1883)

REMOVAL OF CAUSE—SEPARATE CONTROVERSY—INTERVENOR.

The plaintiff, claiming that by a contract with him the defendants became lessees of a plantation, of which he became owner, sued them for rent, and asserted his lessor's lien upon all effects found upon the premises. The parties all lived in the same state. A citizen of a different state intervened, claiming to be the owner of a part of the effects in question, and praying, as essential to his relief, that the contract between the plaintiff and the defendants be decreed to be a mere mortgage giving the plaintiff no rights of ownership. *Held*, that there was no separable controversy wholly between the intervenor, on one side, and the other parties upon the other, such as to give him the right to remove the cause into a federal court.

On Motion to Remand.

¹ Reported by Talbot Stillman, Esq., of the Monroe, La., bar.

BOARMAN, J. Isaac Freidler entered into a contract with Mrs. S. M. Chotard and husband, all citizens of Louisiana, in relation to the Minorica plantation, in Concordia parish, Louisiana. A statement of the demands in his petition will be sufficient, without reciting in detail the items of the agreement for considering plaintiff's motion to remand. Freidler, basing his title and ownership on the contract agreement between himself and Mrs. Chotard, sues her for \$1,166 for one year's rent of the said plantation, and asks for recognition and enforcement of his lessor's lien on all the effects found on the premises. Issue by default was joined on his action against Mrs. Chotard, when W. R. Young, a citizen of Mississippi, intervened in the suit to assert his claim to the ownership of one-half of the stock, revenues, etc., on which Freidler prays for his lien, and to demand other rights to and uses of the plantation. In maintenance of his action he alleges that in pursuance of a contract entered into with Mrs. Chotard and husband, in June, A. D. 1882, subsequent to the date of the agreement between Freidler and Mrs. Chotard, he *became the owner of* and entitled to the rights and things claimed by him. Alleging that he fears collusion between Freidler and Mrs. Chotard to defraud him, his claim to said property and rights are set up against all parties. He avers that the agreement upon which Freidler bases his action is, in form and substance, only a common-law mortgage, and the property and rights claimed by him are in no way affected by Freidler's pretended claim to the ownership of the plantation, or by any liens or privileges in his favor. Young prays that Freidler's demand as to the ownership of plantation be rejected; that the contract be declared a common-law mortgage; that he have exclusive control of the plantation business; that his right to one-half of the stock, revenues, etc., of the plantation, for the period of 10 years, be recognized and made executory.

It may be that under the practice in Louisiana he has included, among his several demands, some issues upon which, as an intervenor, he could not in this suit be heard in the state court. But whatever view this court may entertain, should such questions of state practice be presented in a case on trial, the right to intervene "when one has an interest in the success of either of the parties to the suit, or an interest opposed to both, is clear enough. Code Pr. art. 390. Young's right to remove the suit is not adversely affected by the fact that he appears as an intervenor, and if he has presented such a controversy as is contemplated in the following section of Act 1875, the motion to remand should be denied: "When in any such suit mentioned in this section there shall be a controversy wholly between citizens of different states, and which can be fully determined as between them, then one or more of the plaintiffs or defendants actually interested may remove said suit into the circuit court."

The intervenor claims that the pending suit, which he caused to be

removed, discloses several separable controversies which are wholly between himself and a citizen of another state, and which can be fully determined as between them independently of the other citizen of that state; that the issues he raises with Freidler can be determined without Mrs. Chotard being a necessary party, or that the issues he raises with Mrs. Chotard can be determined for or against himself, independently of and without the presence of Freidler. Without adopting the method for division, suggested in his brief, of the several demands presented in his petition, I think the following summary covers all the controversies or issues he presents:

(1) Shall the claim which he asserts to one-half of the stock, revenues, or on which the lessor's lien is prayed for, be allowed; if allowed shall it be free from the rights asserted by Freidler. (2) In order to maintain his claim to the effects, or free from Freidler's demand, he, denying Freidler's ownership, presents an issue as to the legal effect of the agreement between Freidler and Mrs. Chotard on his rights, and as to its effect between plaintiff and defendant in original suit. (3) Allying his fear of collusion between Freidler and Mrs. Chotard to defraud him, he asserts his demands, and asks that they be recognized and made executory against all parties for 10 years, the period of his contract with Mrs. Chotard. Freidler put all of the intervenor's demands at issue by a general denial. So far no issue is joined between Young and Mrs. Chotard.

In this court Mrs. Chotard may or may not answer Young's petition. If she does not answer, and the court takes jurisdiction, he can put at issue and try, on default against her, all the issues involved in his petition. As the case now stands, are any of the controversies presented in the pleadings wholly between citizens of different states? Can any one of the controversies be fully determined as between Young and Freidler, or between him and Mrs. Chotard, without all three being necessary parties to the suit? Are not the claims or demands set up by Young so intimately blended, and inseparably connected, with the matters and issues asserted and denied by the parties to the original suit that no one of them can be taken up and tried without the judgment, whatever it may be, affecting, controlling, and binding all three of the litigants as to all the issues in the suit?

Before further discussing these questions it may be well to say that the right, under the law and constitution, to remove the *whole suit*, when there is such a controversy disclosed, even though in removing the whole suit the circuit court finds it necessary to take jurisdiction of and to decide issues which are solely between citizens of the same state, and which are entirely free from all entanglements with demands of a non-resident citizen, since the decision in *Barney v. Latham*, 103 U. S. 205, seems no longer an open question. In that case the United States supreme court seem to have considered, and to have reconciled, satisfactorily to themselves, this doctrine as

to the removal of the whole suit, containing issues, *some of which are solely and exclusively between citizens of the same state*, with the constitutional provision that the judicial power of the United States shall extend to "controversies between citizens of different states." At any rate, since that decision we are forbidden to question that, where a suit pending in the state court unites two separable controversies, one distinctly with a citizen of plaintiff's own state, and the other with a citizen of a different state, the cause may be removed.

In discussing the matter of separable issues, or in ascertaining whether such a separable controversy as is contemplated in the act of 1875 is presented by the intervenor, it should be kept in mind that Young asserts his ownership of the stock, etc., his right to the exclusive management of the plantation business, his right to enjoy one-half of the revenues thereof for 10 years, and his right to have all of his demands and claims made executory against all parties to the suit. This summary of his demands appears to me to forbid the idea that any court could allow or deny to him any of them without, at the same time, passing on controversies which, before his appearance in the suit, existed solely between the plaintiff and defendant, or on matters alleged and denied by and between citizens of the same state, and which are inseparably blended with all the items of the intervenor's demand, and to the allowance of which all the parties are necessary parties.

In the case of *Iowa Homestead Co. v. Des Moines Nav. & R. Co.* 8 FED. REP. 97, the complainant sued for a sum of money in a state court and claimed a special lien on certain lands. Litchfield, a citizen of New York, intervened in the suit to assert his ownership of the land, and to dispute the special lien, and caused the suit to be removed. Mr. Justice MILLER, on hearing the motion to remand, said, if complainant saw fit to dismiss his claim for the special lien on the land, the suit would be remanded. The complainant dismissed the claim to the special lien, but after its dismissal the court, having improvidently allowed Litchfield to file some other pleadings, had to pass upon a second motion to remand. The judges (McCRARY and LOVE) of the Fifth circuit said, in considering the last motion to remand, that the first motion should have prevailed without any conditions whatever; that the issues presented by Litchfield did not warrant the removal; that the case was easily distinguished from the *Barney-Latham Case*.

In *Bailey v. New York Sav. Bank*, 2 FED. REP. 14, the plaintiff, a widow, sued the bank for \$25,000, alleged to be a deposit made for her account by her deceased husband. The bank caused Lewis Bailey, executor of Bailey, deceased, a citizen of Connecticut, to be made a party, and the bank, while laying no claim to the money, refused to pay it over to any one except under an order of court. The state court allowed the executor to remove the suit on the ground, as the judge said, that the bank was a mere stockholder, and the real

controversy was between citizens of different states. On motion to remand, Justice BLATCHFORD, holding that the bank was not a mere stockholder, but a necessary party to any judgment that might be given in the case, since the suit discloses no "controversy wholly between citizens of different states, and which can be fully determined as between them, without the presence of a defendant citizen of the same state with plaintiff, actually interested in such controversy."

In the pending suit, before the appearance of Young, judgment could have been given in favor of either party without in any way binding or affecting Young's claims. His voluntary appearance makes the dual controversy, new parties, and separable issues; but he claims nothing that is not intimately blended and connected with the matters actually in controversy between plaintiff and defendant, citizens of the same state. Mrs. Chotard, default having been taken against her by Freidler, stands as denying all of the demands made by Freidler. So she will stand, as against Young's demand, should he take default against her. It is suggested in argument that she may not answer, or may admit Young's claim; but her action cannot in this way be anticipated. If she does not answer, Young cannot try his intervention without putting her in default, and then she will stand, as she is presumed now to stand, in court as having denied all of his claims. All three of the litigants have controversies together, and against one another. The several things claimed by Young form, more or less, the subject matter of a controversy between Freidler and Mrs. Chotard, and he could not obtain a judgment in any court allowing him any one of the rights or things claimed, without such judgment operating upon and binding plaintiff and defendant as to matters and things about which they are actually disputing. Cause remanded.

TORPEDO CO. v. BOROUGH OF CLARENDON.

(*Obreust Court, W. D. Pennsylvania.* January 21, 1884.)

1. MUNICIPAL CORPORATION—REMEDY FOR DAMAGE CAUSED BY UNREASONABLE ORDINANCE—ACTION AT LAW.

The ordinary remedy for an injury from the operation of an unlawful municipal ordinance is by an action at law, for complete redress in damages is generally thus attainable.

2. SAME—INJUNCTION REFUSED.

A borough ordinance forbids any person to convey or have, etc., within the borough limits, any nitro-glycerine, (except enough to "shoot" any oil well within the borough, and this upon payment of a license fee,) under a penalty of not less than \$50, nor more than \$100, for each offense, upon conviction before the burgess or a justice of the peace. Plaintiff's works for the manufacture of nitro-glycerine are nine miles from the borough, and a magazine for its storage is one mile from the borough, on the opposite side. Plaintiff's employees conveying nitro-glycerine from its works to the magazine along public

highways, through the borough limits, were arrested and fined, but these judicial proceedings were removed into the proper county court, and are there pending. The plaintiff, alleging that the ordinance is unreasonable, unauthorized, and void, and injurious to its business, filed a bill in equity against the borough to restrain the enforcement thereof, etc. *Held*, that the case was not one for equitable relief, and, on this ground, a preliminary injunction refused.

In Equity. Sur motion for a preliminary injunction.

Brown & Stone, for complainant.

D. I. Ball, for defendant.

ACHESON, J. This is a suit by the Torpedo Company, a corporation of the state of Delaware doing business in the state of Pennsylvania, against the incorporated borough of Clarendon, in Warren county, in the latter state, to restrain the enforcement against the plaintiff of an ordinance of the borough, enacted April 24, 1882, which declares it to be unlawful for any person to "store, house, convey, carry, or have in his or her possession," within the borough limits, any nitro-glycerine, (except enough to "shoot" any oil well in the borough, on payment of a license fee of \$10,) under a penalty of not less than \$50, nor more than \$100, for each offense, upon conviction before the burgess or a justice of the peace. The proper operation of oil wells, it seems, requires that torpedoes containing nitro-glycerine be exploded from time to time in the wells. The plaintiff has established works for the manufacture of nitro-glycerine in the county of Warren, nine miles from Clarendon, and on the opposite side of the borough there has been located a magazine of one of its customers for the storage of nitro-glycerine for the supply of the trade in the oil territory known as the Clarendon field, lying in and about the borough. The plaintiff alleges that to reach this magazine with supplies of nitro-glycerine it is necessary to traverse certain highways within the borough limits, but which do not pass through the thickly-settled portions of the town. To insure safety in transportation, the plaintiff has observed commendable care in providing wagons constructed specially for the purpose, with appliances well adapted to reduce the danger of explosion to the minimum, and it is alleged by the plaintiff that these precautions secure the public from all risk. The plaintiff began business after the passage of the ordinance, and the magazine was located so late as May or June, 1883. Employes of the plaintiff have been twice arrested and fines imposed for violations of the ordinance, but these judicial proceedings have been removed into the proper court of Warren county, and are there now depending. The plaintiff claiming that the regulation in question is unreasonable and oppressive,—abridging its legal right to use the public highways of the borough, and injuring its business,—and that the ordinance is without legislative warrant and void, prays the court for an injunction to restrain the borough from enforcing the same against the plaintiff, and from arresting its employes, or bringing or prosecuting any action, civil or criminal, against them for a violation thereof.

The affidavit in behalf of the defendant in opposition to the allowance of the present motion, sets forth facts in vindication of the ordinance as wise and reasonable, and controverts some of the material allegations of the bill. But were it clear that the ordinance is void, is this a case for equitable relief? Undoubtedly courts of equity often interdict the unlawful exercise by municipal corporations of their powers; and, possibly, cases of such peculiar hardship from the enforcement of a void ordinance in restraint of trade might arise, that a court of equity would feel moved to interpose, by injunction, even before its illegality had been established at law. But such cases would be exceptional. Dill. Mun. Corp. § 727; *Ewing v. City of St. Louis*, 5 Wall. 413; High, Inj. §§ 1242, 1244. The ordinary remedy for an injury from the operation of an unlawful municipal ordinance is by an action at law, for complete redress in damages is generally thus attainable.

The learned counsel for the plaintiff rely on *Butler's Appeal*, 73 Pa. St. 448. But it is not an authority, it seems to me, for the proposition that an injunction is a proper remedy for the injury of which the plaintiff complains. That was a case of a clearly illegal exercise by city councils of the taxing power. I have been referred to no precedent, nor have I been able to find any, where a court of equity in such a case as the present has granted the relief the plaintiff seeks. But in several analogous cases such redress has been denied, and the aggrieved party turned over to his legal remedies. *Burnett v. Craig*, 30 Ala. 135; *Gaertner v. City of Fond du Lac*, 34 Wis. 497; *Cohen v. Goldsboro*, 77 N. C. 2; *Brown v. Catlettsburg*, 11 Bush, 435. Here the plaintiff's legal remedies are, I think, ample. One of these has already been invoked; for by *certiorari* or appeal the proceedings against the plaintiff's employes for violation of the ordinance have been removed into the proper state court, and are there pending. It does not appear to me that the plaintiff is likely to sustain any injury which may not be fully and adequately compensated by an action for damages, should it be adjudged that the ordinance is invalid.

The motion for an injunction is denied.

WASHBURN & MOEN MANUF'G CO. v. WILSON.

(Circuit Court, S. D. New York. January 2, 1884)

CONTRACT—CONSTRUCTION—DEPENDENT AND INDEPENDENT STIPULATION.

The Washburn & Moen Manufacturing Company granted Wilson an exclusive license to manufacture bale-ties under their patent, in New York city, for which he agreed to pay them certain royalties every month. He afterwards invented a splicing-machine, and made a written agreement with the company, by the terms of which he was to assign to them for \$300 the patent for his machine when secured, and they were to grant him back a license to use the

machine, under certain conditions, while he was to continue paying the royalties. The patent was obtained, and the assignments were made according to agreement, but Wilson refused to pay the royalties. The manufacturing company thereupon brought suit to restrain him from using the splicing-machine till the royalties were paid; but, *held*, that the license to use the machine was independent of the agreement to pay the royalties, which had to do only with the previous license to manufacture bale-ties.

In Equity.

W. B. Hornblower, for orator.

Edwin S. Babcock, for defendant.

WHEELER, J. The orators own reissued letters patent No. 7,388, dated November 7, 1876, and original letters patent No. 66,065, dated June 25, 1867, for wire bale-ties, and December 6, 1878, granted to the defendant an exclusive license for the city of New York and its neighborhood to make such ties of wire that had been before used for binding bales, for the term of one year, and agreed to license him for an additional year, for which he agreed to pay on the fifteenth day of each month a royalty of 10 cents for each 250 ties made the last previous month. The defendant invented a machine for splicing wire, made application for a patent, and on the twelfth day of June, 1879, while the application was pending, agreed with the orators that they should have the invention, when he got a patent, for \$300, and grant him the right to use his machine in the United States except for uniting the ends of bale-ties in position around bales, and not to license any one else to make ties under their patents, nor engage in splicing wire themselves, within 25 miles of New York city, and that he should continue to pay the royalties on the former patents during their term on all ties he should make and not sell to the orators. His patent was granted and assigned to the orators, and a license back for his machine executed, according to the agreement, but he did not continue to pay the royalties according to the agreement, and they brought suit and recovered judgment for \$728.71 arrears, with \$313.15 costs. This suit is brought to restrain the defendant from using his machine without paying these royalties. These agreements were in writing, signed by the parties, and contained some stipulations other than those mentioned, not here material, but none that the license should cease on or be revocable for non-payment, and no express condition on the subject of the license.

It is claimed in behalf of the orators that the grant of the license by the orators, and the agreement to pay the royalties by the defendant, were so far dependent stipulations that the law would imply a condition that the benefits of one should not be enjoyed without a reciprocal performance of the other; or that such enjoyment without performance would be so unjust and inequitable that a court of equity should restrain the enjoyment until performance should be made or secured. This claim is not acquiesced in by the defendant, but is disputed. The court cannot make nor unmake, even in equity, the contracts of the parties; at most, it can only interpret and enforce

them. This is all that the orators claim; but they insist that these contracts should be so interpreted as to require performance by the defendant, if he is to enjoy the license. If the royalties were to be paid for the privileges of the license, so that one was the exact consideration for the other, there might be reason founded in some authorities for the orators' view. *Withers v. Reynolds*, 2 Barn. & Adol. 882; *Chanter v. Leese*, 5 Mees. & W. 698; *Brooks v. Stolley*, 3 McLean, 523. These royalties were stipulated for in the first contract before the subject of the license under consideration was in existence far enough to be mentioned or alluded to in it. The agreement to pay them was the consideration for the grant of the license under the patents which the orators then owned. The agreement to assign the patent for \$300 appears to have been the substantial consideration for the license under that patent. The term of the license is the term of the patent. The right to the royalties expires with the term of the former patents. The defendant assigned his patent to the orators with the agreement that they should grant him back this license. In effect it was the same as if he had assigned all the rights secured by his patent, except those secured by the grant of the license, or had assigned the patent reserving those rights. Had the conveyance taken this form there would have been no grant of a license whatever which could have formed the consideration for the royalties, and no ground to claim that the machine of defendant should not be used unless the royalties should be paid. This is the substance of the arrangements made. The defendant never parted with the right to use his machine. By the instrument by which it was provided that he should assign his patented invention, it was provided that this right should be reassigned. He assigned the invention, and the right was reassigned. So this right was always his; he did not buy it, nor hire it, but created it under the law, and never agreed to pay anything for it, and cannot legally be compelled to pay anything as a condition for enjoying it.

Let there be a decree dismissing the bill, with costs.

FOGG v. FISK.

(*Circuit Court, S. D. New York. January 25, 1884.*)

1. PRELIMINARY EXAMINATIONS—PRACTICE IN STATE AND FEDERAL COURTS.

The examination of a party to a suit as a witness for the adverse party, pending in a state court under a provision of the Code of Procedure for that state, may be continued after the removal of such suit to the federal court, though such an examination would not be allowed under the practice of the federal court, had the action been originally brought there.

2. SAME—SURVIVAL OF PROCEEDINGS TAKEN IN STATE COURTS AFTER REMOVAL.

The removal act of 1875 carefully saves to both parties the benefit of all proceedings taken in the action prior to its removal from the state court, and by section 4 of said act, it is provided that when any suit is removed from a state court to a circuit court of the United States, all injunction orders and other proceedings had in such suit prior to its removal shall remain in full force and effect until dissolved or modified by the court to which such suit has been removed.

At Law.

John R. Dos Passos, for plaintiff.

Miller, Peckham & Dixon, for defendant.

WALLACE, J. At the time this suit was removed from the state court by the defendant his examination as a witness was pending under an order of that court, directing him to appear and be examined before the trial as a witness at the instance of the plaintiff. By the Code of Civil Procedure of this state a deposition thus taken may be read in evidence by either party at the trial of the action, and also in any other action brought between the same parties, or between parties claiming under them, or either of them, and has the same effect as though the party were orally examined as a witness upon the trial. Section 883. The plaintiff now moves for leave to proceed with the examination of the defendant pursuant to that order, and the defendant resists the application upon the ground that the examination of a party before the trial as a witness for the adverse party is not permitted by the practice of this court.

It is well settled in this circuit that section 914, Rev. St., for conforming the practice of the federal courts in suits at common law as near as may be to that of the state courts, does not apply to the taking of testimony, because the statutes of congress cover the whole subject; and these statutes not only do not provide for the examination of a party as a witness for the adverse party before the trial in actions at law, but do not permit evidence thus obtained to be used upon the trial as a substitute for the oral examination of the witness. Rev. St. § 861; *Beardsley v. Littell*, 14 Blatchf. 102; *U. S. v. Pings*, 4 FED. REP. 714. If, therefore, this were an action originally brought in this court, the plaintiff should not be permitted to proceed with the examination of the defendant. But the removal act of 1875 carefully saves to both parties the benefit of all proceedings taken in the action prior to its removal from the state court. Section 4 declares that when any suit is removed from a state court to a circuit court of the United States, all injunction orders and other proceedings had in such suit prior to its removal shall remain in full force and effect until dissolved or modified by the court to which such suit shall be removed. By force of this provision the plaintiff is entitled to proceed with the defendant's examination, unless for some substantial reason the revisory power of this court should be exercised to deprive him of the benefit of the order he has obtained and the proceed-

ing he has instituted. It lies with the defendant, therefore, to present some controlling reason to the judicial discretion for denying to the plaintiff the right which he had secured, and of which he could not be deprived except by a removal of the suit. That both parties have deemed this proceeding an important one is obvious from the tenacity with which the right to pursue it has been contested.

It appears by the record and moving papers that the defendant has been defeated in efforts to vacate the order for his examination by the supreme court at special term and at general term, and by the court of appeals; and that, although for a period of 18 months he was willing to submit his rights to the state courts, he invoked the jurisdiction of this court when there was no other resource left by which he could escape an examination. Certainly, there are no equities which should induce this court to deprive the plaintiff of the fruits of his long struggle. If the examination of the defendant could subserve no useful purpose to the plaintiff, undoubtedly the defendant should not be subjected to it, or be put to the annoyance or inconvenience which it might entail upon him. But although the defendant's testimony, when obtained, may not be of service to the plaintiff to the full extent it would be in the state courts, it may, nevertheless, be of some value. If it cannot be used on the trial of this action as a substitute for the oral examination of the defendant, it can be as the declarations of a party; and it can also be used in other suits in the courts of this state between the same parties, or their privies, pursuant to section 881 of the Code. There seems to be no reason, therefore, for dissolving or modifying the order of the state court, or for denying to the plaintiff the benefit of the proceeding which was pending when the defendant removed the suit.

The motion is granted.

ASHUELOT SAVINGS BANK v. FROST.

(Circuit Court, D. New Hampshire. 1884.)

CONVEYANCE IN LIEU OF ATTACHMENT HELD NOT IN FRAUD OF CREDITORS.

Where a bank levied an attachment upon lands owned by its treasurer who was under liabilities to it far exceeding in amount the value of the land, and in order to save the trouble of legal proceedings he made a deed of the land to the bank in lieu of the attachment, *held*, that creditors of his who afterwards attached the land could not avoid the conveyance to the bank.

At Law.

Batchelder & Faulkner, for plaintiff.

A. S. Waite, for defendant.

LOWELL, J. In this writ of entry the plaintiff corporation demands several parcels of land in the county of Cheshire and state of New

Hampshire, said to be worth about \$10,000. The parties have waived trial by jury. The evidence is that Ellery Albee had been treasurer of the savings bank for many years, and in March, 1881, it was discovered that he had embezzled the money or property of the bank to an amount which was believed to be, and which has proved to be, not less than \$80,000. March 16, 1881, he made to the bank a deed of the land in question in the usual form of an unconditional conveyance. The defendant was a creditor of Albee, and attached the lands after the deed had been made and recorded, and having obtained judgment caused them to be duly set off to him on the execution. The single question in this case is whether the deed to the bank was in fact a mortgage. It is agreed by counsel that the law of New Hampshire makes every deed which is given upon a secret condition voidable by the creditors of the grantor, however honest the transaction may be, and though the condition is merely a parol defeasance. *Coolidge v. Melvin*, 42 N. H. 510, and cases; *Winkley v. Hill*, 9 N. H. 31; *Ladd v. Wiggin*, 35 N. H. 421.

The grantor, Albee, testifies for the defendant by deposition: "I do not understand that there was any consideration, except that they were, as I understand, given as collateral security to secure my bondsmen." By "they" he means the deed; for, though there was but one, he had before testified that he did not remember how many there were. The deposition of this witness is not very satisfactory, because he remembers but little with any positiveness, and speaks of "impressions" chiefly. He further says that he did not know the amount of his indebtedness to the bank at the time, and that no valuation was agreed on at which the land was to be taken. On the other side, the evidence is that the bank had laid a first attachment on the land; that the amount of defalcation was approximately known, and far exceeded the value of the property; that Albee himself, knowing of the attachment, offered to give the deed to save the plaintiff bank the trouble and expense of legal proceedings; and that, accordingly, the deed was given and taken without any condition of any sort. If such was the transaction, the inference is that the deed was given, instead of the attachment, as a payment so far as it would go, for the debt. The plaintiff might be required to account in some form of action for the full value if Albee or his sureties should be ready to pay the remainder, but it would be as payment, and not as security, that the credit would be due.

I consider the plaintiff's case to be made out by a decided preponderance of the evidence. Verdict for the plaintiff.

TEXAS & ST. L. RY. CO., in Missouri and Arkansas, v. RUST and another.

(Circuit Court, E. D. Arkansas. October Term, 1883.)

1. CONTRACT—STIPULATED DAMAGES FOR FAILURE TO PERFORM.

A provision in a contract to build a railroad bridge that, in case of non-completion of the bridge or providing a crossing for trains by a given date, the sum of \$1,000 per week should be deducted from the contract price of the bridge for the time its completion or provision for crossing trains is delayed beyond that date, is a stipulation for liquidated damages.

2. SAME—DELAY—GOOD FAITH.

In such case, if the contractors act in good faith, and the delay results from causes beyond their control, they will not be liable for damages in excess of the stipulated amount.

3. SAME—ASSUMING RISKS—EXCUSE.

The fact that the contractors were retarded in the work by high water, sickness of hands, and sunken logs encountered in sinking piers, does not excuse them from performance of their contract. They assumed these risks when they executed the contract, without a provision exempting them from the consequences of such casualties.

4. SAME—CONSTRUCTION OF CONTRACT—PROVINCE OF COURT AND JURY.

It is the duty of the court to determine the construction of a contract. But where it has relation to a trade, profession, or business of a technical character, and is expressed in terms of art, or in words having a technical or peculiar sense in such trade, profession, or business, resort must be had to the testimony of experts, or those acquainted with the particular art or business to which the words relate; and when such testimony is conflicting, the question of the meaning of such terms and words must be referred to the jury.

5. SAME—WAIVER—SILENCE.

A waiver is not to be implied from the silence of one who is under no obligation to speak. The intention to waive a right must be established by language or conduct, and not by mere conjecture or speculation.

6. SAME—ADDITIONAL WORK—EXTENDING TIME.

If, after a contract is made for building a bridge by a given day, the owner of the bridge directs the contractor to make additions or changes, or do work on the bridge not covered by the contract, which will require longer time to complete the bridge, the time necessary to do such extra work must be added to the contract time allowed for the completion of the work.

At Law.

John McClure, H. K. & N. T. White, and Phillips & Stewart, for plaintiff.

U. M. & G. B. Rose and M. L. Bell, for defendants.

CALDWELL, J., (*charging jury.*) On the twenty-second day of April, 1882, the parties entered into a written contract for the construction, by the defendants for the plaintiff, of a railroad bridge across the Arkansas river, at the price of \$305,000. Differences arose between them as to their relative rights, duties, and obligations under the contract, which resulted in the institution of this suit. The matters in controversy between them can best be brought to your attention by stating the defendant's claims first, which may be stated thus:

1. Contract price for bridge, - - - - -	\$305,000 00
2. For sinking piers, other than center pier, below 60 feet, at \$200 per vertical foot, as per contract, - - - - -	1,000 00
3. Extra for sinking center pier 10 feet below 60 feet, - - - - -	15,000 00
4. Extra for draw protection, - - - - -	21,530 00
5. Extra for iron stringers, - - - - -	2,646 00
6. Extra for two shore abutments, - - - - -	1,600 00
7. Extra for additional material for piers sunk below 60 feet, - - - - -	1,900 00
8. Extra for trestle approaches, - - - - -	911 70
	<hr/>
	\$349,587 70

Against this sum the defendants admit credits as follows:

1. For reduced height of piers, - - - - -	\$ 8,100 00
2. For material and labor to complete bridge after defendants quit work, - - - - -	6,000 00
3. Payments on estimates, - - - - -	267,959 79
	<hr/>
	\$282,059 79

This makes the balance claimed by the defendants as due to them from the plaintiff \$67,527.91. The parties agree as to the amount paid defendants on estimates, i. e., \$267,959.79. The items in the defendants' accounts which the plaintiff disputes are, the charge for sinking center pier below 60 feet in excess of \$200 per vertical foot; the whole of the charge for a draw protection; the whole of the charge for iron stringers for draw span; the whole of the charge for extra materials for piers sunk below 60 feet; and the charge for shore abutments is said to be excessive to the amount of \$200.

The plaintiff's claims against the defendants may be stated thus:

1. Payments made on estimates, - - - - -	\$267,959 79
2. Weekly reduction in price of bridge for its non-completion, 39 weeks and 4 days, at \$1,000 per week, - - - - -	39,570 88
3. Claim for general damages for failure to complete bridge, - - - - -	200,000 00
4. For money expended in completing bridge after defendants quit work, - - - - -	15,075 61
5. Reduction in contract price of bridge on account of reduced height of piers, - - - - -	8,100 00

The defendants dispute the plaintiff's claim for damages, including the \$1,000 per week specified in the contract, on the ground that plaintiff waived the same; they admit their liability for what it cost the plaintiff to complete the bridge after they quit work upon it, but they say the amount charged therefor above \$6,000 is excessive. The provisions of the contract, and the law applicable to the matters in controversy between the parties, will now be stated in their order. The contract contains this provision:

"In case of non-completion of the bridge upon November 1, 1882, or providing a crossing for trains by said date, then in such event the sum of \$1,000 per week for the period of time such completion or provision for crossing of trains is delayed shall be deducted from said contract price; and in like manner, should the bridge be completed at an earlier date than November 1, 1882, then in such event the sum of \$1,000 per week shall be added to

said contract price, for the period by which said fixed date of completion shall be anticipated."

It is a conceded fact in the case that the bridge was not completed so trains could cross on it until the fourth day of August, 1883, and that no other mode of crossing trains was provided by the defendants before that time; and the plaintiff claims that, under the clause of the contract I have quoted, it is entitled to a reduction of \$1,000 per week in the contract price of the bridge, from the first of November 1882, to the fourth day of August, 1883, when the bridge was so far completed as to admit of the passage of trains over it. It is open to parties when they make a contract to agree on the amount to be paid or allowed by either to the other as compensation for a breach of it. Sometimes stipulations providing for the payment of a fixed sum for a breach of contract are termed penalties, and go for nothing for reasons not necessary to be stated here. But where the damages for the breach of the contract are uncertain in their nature, or difficult to be proved with any degree of accuracy, and the amount fixed by the contract is not grossly in excess of a probably just compensation, that sum will be taken as the true amount of the damages, and is called in legal parlance liquidated damages.

The difficulty of ascertaining, with any degree of certainty, the damages the plaintiff sustained, is made apparent by the testimony of the witnesses in the case, who estimated the damages from half a million of dollars down to a comparatively small sum. You will observe the contract does not provide for the payment of a large sum in gross for a failure to have the bridge completed on the day named, or for any mere technical breach of the contract. If it had done so a different question would be presented. The damages fixed by the contract do not accrue for failure to complete the bridge on a given day, but for "non-completion of the bridge, or of providing a crossing for trains by said date," which latter alternative could have been complied with by providing a boat to transfer trains; and upon failure to do either, the damages are not given in one gross sum the day the default accrues, but are graduated according to the length of time the breach continues, and are not excessive or unreasonable in amount. You are therefore instructed that the contract fixed the amount of the defendants' liability for non-completion of the bridge, or failure to provide a crossing for trains by the first of November, 1882, and afterwards. That amount is \$1,000 per week from that date until a crossing for trains was provided. As the defendants seem to have acted in good faith, and the delay resulted from causes beyond their control, the plaintiff will not be permitted to show the damages were more, nor the defendants that they were less, than the stipulated amount. Nor does the fact, if it is a fact, that the defendants were unexpectedly retarded in the work on the bridge by high water, sickness of hands, and sunken logs, encountered in sinking the piers, excuse them from performance of their contract, or from any of its

obligations. Against the consequences of such casualties they might have guarded by a provision in the contract. Not having done so, it is not in the power of the court or jury to relieve them. *Dermott v. Jones*, 2 Wall. 1.

The learned counsel for the plaintiff has argued that this clause of the contract relates to the price to be paid for the bridge, which it is said is made to depend on the time of its completion, and that the \$1,000 per week is a "deduction from the contract price" of the bridge, and not damages for its non-completion. In construing a contract every part of it must be taken into consideration. It is perfectly obvious from the face of the contract, as well as from the correspondence which preceded its execution, that \$305,000 was deemed by both parties a fair and just price for the bridge, and that the time fixed for its completion was thought to be reasonable. In view of these facts it is unreasonable to suppose that the parties deliberately agreed that the more time and money it took to build the bridge, beyond what the contract contemplated, the less price the contractors should receive for it by the amount of \$1,000 per week; and that over and above the loss of this sum, which might absorb the price of the bridge and more too, they should be liable for all damages sustained by non-completion of the bridge for the same period this \$1,000 per week was deducted. The contract does not mean this. The \$1,000 per week is damages, and it is none the less so because it is to be "deducted from the contract price."

Witnesses were examined, without objection from either side, on the question of damages. On the case as it stands such evidence is irrelevant, and is excluded from your consideration. You will therefore reject *in toto* the plaintiff's claim of \$200,000 for general damages.

The provisions of the contract bearing on the question whether the defendants are entitled to compensation above \$200 per vertical foot, for sinking the center pier below 60 feet, are the following:

"A center pier consisting of wrought-iron cylinders, sunk to a depth of sixty feet below low water into the compact material of the bed of the river, making a total height of 100 feet from base of pier to bridge seat, the center column being seven feet in diameter, and the six outside columns four feet in diameter. * * * Seven intermediate piers consisting each of two wrought-iron cylinders, seven feet in diameter, sunk and filled in manner provided for center pier. * * * If, during the progress of sinking of piers, it shall be decided to found any of them at a less depth than said sixty feet below low water, then in such event the sum of \$200 per vertical foot of pier for said reduced height shall be deducted from contract price, and in like manner should it be decided to sink to a depth below sixty feet, and not below seventy feet, then in that event there shall be added to the contract price said sum of \$200 per vertical foot of pier."

The defendants' contention is that the word "piers" in the last of these clauses, in the understanding and usage of engineers and bridge builders, does not include the center, or draw pier. The evi-

dence shows that the difference in the cost of sinking the center and any other pier is as three and a half or four to one. It is the duty of the court to determine the construction of a contract, and this duty it is usually able to perform without the aid of a jury or extrinsic evidence. But it not unfrequently occurs that contracts have relation to a trade, profession, or branch of business of a technical character, and are expressed in terms of art, or in words having a technical or peculiar sense in such trade or business, with which the court is not familiar. In such cases resort must be had to the testimony of experts, or those acquainted with the particular art or business to which the words relate, and when such evidence is conflicting, as it is in this case, the question of the meaning of such terms and words in the contract must be referred to the jury.

It is under the operation of this rule that it becomes proper for the court to refer to you for decision these questions: (1) Whether the word "pier," as used in that clause of the contract providing for the sinking of "piers" below 60 feet, at the option of the plaintiff, does or does not include the center or draw pier; (2) whether a contract to construct "a 355 feet rectangular wrought-iron truss-draw" requires the main stringers for such draw-span to be constructed of iron; and (3) whether the contract to build the "bridge complete" included a draw protection?

You have heard the testimony of the engineers and bridge builders who were called as experts, and of the parties who made the contract, and from this evidence you will determine these questions. If you find the word "pier" in the clause referred to did not include the center or draw pier, and that the sinking of that pier below 60 feet was not provided for in the contract, then you will allow the defendants the reasonable value of their labor and materials used in sinking the center pier below the depth of 60 feet; and you will make a like allowance for the draw protection and iron stringers for the draw span, if you find they were not included in the original contract. One having no knowledge of the science of engineering or bridge building would construe the word "piers" in the clause of the contract under consideration to include all the piers in the bridge; and you will so construe it, unless it is shown by a preponderance of evidence that among engineers and bridge builders it has in the connection in which it is here used a particular or technical meaning which limits and restricts it to the piers which support the fixed spans.

In relation to the questions whether the "draw protection" and the "iron stringers" for the draw span are called for by the contract, I call your attention to this clause of the contract: "Plans, diagrams, and detailed specifications embodying the above stipulations, which shall meet the approval of the chief engineer, will be promptly furnished upon acceptance hereof."

The plaintiff claims that "plans, diagrams, and detailed specifications" were furnished by defendants under this clause of the contract and submitted to and approved by plaintiff's chief engineer, and that the detailed specifications thus submitted contained this provision: "The draw protection to consist of two timber cribs, 24 feet by 30 feet, as shown on drawings, sunk to bed of river, filled with oak piles driven to a firm bearing; the cribs to be carried up to level of ordinary high water and filled with rip-rap stone;" and that the plan and diagram furnished conformed to this specification and showed a draw protection. And the same specifications contain this provision: "The trusses of the draw to be built entirely of wrought-iron, floor beams and main stringers of iron. * * *" If you find the specifications submitted to and approved by the plaintiff's chief engineer, under the contract, contained the clauses I have quoted, then it is quite clear the defendants themselves understood the contract to include the draw protection, and that the "main stringers" of the draw span were to be "of iron."

Under the clause of the contract which I have quoted the "plans, diagrams, and specifications," when submitted to and approved by the chief engineer, became a part of the contract, and whatever is included in them is included in the contract; and if you find the specifications submitted by the defendants under the contract to the plaintiff's engineer and approved by him contained the provisions I have quoted then you can make no extra allowance to defendants for the "draw protection" or for "main iron stringers" for the draw span.

The defendants say the plans and specifications in evidence are not those originally furnished under the contract, but a copy subsequently made in which the draw protection and iron stringers are called for in pursuance to an agreement to furnish them as extras, made after the first plans were delivered. This is denied by the plaintiff, and you will settle this in common with all other disputed facts.

I now come to the claim of the defendants that the sum of \$1,000 per week stipulated for in the contract for non-completion of the bridge was waived by mutual consent of the parties. If one in possession of a right conferred either by law or contract, knowing his rights and all the attendant facts, does or forbears to do something inconsistent with the existence of the right or of his intention to rely upon it, he is said to have waived it. No man is compelled to stand on a right which the law or his contract gives him. Parties have the same right to add to or vary a contract after it is made that they had to make it originally. The burden is on the party asserting a waiver or any modification or alteration of a contract to prove it. It is not necessary to show an express agreement for the waiver or modification; like any other fact, it may be proved by circumstances, such as the acts or language of the parties, which, of course,

includes their correspondence and any other facts which throw light on the question.

The right of the plaintiff under the contract to the \$1,000 per week for the non-completion of the bridge is a valuable right of which it is not to be deprived without its consent, either expressed or implied. What inducement or consideration was there for the plaintiff to waive its right to all damages for non-completion of the bridge? It was the duty of the defendants, under the contract, to go forward and complete the bridge, and this was a continuing duty. They had no right to demand of the plaintiff a relinquishment of its right to damages as a condition of going forward with the work. The contract does not state when the \$1,000 per week is to be deducted from the contract price, and the plaintiff was not bound to deduct it from the monthly estimates; and a failure, therefore, to make a claim for it, from month to month, is not sufficient evidence of a waiver. A waiver is not to be implied from the plaintiff's silence, because there was no obligation on the plaintiff to say anything on the subject. The intention to waive a right must be established by language or conduct, and not by mere conjecture or speculation. You will remember that it is not the province of courts and juries to make contracts for parties, or to alter them after they are made, but to enforce them as the parties made them. You should not, therefore, let any supposed considerations of hardship influence you to find a waiver upon insufficient or unsatisfactory testimony. It may be that \$1,000 a week was more damages than plaintiff actually sustained for some weeks after the first of November, 1882, but, on the other hand, it is obvious that that sum is greatly less than the damages that accrued weekly after the completion of the road, which occurred some weeks before the bridge was completed. But there may have been a partial or limited waiver of this right, or rather an extension of the original contract time for completing the bridge, in a mode to which I will now call your attention.

If the plaintiff directed the defendants to make additions or changes, or do work on the bridge not covered by the contract, and which would require longer time to complete the bridge, and this fact was known to both parties, then it must be implied that both parties consented to such an extension of time as was necessary or reasonable for making such additions or changes, but no more. *Manuf'g Co. v. U. S.* 17 Wall. 592. If such orders for additions or changes in the bridge were given by the plaintiff, and the defendants, with good faith and with reasonable diligence and adequate force and appliances, performed such extra work, then the time required to do the same must be added to the contract time allowed for completion of the bridge; as, for instance, if you find additions and changes were made at plaintiff's request, and that the time necessary to make them was, say one week, then the time at which the \$1,000 per week was to commence to accrue under the contract would be postponed one week. You are

the judges of the facts, the weight of evidence, and the credibility of witnesses.

The jury found a verdict of \$2,489.97 for the plaintiff, which neither party sought to disturb.

BRADLEY and wife v. HARTFORD STEAM-BOILER INSPECTION & INS. Co.¹

(Circuit Court, E. D. Pennsylvania. December 22, 1883.)

1. NEGLIGENCE—EXPLOSION OF BOILER—LIABILITY OF PUBLIC INSPECTORS.

A corporation authorized by statute to insure and also to inspect steam-boilers and stationary steam-engines, and issue certificates, stating the maximum working pressure, which certificates should be accepted by the chief inspector for the city of Philadelphia, is liable for damages resulting from a negligent inspection and false certificate.

2. SAME—BURDEN OF PROOF.

Where a steam-boiler insured and inspected by such corporation exploded, killing a child of the plaintiffs, the burden of proof was upon the plaintiffs to show (1) that the certificate accorded to the boiler a greater capacity of resistance than it would safely bear, thus authorizing its use under a dangerous degree of pressure, and (2) that this was the result of negligent inspection.

3. SAME—EVIDENCE—ADMISSIBILITY OF TESTS UPON ANOTHER BOILER SIMILAR IN CONSTRUCTION TO THE BOILER IN QUESTION.

Experimental tests, made after the accident, upon a boiler similar in construction to the one in question, are admissible in evidence for the purpose of showing that the defendant was not negligent in the inspection of the boiler which exploded.

4. SAME—INSURERS.

The defendants were not insurers as respects the plaintiffs, and are not, therefore, responsible for the consequences of according to the boiler a higher degree of resisting power than it would safely bear, unless their doing this resulted from negligence.

Motion for a rule for a new trial. This was an action upon the case brought by William Bradley and wife, citizens of Pennsylvania, against The Hartford Steam Boiler Inspection & Insurance Company, a corporation of Connecticut, to recover damages for the death of plaintiffs' child, caused by the explosion of a boiler inspected and insured by the defendant. By an act of Pennsylvania, approved May 7, 1864, (Pamphlet Laws 1864, p. 880,) the mayor of Philadelphia is directed, by and with the advice of councils, to appoint inspectors of steam-boilers, and a penalty is imposed upon any using boilers without first obtaining a certificate from the inspectors that the same was found safe and stating its maximum working pressure. By an ordinance of Philadelphia, approved July 13, 1868, (West's Dig. 417,) the number and duties of the inspectors are set forth. By an act of Pennsylvania, approved July 7, 1869, (Pamphlet Laws 1869, p. 1279,)

¹ Reported by Albert B. Guilbert, Esq., of the Philadelphia bar.

the defendant was authorized to inspect steam-boilers and issue certificates in accordance with the above recited act and ordinance.

George H. Van Zandt and Furman Sheppard, for plaintiffs.

Frank Wolfe and Benjamin Harris Brewster, for defendant.

BUTLER, J., (*charging jury*.) By virtue of the statute, to which your attention has been called, authorizing the defendants to inspect steam-boilers in pursuance of the laws of this state, the defendants' acceptance of the authority thus conferred, and undertaking to inspect Gaffney & Nolan's boilers, at the corner of Martha and Collins streets, it became their duty to make this inspection in the manner indicated by the city ordinance read to you with the care skill which the importance of the duty demands, and to grant a certificate specifying the extent of pressure the boilers would safely bear. The plaintiffs allege that the certificate granted accorded to the boiler in question, a greater power of resistance than it would safely sustain; that this was the result of carelessness in the inspection, and that in consequence a greater strain was put upon the boiler than it would bear, whereby it was exploded, and the plaintiffs' son killed. If this allegation is sustained by the evidence, the plaintiffs are entitled to your verdict; and, in such case, should be awarded a sum equal to what you may find would have been the value of the child's services to his parents, during minority, if he had lived. Is the allegation sustained by the evidence? This inquiry presents two questions, and two only. (1) Did the certificate accord to the boiler a greater capacity of resistance than it would safely bear, thus authorizing its use under a dangerous degree of pressure? And if it did, then (2) was this the result of negligent inspection? The burden of proof respecting both questions is on the plaintiffs, who must show by satisfactory evidence—*First*, the incapacity of the boiler to sustain the pressure accorded; and, *second*, that the failure to discover this incapacity, and granting the certificate to use it at so high a rate, was the result of negligence.

Considering these questions in their order, you will first inquire whether the plaintiffs have shown that the boiler would not safely bear the certified pressure. They called before you several mechanical engineers as experts, some of whom testified from investigations made after the explosion, that, in their judgment, the boiler-head would not safely sustain the pressure, and gave you their reasons for this conclusion. Some of these witnesses, as the court understood them, did not unite fully in this judgment. This, as you observe, is the opinion simply of skilled and intelligent witnesses, who had no opportunity of examining and testing the head (the only part alleged to be defective) before the explosion. On the other hand, the defendants have called before you the manufacturers of the boiler, who testify not only that the boiler was constructed of good material, and in the best manner as respects workmanship, but also that they subjected it to the hydrostatic test, and thus actually ascertained that it

would safely bear a considerably higher degree of pressure than the certificate subsequently accorded it. The defendants' agents, who inspected the boiler and granted the certificate, testify that they also subjected it to this test, and ascertained it to be capable of bearing the pressure accorded, with safety. The engineer who was first placed in charge testifies that for the several weeks he ran the engine the boiler sustained this pressure with safety. Several witnesses have testified that, with a view of ascertaining what pressure such a head would bear, a short boiler, with a head precisely like this, was manufactured after the accident, and subjected to the hydrostatic test, under the supervision of the city inspector; and that it actually bore between four and five hundred pounds to the square inch. The defendants also called experts, who, from the appearance of the boiler, expressed the judgment that it would safely bear the pressure certified. Now, gentlemen, under the evidence (and if there is anything more bearing upon this question than I have referred to, you will remember and consider it,) can you say that the boiler in question would not safely bear the pressure accorded it? If you cannot, then your verdict must be for the defendants without going further. If you find it was not capable of bearing this pressure, then you will pass to the second question, to-wit, does it appear from the evidence that the defendants were negligent in not discovering this?

The defendants were not insurers, as respects the plaintiffs, and are not, therefore, responsible for the consequences of according to the boiler a higher degree of resisting power than it would safely bear, (if they did so,) unless their doing this resulted from negligence. As before stated, it was their duty to inspect and test the boiler, as has been explained to you. If the want or insufficiency of resisting capacity could be discovered by such inspection, they should have discovered it, and failure to do so, under such circumstances, would be negligence. They were not required, nor authorized, however, to cut or chip the iron, and thus ascertain its quality, but to examine the boiler and its workmanship carefully and intelligently, and see whatever could thus be seen, and to subject it to the prescribed hydrostatic test. If they did this, and certified according to their best judgment thus formed, they are not responsible, no matter what latent defects may have existed. Does the testimony warrant a conclusion that this duty was not properly performed? Can you say that the boiler was subject to any defect discoverable by such an inspection? As before stated, the only defect alleged was in the head. This was of cast iron, flat, with the flange turned inward. If such heads as you find this to have been were in common use, and thus approved by manufacturers and the trade, the defendants cannot be held guilty of negligence in failing to condemn it on this account. That such heads were in common use at the time, the testimony on both sides would seem to put beyond doubt. That other heads, of a different type, might be safer, or that experts differ in judgment on

this subject, is unimportant. The defendants cannot be found guilty of negligence in failing to condemn a head such as was in general use, and thus proved to be reasonably safe, or at least shown to be so esteemed.

The plaintiffs, however, contend, and have endeavored to prove, that this head, aside from its kind and material, was defective in manufacture, in that the man-hole plate, as they assert, was irregular or uneven on its surface, so that when bolted down upon the head, to make a close joint, it would strain the metal of the head, and in some other minor respects. While two, and possibly more, of the plaintiffs' experts testify to such defects of construction, others, and probably a large number of the plaintiffs' witnesses who had an equal opportunity of examining the head, testify either that they did not find these defects, or that they attach no importance to them. On the other hand, the defendants have exhibited the man-hole plate to you, and called witnesses, who, examining it in your presence, say it does not exhibit such uneven surface, and that it cannot have been altered in this respect since the accident.

To the court the exhibition of the plate, with this testimony, seems to be a complete and conclusive answer to the plaintiffs' allegation in this regard. You will say, however, whether it is so or not. Other experts called by the defendants, tell you that there were no defects in the boiler-head, such as the plaintiffs ascribe to it, nor any other that a careful and competent inspector could have discovered. The city inspector, Mr. Overn, called by the plaintiffs, as well as the defendants, tells you distinctly and emphatically, that no imperfection of any description could have been discovered in it before the explosion. He further tells you that he, as inspector, would certainly have passed it, and accorded the pressure certified; that the broken parts, examined by him after the accident, showed plainly that the explosion resulted from faultiness of the iron alone, which faultiness no previous inspection could have revealed. The defendants' agents, who inspected and tested the boiler, describe to you how they did it; testify that they were careful in all respects; that they could discover no defect; and that it safely bore the prescribed test. The court sees nothing to justify the suggestion that these inspectors were wanting either in experience or intelligence. Now, gentlemen, can you say that the want of resisting power in the boiler (if it existed) should have been discovered by inspection?

I have little more to say. Unless the evidence satisfies you that the boiler would not bear the pressure accorded to it, and also satisfies you that this incapacity to bear such pressure could have been discovered by proper inspection, your verdict must be for the defendants. I deem it my duty to say to you, that the plaintiffs' case, in my judgment, is weak, as respects both these points; so weak as hardly to justify a verdict in their favor. The question, however, is submitted to you, to be determined according to your judgment. In submitting

it I caution you against all suggestions of sympathy or prejudice. They have no proper place in a court of justice.

The point submitted by the defendants, to-wit: "That under all the evidence as presented, the verdict must be for the defendants," was reserved by the court.

Verdict for defendants.

The plaintiffs moved for a rule for a new trial, assigning for reasons that evidence was admitted concerning an experimental test of a different boiler than the one in question, but said to be constructed in a similar manner; that the court charged that the defendant was not guilty of negligence if the boiler in question was of a kind in common use and approved by manufacturers and the trade, and properly inspected and tested; and because the court declared that the plaintiff's case was so weak as hardly to justify a verdict in their favor.

Rule discharged.

Vide Rose v. Stephens & Condit Transp. Co. 11 FED. REP. 438.

VIETOR and others v. ARTHUR.

(Circuit Court, S. D. New York. February, 1884.)

CUSTOMS DUTIES — WOOLEN STOCKINGS — SPECIFIC STATUTE NOT REPEALED BY GENERAL.

The specific provisions of the act of July 14, 1862, § 13, fixing the duty upon "stocking, etc., made on frames," are not repealed, with respect to stockings made of either wool or worsted and cotton, by the general provisions of the act of March 2, 1867, § 2, regulating the duty upon "all manufactures of wool."

Motion for New Trial.

Stephen G. Clarke, for plaintiffs.

Elihu Root and Samuel B. Clarke, for defendant.

COXE, J. Prior to the Revised Statutes, the plaintiffs imported into this country stockings composed of either wool or worsted and cotton. They were made on frames and worn by men, women, and children. The collector assessed them under the second section of the act of March 2, 1867, as follows:

"On woolen cloths, woolen shawls, and *all manufactures of wool of every description made wholly or in part of wool, not herein otherwise provided for*, fifty cents per pound, and, in addition thereto, thirty-five per cent. *ad valorem*. On flannels, blankets, hats of wool, knit goods, balmorals, woolen and worsted yarns, and *all manufactures of every description composed wholly or in part of worsted*, the hair of the alpaca, goat, or other like animals, except such as

are composed in part of wool, not otherwise provided for, valued at not exceeding forty cents per pound," etc. 14 St. at Large, 559.

The importers insisted that they should have been classified under section 13 of the act of July 14, 1862, as follows:

"Caps, gloves, leggins, mits, socks, stockings, wove shirts and drawers, and all similar articles *made on frames, of whatever material composed, worn by men, women and children, and not otherwise provided for.*" 12 St. at Large, 556.

The supreme court, having the provisions of the Revised Statutes under consideration, as applicable to these identical importations, say, in *Victor v. Arthur*, 104 U. S. 498:

"It is also well settled that when congress has designated an article by its specific name, and imposed a duty on it by such name, general terms in a later act, or other parts of the same act, although sufficiently broad to comprehend such article, are not applicable to it. * * * It is conceded that stockings made on frames have been dutiable *eo nomine* since 1842, and by four different enactments."

Here, then, is a general and long recognized rule of statutory construction applicable to the law as it existed both before and after the Revision, as applicable to the case at bar as to the case the supreme court were considering. Tested by it the position of the plaintiffs seems well taken. They imported "stockings made on frames worn by men, women, and children." It would be difficult to employ language more correctly describing the articles—the duty being imposed without reference to the material. But it is asserted that the general language of the act of 1867, viz., "manufactures of wool of every description" and "knit goods * * * composed wholly or in part of worsted" repealed the provisions quoted from the act of 1862. That it does not do this expressly is admitted, but it is argued that it operates as a repeal by implication.

The act of 1867 was, to use the language of defendant's brief, "intended to be a complete and exhaustive revision of the tariff so far as it related to wool and articles containing wool." It certainly was very comprehensive, specific, and minute in its classifications. That in such an act, where "buttons," "head-nets," and "hats of wool" were not forgotten, no mention should have been made of "stockings made on frames" or the acts which for many years imposed a duty upon them by that name, is indeed significant. Within the rule just quoted from the supreme court the specific description in the act of 1862 was not affected by the general description in the act of 1867. When the collector turned to the former act he found precisely what the law requires him to search for in the first instance—a particular description of the imported articles. There was no need to examine further. His duty was done.

The motion for a new trial is denied.

MIDDLETON PAPER Co. v. ROCK RIVER PAPER Co., Defendant, and another, Garnishee.

(Circuit Court, W. D. Wisconsin. January 26, 1884.)

1. FEDERAL COURT PRACTICE—PROCESSES—HOW ISSUED.

All writs and processes issuing from the courts of the United States shall be under the seal of the court from which they issue, and shall be signed by the clerk thereof. Those issuing from the supreme court, or a circuit court, shall bear *teste* of the chief justice of the United States. Section 911, Rev. St.

2. SAME—GARNISHEE PROCEEDINGS—SUMMONS IN—HOW ISSUED.

The summons in a garnishee proceeding is "process" within the meaning of the statute prescribing the manner in which processes shall issue from the federal courts, both the statutes and the decisions of the state courts regarding the garnishee proceeding as the commencement of a new suit against the defendant therein.

3. SAME—SUMMONS ISSUED BY THE ATTORNEY—AMENDMENT.

A process which has been issued by the attorney when it should have been issued by the clerk is no process at all, and cannot be amended as in the case of an irregularity. Under such a summons the court gets no jurisdiction of the case, and there is nothing to amend.

At Law.

Tenny & Bashford, for plaintiff.

Pease & Rugen, for defendant and garnishee.

BUNN, J. This action was brought by the plaintiff, a citizen of Ohio, against the defendant, the Rock River Paper Company, a citizen of Wisconsin, upon an acceptance made by said defendant in favor of the plaintiff. John Hackett, also a citizen of Wisconsin, was served with garnishee process, issued and signed by the plaintiff's attorneys, according to the forms of proceeding in such cases under the laws of Wisconsin. The defendant's attorneys, appearing for the garnishee for that special purpose, move the court to set aside the garnishee proceedings, on the ground that no sufficient process has been served upon the defendant. Section 911, Rev. St., provides that "all writs and processes issuing from the courts of the United States shall be under the seal of the court from which they issue, and shall be signed by the clerk thereof. Those issuing from the supreme court or a circuit court shall bear *teste* of the chief justice of the United States. And rule 20 of the rules for this district provides that all process shall be issued by the clerk under the seal of the court, and shall be signed by the clerk issuing the same, and shall be returnable at Madison or La Crosse, as directed by the party applying therefor. The garnishee summons in this case, served upon the defendant in the garnishee proceedings, is in the form prescribed by the law and practice in the state court, runs in the name of the state of Wisconsin, has no seal, and is issued and signed by the plaintiff's attorneys.

The question is whether in view of the foregoing provisions such a practice can obtain in this court; and it seems quite clear that it

cannot. It is true that section 914, Rev. St., provides that the practice, pleadings, and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the circuit and district courts shall conform as near as may be to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the state within which such circuit or district courts are held, any rule of court to the contrary notwithstanding. But it is evident that this provision must receive a reasonable construction in connection with the other provisions above referred to, requiring process to be issued by the clerk of this court under the seal thereof. Under the state law in this state and in New York and some other states, the plaintiff's attorney issues the summons, which is the commencement of a suit. But I believe it has uniformly been held, in view of the provisions of congress, that this cannot be done in the federal courts; and so it has been the uniform practice in this state, so far as our knowledge goes, that the summons, as well as writs of attachment and arrest, are issued by the clerk of this court under the seal of the court, run in the name of the president of the United States, and bear *teste* of the chief justice of the United States. In other respects they are in substance and form as prescribed by the laws of the state.

It is insisted, however, by plaintiff's attorneys, that a garnishee summon is not "process." I am unable to concur in this view. Both the statutes and decisions of the state courts regard the garnishee proceedings as the commencement of a new suit against the defendant therein. Section 3766, Rev. St. Wis., provides: "The proceedings against a garnishee shall be deemed an action, by the plaintiff against the garnishee and defendant, as parties defendant, and all the provisions of law relating to proceedings in civil actions at issue, including examination of the parties, amendments, and relief from default, or proceedings taken, and appeals, and all provisions for enforcing judgments, shall be applicable thereto. The statute provides for the formation of an issue and trial, and a personal judgment against the garnishee defendant. He may also be punished for contempt for failing to answer when duly summoned. See, also, *Atchison v. Rusaklip*, 3 Pin. 288; *Orton v. Noonan*, 27 Wis. 572; *Everdell v. S. & F. du L. R. Co.* 41 Wis. 395. Although the garnishee proceedings are ancillary and auxiliary to the suit against the original defendant, they are nevertheless properly regarded as constituting a separate action against the garnishee. And the summons served upon him is the "process" by which the court is to get jurisdiction of the action, if it gets it at all. It comes within any definition of process with which the court is acquainted. The summons, notice, writ, or whatever it may be called, by virtue of which a defendant is required to come into court and answer, litigate his rights, and submit to the personal judgment of the court, must be "process within the meaning of the law of congress" and the rule of the court, which is to be issued

by the clerk of this court, under the seal of the court and *tested* in the name of the chief justice of the United States. And this makes the practice in this court consistent and uniform. There would be no consistency in requiring the summons, by which the action is begun, to be issued from the court and allow the garnishee summons to be issued by the attorney. It is no doubt the policy of the law to keep process under the immediate supervision and control of the court.

The plaintiff's counsel ask for leave, in case the practice is held to be irregular, to allow an amendment; and the law of amendments is ample for the purpose, if the defect be curable by amendment. But the difficulty is, there is nothing to amend by. If process, in some respects irregular in form or substance, had been issued, the court could amend it. For instance, if the clerk had issued the summons and failed to seal it, the court could order it sealed. But no process, regular or irregular, has been issued by the proper authority. Hence it is that the court gets no jurisdiction of the case, and there is nothing to amend by.

The motion must therefore be allowed, and the garnishee proceedings set aside.

See *Peaslee v. Habestro*, 15 Blatchf. 472; *Dwight v. Merritt*, 4 FED. REP. 614; *Ins. Co. v. Hallock*, 6 Wall. 556; *Republic Ins. Co. v. Williams*, 3 Biss. 372; *Manville v. Battle M. S. Co.* 17 FED. REP. 126; Field, Fed. Pr. 176, 181, 427, note 1.

LUNG CHUNG, Adm'r, etc., v. NORTHERN PAC. RY. CO.

BUCHANAN v. SAME.

(District Court D. Oregon. February 8, 1884.)

1. RIGHT TO APPEAR SPECIALLY.

A defendant in an action, upon whom a summons has been served illegally, may appear therein specially, for the purpose of having such illegal service set aside; and there is nothing in sections 61 and 520 of the Oregon Code of Civil Procedure derogatory of such right.

2. ACTION IN NATIONAL COURTS.

Subdivision 1 of section 54 of said Code, when applied to actions in the national courts, must be construed as if the word "county" read "district."

3. CORPORATION—SERVICE OF SUMMONS ON.

In an action against a corporation in the United States circuit court for the district of Oregon, if the summons is served under said subdivision 1 of section 54, on any agent of the defendant other than its president, secretary, cashier or managing agent, unless it appears that the cause of action arose in the district, such service is illegal, and will be set aside on the application of the defendant.

4. CAUSE OF ACTION—WHEN AND WHERE IT ARISES.

A cause of action given by statute to an administrator to recover damages for the death of his intestate arises out of such death, and where it occurred; and not the appointment of the administrator or the place where it was made.

Action for Injury to the Person. Motion to set aside the service of a summons.

John H. Woodward, for Lung Chung.

O. P. Mason, for Buchanan.

Cyrus A. Dolph, for defendant.

DEADY, J. These actions are each brought to recover damages for an injury to the person, caused by the negligence and misconduct of the defendant. In Lung Chung's case it appears from the complaint that on June 21, 1883, Lung Ban was at work on the grade of defendant's railroad, in Montana, about 10 miles to the westward of Herron's Siding, when he was killed by the wrecking of a train on which he was being carried from the place where he was working to the camp of the contractors, On Chung Wa Company, under whom he was employed; and that on November 23, 1883, the county court of Multnomah county, Oregon, granted letters of administration upon the estate of the deceased to the plaintiff, who is a citizen of China. In Buchanan's case it appears that the plaintiff is a citizen of Nevada, and that on February 13, 1883, he was at work for the defendant as a carpenter, repairing bridges, on the line of its road in Washington territory, when, by the falling of timbers from a platform car, he had his arm and wrist broken, and was otherwise injured. In each case it appears that the defendant is a corporation formed under a law of the United States; and in Buchanan's case it also appears that its principal place of business is at New York; while in Lung Chung's case it is also alleged that the defendant was so organized for the purpose of constructing and operating a railway from Minnesota to Oregon and Washington territory; of all which, except the place of business, the court takes judicial notice. A summons was duly issued in each case, and from the return of the marshal thereon it appears that not being able to find the president, secretary, cashier, or managing agent of the defendant in this district, he served the summons on Homer D. Sanborn, "the purchasing agent" of the defendant herein. The defendant now moves to set aside the service of the summons in each case, having given the plaintiffs written notice of its appearance for that purpose; and by consent of parties the motions are heard together.

And, *first*, the counsel for the plaintiff in Buchanan's case insists that the defendant cannot appear for this purpose only—that it must either appear fully and without reserve or not at all, citing sections 61 and 520 of the Oregon Code of Civil Proc. By the first of these sections it is provided, in effect, that a voluntary appearance of the defendant shall, for the purpose of giving the court jurisdiction, be equivalent to a personal service of the summons; while the latter declares that "a defendant appears in an action or suit when he answers, demurs, or gives the plaintiff written notice of his appearance; and until he does so appear he shall not be heard in such action or suit, or in any proceeding pertaining thereto, except the giving of the un-

dertakings allowed to the defendant in the provisional remedies of arrest, attachment, and the delivery of personal property." Section 61 contemplates, of course, a full and unqualified appearance, and declares the effect of it on the jurisdiction of the court; but it has no bearing on the question whether a defendant has a right to make a qualified appearance for a special purpose, as to set aside an attachment or the service of a summons. So, an appearance under said section 520, by delivering a demurrer or answer to the complaint, is in the nature of things an unqualified appearance. There is only one other way for a defendant to appear, and that is by giving the plaintiff written notice thereof. And the question is, can that appearance be something short of a general appearance and for a particular purpose? There is nothing in the Code to the contrary. The statute says the defendant may appear by a written notice. This does not necessarily imply a full appearance or exclude a qualified one. If the defendant desires, in the language of the statute, to appear, not to the action, but in a "proceeding pertaining thereto," why may he not, and what is there in section 520, or the nature of the proceeding, to prevent it? The right to appear specially and move to set aside the service of a summons is one thing, and the allowance of the motion is another. When the summons or the service thereof is merely defective or wanting in some matter of form or method which does not affect the substantial rights of the defendant, the motion to set aside will be disallowed, or a counter motion allowed to amend. But where the service is unlawful, and cannot give the court jurisdiction of the defendant, it ought to be set aside or quashed, and, unless the party upon whom it is made is allowed to appear for that purpose, he must run the risk of having a judgment given against him for want of an answer, in a case where it may be there is no appeal, and, if there was, the illegality of the service is not apparent on the face of the record.

In *Lyman v. Milton*, 44 Cal. 635, and *Kent v. West*, 50 Cal. 185, it was held in the one case that a party was entitled to appear specially and move to set aside the service of an illegal summons, and, in the other, to set aside the illegal service of a legal summons; and further, that the wrongful denial of such motion was an error that was not waived by the defendant's subsequent appearance and trial of the case.

To the same effect is the case of *Harkness v. Hyde*, 98 U. S. 476, in which it was held that the service of a summons from a district court in Idaho, upon a defendant while on an Indian reservation, from which the jurisdiction of the court was by law excluded, was unlawful, and that the defendant was entitled to appear specially, to have such illegal service set aside; and further that the error committed in denying the motion to set aside was not waived by the defendant's subsequent appearance and submission to a trial of the cause.

The cases under consideration are within the rulings made in these cases, and I see nothing in the Code to take them out of it. Nothing less than the express language of a statute or the necessary implication therefrom would be construed by any court of justice as forbidding or preventing a party to appear in an action for the purpose of having the service of a summons set aside, on the ground that it was illegally served upon him,—not in manner, but in substance,—and under such circumstances as not to give the court any jurisdiction of his person, or authority to proceed to judgment against him.

By the act of 1875 (18 St. 470) it is provided that no civil suit shall be brought before any circuit court against any person, by any original process or proceeding, in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving such process or commencing such proceeding," saving certain exceptions not now material. Whether the defendant is an "inhabitant" of this district, within the meaning of this act, need not now be considered. If it is such an inhabitant it cannot be brought before this court as a defendant in this action unless by the due service of a summons upon it; nor can it be "found" here for such purpose, only so far as it can be so served here. And in either case we must look to the local law prescribing the method of serving a summons on a corporation to ascertain what constitutes such service and the effect of it. The defendant, being a mere legal entity, cannot be directly served with process. From the nature of the case the service must be a substituted one. Generally, it is made upon some natural person for it. This person is usually designated by the local law, upon the theory that his relation to the corporation is such that notice to him will result in notice to it.

By section 54 of the Code of Civil Procedure, as amended in 1876, (Sess. Laws, 37,) it is provided that in case of an action against a private corporation the summons shall be served on "the president or other head of the corporation, secretary, cashier, or managing agent," or in case none of these officers "shall reside or have an office in the county where the cause of action arose, then on any clerk or agent of such corporation who may reside or be found in the county; or if no such officer be found, then by leaving a copy thereof at the residence or usual place of abode of such clerk or agent." Allowing that the practice in this court, in this respect, must conform "as near as may be" to the directions of this section, as provided by section 914 of the Revised Statutes, still the word "county," as used therein, must in this court be understood to mean the "district" or territorial limit of the court's jurisdiction. The defendant, although an inhabitant of this district, cannot be brought before this court in a civil action, unless it is served with a summons in the mode prescribed in this section. If the action is transitory in its character, and service of the summons is made within the district on the president, secretary, cashier, or managing agent of the defendant, the

v.19,no.4—17

court acquires jurisdiction without reference to where the cause of action arose. But if neither of them can be so served, the action cannot be maintained in the district unless the cause of action arose therein. For the statute, in giving a plaintiff the right to serve a summons against a corporation upon any inferior agent or clerk thereof, where the superior ones cannot be found in the district, limits the same to cases where the cause of action arose in the district. Now, in each of these cases the cause of action arose without the district, and therefore the service of the summons thereon upon an agent of the corporation who does not appear to be its "managing" one, or its secretary, cashier, or president, is unauthorized and illegal. The illegality arises, not from a defect in form or method, but in substance, and is therefore incurable. In effect, the law does not, under these circumstances, permit the defendant to be brought before this court in civil action without its consent upon a cause of action that arose without the district.

The suggestion of counsel for the plaintiff, in *Lung Chung's* case, that the cause of action ought to be considered as having arisen within the district because the plaintiff's letters of administration were granted here, is ingenious, but not sound. On the contrary, the cause of action arose in Montana on the death of the deceased,—the law of that territory giving an action to his heirs or personal representatives for damages on that account. The plaintiff's right to sue on this cause of action may be said to have originated here, but the grant of administration to him did not create or originate the cause of action, though it gave him a certain control over it.

The motions are allowed, and the service set aside.

CHILD v. BOSTON & FAIRHAVEN IRON WORKS.

(*Circuit Court, D. Massachusetts.* January 25, 1884.)

1. PATENTS FOR INVENTIONS—INFRINGEMENT—SECOND ACTION FOR DAMAGES FOR SAME ACT.

A party who has elected to take judgment for his profits, which judgment has not been reversed, cannot prosecute a second action for other damages arising out of the same acts of infringement.

2. SAME—DAMAGES FOR A SINGLE WRONG.

For a single wrong, the damages for which are capable of ascertainment, and which is not in the nature of a continuing nuisance or trespass, only one action will lie, and the damages must be assessed once for all

At Law.

E. P. Brown and C. E. Washburn, for plaintiff.

Causten Browne, for defendant.

LOWELL, J. The parties have agreed that if, upon the facts submitted, the action can be further maintained, it shall stand for trial;

if not, a verdict shall be entered for the defendant. It is an action at law for infringement of two claims of a patent owned by the plaintiff. After it was begun the plaintiff filed his bill on the equity side of the court for precisely the same infringement, which consisted of making and selling certain printing presses, and Judge SHEPLEY, after a full hearing, entered an interlocutory decree for an injunction, and an account of the profits and damages. *Child v. Boston & Fairhaven Iron Works*, 1 Holmes, 303. The master reported that the plaintiff had not claimed damages as such, and that he was entitled to recover \$5,640.26, as profits. No claim was made before the court or the master under the second claim of the patent, and it was not passed upon, though the bill was broad enough to include it. A final decree was entered for the sum found by the master, but it has not been satisfied. The suit in equity was begun after the statute of 1870 had given the owners of a patent the right to recover damages as well as profits, in equity; and, under the prayer for general relief, the plaintiff might have had his damages assessed, as the interlocutory decree itself provides. Both suits, therefore, were for precisely the same cause of action; and though the remedy in equity was more complete, it was a concurrent remedy with this action, and has now passed into judgment. If the plaintiff had found that his damages exceeded the defendant's profits, he might have had the larger sum assessed. *Birdsall v. Coolidge*, 93 U. S. 64.

The principle of law relied on by the defendant, applies to the damages for the second claim, as well as damages generally. It is that the same defendant shall not be twice vexed by the same plaintiff for a single wrong, any more than for a single contract. "Suppose," said the court, in *Farrington v. Payne*, 15 Johns. 432, 433, "a trespass, or a conversion of a thousand barrels of flour, would it not be outrageous to allow a separate action for each barrel?" So far as I have been informed by the able arguments, or have discovered by my own examination, the authorities agree entirely, to this extent, at least, that for a single wrong, the damages for which are capable of ascertainment, and which is not in the nature of a continuing nuisance or trespass, only one action will lie, and the damages must be assessed once for all. The doctrine has sometimes operated harshly for plaintiffs, whose damages proved to be greater than they were expected to be. Here, however, the infringement consisted in making and selling certain machines, identical in the two cases, and not for their continued use; and there is no possible element of prospective or uncertain damage. See *Bennett v. Hood*, 1 Allen, 47; *Trask v. Hartford & N. H. R. Co.* 2 Allen, 331; *Goodrich v. Yale*, 8 Allen, 454; *Fowle v. New Haven & N. Co.* 107 Mass. 352; *Folsom v. Clemence*, 119 Mass. 473; *McCaffrey v. Carter*, 125 Mass. 330; *Adm'r of Whitney v. Clarendon*, 18 Vt. 252; *Great Larey Mining Co. v. Clague*, 4 App. Cas. 115.

In giving the opinion of the supreme court, that an unsatisfied

judgment against one wrong-doer does not bar an action against others who are jointly and severally liable, *MILLER, J.*, is careful to distinguish the case from that of a second action against the same defendant. *Lovejoy v. Murray*, 3 Wall. 1, 16.

The plaintiff having elected to take judgment for his profits for the precise infringement which is the subject of this action, which judgment has not been reversed, he cannot now prosecute his action for other damages arising out of the same acts of infringement; and, in accordance with the stipulation, there must be a verdict for the defendant.

NICODEMUS and another *v.* FRAZIER.

(Circuit Court, D. Maryland. January 24, 1884)

PATENTS FOR INVENTIONS—COMBINATION VOID FOR WANT OF PATENTABILITY.

Patent No. 241,405, granted December 27, 1881, to Nicodemus & Weeks, for improvement in apparatus for processing canned goods, *held* to be a combination of old elements, void for want of patentability.

In Equity.

Sebastian Brown, for complainants.

John H. Barnes, for defendant.

MORRIS, J. Bill of complaint for infringement of patent No. 241,405, granted to complainants December 27, 1881. Complainants' patent is for an improvement in an apparatus for processing canned goods. To enable the goods, after being put in hermetically-sealed cans, to be subjected to a higher degree of heat than 212 degrees Fahrenheit, the complainant provides a vessel, or kettle, with a steam-tight cover in which the cans may be placed, and the steam admitted until the temperature is raised to the required degree. The cans being subjected while in the steam-tight vessel to the pressure of the confined steam are not liable to be burst by the explosive pressure generated within them. The steam-tight processing vessel is substantially the same contrivance described and claimed in patent No. 149,256, granted to Andrew K. Shriver March 31, 1874. Shriver's contrivance is not claimed by him in his patent in combination with any boiler or steam generator, but simply as a steam-tight processing vessel, to be supplied with steam from any convenient steam generator.

The complainant in his patent claims this steam-tight vessel in combination with an ordinary tubular boiler, and it is described and shown as placed upon the boiler with the bottom extending downward a little distance into the boiler itself. The first claim is for the combination of the vessel and the boiler, the vessel mounted upon

the boiler and communicating with the steam drum. The second claim is for the combination of the vessel and boiler, with the vessel resting upon and partially within the boiler. The third claim is for the combination of the same elements in connection with a removable lid for the kettle, a clamp to fasten it, a gage cock and pipe, all of them well known appliances used in connection with boilers and vessels in which steam is confined. It is quite evident, I think, that there is nothing new in the processing kettle, and nothing new in the tubular boiler, and nothing of invention in the mechanical construction by which the complainants unite the two together. The only question then is, are the two when brought together a patentable combination? Do the two as combined by complainants contribute to a new mode of operation or produce any new and common result? I do not see how it can be so contended. The boiler, just as before, produces the steam, and just as before it is conveyed by a pipe into the processing vessel, and being there confined it acts upon the cans just as before, producing the same results by precisely the same operation.

The complainant claims that his contrivance has for its object to economize steam, to facilitate the removal of the cans, and to increase generally the efficiency of the apparatus. It may be that by placing the kettle upon and partly within the boiler he has accomplished these objects, but it seems to me that what he has done are mere details of construction, and do not approach invention. In *Atlantic Works v. Brady*, 107 U. S. 200, [S. C. 2 Sup. Ct. Rep. 225,] the supreme court has declared very plainly that it is not the design of the patent laws to grant a monopoly of the improvements and adaptations which in the progress of manufactures from time to time would occur as the demand for them arises to any skilled mechanic or operator. If, for the use of any class of persons engaged in putting up canned goods, it is more convenient and economical to have the steam processing kettle placed on and sunk partly into the boiler which generates the steam, instead of placed alongside of it, it was an arrangement the virtues of which could not perhaps be ascertained except by experiment, but I cannot see that it required invention to suggest it, or that when so arranged it is a patentable combination of the boiler and the kettle.

The complainant contends that this defense should not be considered by the court, because it is not set up by the respondent in his answer, but that the defense disclosed by the answer, and to support which the testimony by respondent was pertinent, was that the respondent and not the complainants was the real inventor of the patented combination, and that the complainants by fraud had procured the patent to be granted to them. Respondent in his answer "denies that the complainants were the first inventors of the invention patented to them as alleged, but that this respondent is the true, first,

and original inventor of the said device, or so much thereof as is patentable." The answer also contains this statement:

"*Fourth*, this respondent charges that said complainants are not the original and first inventors of the processing apparatus patented as aforesaid by them, but charges that the same was well known and publicly exhibited by said Frazier (the respondent) in Baltimore city, Maryland, 132 Thames street, before the date of complainants' alleged invention or discovery of the same, *which is but an aggregation of old and well-known devices, and producing no new and useful result*, and that the following persons of Baltimore city had knowledge of the existence of the said invention in said city, and will testify in behalf of respondent, to-wit, etc.:

"*Fifth*, and this respondent charges that the complainants, well knowing this respondent to be the true, just, and original inventor of said device, sought to deprive him of the just fruits of his invention, and did, surreptitiously and fraudulently, obtain from respondent a knowledge of said invention, and secretly, and without the knowledge or consent of this respondent, obtain a patent therefor by falsely and deceitfully representing themselves to be the first inventors thereof. And this respondent charges that as soon as he was advised of the issuing of said patent No. 251,456 to complainants he proceeded to the city of Washington and instituted at the United States patent-office proceedings in interference, and accordingly interference was declared, under which the questions of priority of invention will be adjudicated and determined."

The answer, it will be seen, claims that the respondent is entitled to a patent, and is striving to obtain a patent, for the very thing patented to the complainants; and although, in a parenthetical and indirect fashion, the respondent does intimate that the alleged invention is but an aggregation of old and well-known devices, producing no new results, the substantial defense in the answer, and attempted to be established by respondent's proof, is that the invention and the patent of right belong to him, and that the complainant stole it from him. Indeed, the copy of the Shriver patent was not put in evidence by respondent until the very last sittings for taking testimony, and more than a year after the first testimony was taken. I think, however, that this is a case in which the want of patentability is clear, and that, as ruled by the supreme court in *Slawson v. Grand Street R. Co.* 107 U. S. 652, [S. C. 2 Sup. Ct. Rep. 663,] the court may, *sua sponte*, without looking into the answer, dismiss the bill on that ground, and that it cannot be the duty of the court to render a money decree for the infringement of a void patent, even though that defense is not properly made by the respondent. In the case before the supreme court they held that a mere inspection of the Slawson patent showed it to be void on its face. It may be that such an inspection merely of complainant's patent would not show it to be void on its face; but reading it, as it is proper it should be read, with some knowledge of the state of the art, and particularly with a knowledge of the contrivances made known to the public by Shriver's patent nearly eight years prior to complainant's patent, it then becomes evident that there is nothing new in any of the elements of the combination, and,

indeed, it is not claimed in the patent that there is, and it is plain on the face of the patent that, as a combination of old elements, there is nothing patentable in the combination.

Bill dismissed, without costs.

McARTHUR v. BROOKLYN RAILWAY SUPPLY Co. and others.

(*Circuit Court, S. D. New York. January 2, 1884.*)

PATENTS—VALIDITY OF REISSUED LETTERS, No. 2,568.

Reissued letters patent No. 2,568, granted upon the surrender of original letters patent No. 59,733, for an improved broom, were properly reissued. The invention therein described is the same as that described in the original letters, and if the claim is enlarged the reissue was, nevertheless, proper in the absence of intervening rights.

In Equity.

Eugene N. Elliot, for orator.

H. D. Donnelly, for defendants.

WHEELER, J. The right to a decree in this cause depends upon the validity of reissued letters patent No. 2,598, dated May 14, 1867, granted to William H. Cory, assignee of Thomas Wright, upon the surrender of original letters patent No. 59,733, dated November 13, 1866, for an improved broom. The questions made are as to novelty; and the propriety of the reissue. The broom is for out-door work, and made by doubling small bundles of splints for the brush in the middle and inserting the ends through pairs of holes in a wooden head, astride the wood between the holes, by which and by a back of wood, with a groove for the loop in one or the other, they are held in place. Brushes made of looped bristles drawn through single holes and held in place by wires through the loops, and by grooved backs, and other similar devices, and patents for similar devices, had existed before, but no broom with a head like this had been known or used before. The original patent showed a double socket for a handle to be inserted on either side to secure even wear, and described only metallic splints, and the claim was for simply a wire broom made substantially in the manner set forth. The reissue describes metallic or other suitable splints, and the claim is for such splints inserted in bundles through apertures formed in pairs, in the base plate of the broom, by looping them as described, said apertures being connected by a groove or recess to accommodate the loop and the latter held to its place by a back or upper plate substantially as shown and described. The substitution of other suitable splints for wires would occur to any mechanic with skill for making the brooms, and required no invention. There is nothing described as invented in the reissue that was not in the original, and therefore the invention described in

the reissue is the same as that described in the original. The claim in the original covered the broom merely. If that would include the handle and sockets for it, or the sockets, the reissue is for less, for it does not include either. It is merely for the splints so inserted in the head and fastened, making a broom. If the claim is really enlarged, as the reissue was taken out so promptly, and the invention is the same, and no rights of others are shown to have intervened, the reissue would seem to be proper. *Hartshorn v. Eagle Shade Roller Co.* 18 FED. REP. 90. But as the head was new, and included in the claim of the original, that could not be taken without infringement by the use of equivalents for the wires of the original, and therefore the claim may not be really enlarged at all. In this view the orator seems to be entitled to the usual decree against infringement.

Let a decree for the orator be entered according to the prayer of the bill, with costs.

THE JAMES P. DONALDSON.

(*District Court, E. D. Michigan. July 9, 1883.*)

1. TOWAGE—CHOICE OF ROUTE—DISCRETION OF MASTER.

Where the propriety of the general course to be taken by a tow from one port to another depends largely upon the season of the year, the state of the weather, the velocity of the wind, the probability of a storm, and the proximity of harbors of refuge, the choice of a route is usually within the discretion of the master of the tug; and if he has exercised reasonable judgment and skill in his selection he will not be held in fault, though the court may be of opinion that the disaster which followed would not have occurred if he had taken another route.

2. SAME—REFUSAL TO CROSS LAKE—STORM.

A like rule obtains with reference to the conduct of the master in refusing to cross the lake or turn back to the port of departure in face of a storm.

3. SAME—INTOXICATION OF MASTER.

The intoxication of a master upon duty ought not to be inferred from slight circumstances equally consistent with a different theory, or from the equivocal testimony of one or two dissatisfied seamen, when flatly contradicted by the remainder of the crew.

4. SAME—ABANDONMENT OF TOW—GENERAL AVERAGE.

The abandonment and ultimate loss of a tow of barges to save the tug from destruction, and the subsequent arrival of the tug in a port of safety, does not vest in the owners of the barges a claim against the tug for contribution in general average.

In Admiralty.

These were consolidated libels against the propeller *James P. Donaldson*, to recover for the abandonment and subsequent stranding and loss of the barges *Eldorado* and *George W. Wesley*, some three or four miles below Erie, Pennsylvania, upon the evening of November 20, 1880. The conceded facts were substantially as follows: That the barges in question, together with the barge *Bay City*, left Buffalo

in tow of the Donaldson about 9 p. m. of November 19th, bound for Bay City, Michigan. None of the tow were laden except the Bay City, which carried a small cargo of coal. There was a light breeze from the S. E., which changed about 3 in the morning to the southward and westward, and became somewhat fresher. It continued S. W. and S. S. W. during the entire day, with indications of veering still further to the westward, and by evening was blowing a gale from S. S. W. On leaving Buffalo, the propeller took a S. W. course, in order to obtain the advantage of smoother water off the S. shore, and kept substantially the same course until about dark, when the lights of Erie harbor were made, eight or ten miles distant. The progress of the tow during the whole day had been very slow, not exceeding two and one-half miles per hour, and for some time prior to the abandonment the propeller could do little more than to keep her tow headed to the sea. About 8 or 8:30 o'clock, the wind, which had been blowing hard from S. S. W. by S., suddenly veered into a N. W. or W. N. W. squall of great violence, accompanied by gusts of snow, striking the Donaldson on her starboard bow, and forcing her head around toward the shore so far that she was heading nearly S. $\frac{1}{2}$ E. during its continuance. This squall lasted from six to ten minutes. During its continuance the Donaldson and her tow, with wheel hard-a-port, drifted helplessly before its fury, until, according to the theory of the propeller's crew, they had come within about three-quarters of a mile of the shore, when the squall ceased as suddenly as it had arisen, and the wind dropped back instantly to S. W. by S., and so continued for 20 or 30 minutes. About 9 o'clock a second squall struck the tow, even harder than the first. The propeller immediately put her wheel hard-a-port, but without effect. She continued to swing off before the gale, heading for the shore. When she had drifted to within about 600 feet of the reef which lines the shore at that point, seeing there was no escape except by flight, she gave the proper signal, cast off her line, abandoned the barges, and made for the entrance to Erie harbor, and there came to anchor. The barges drifted ashore and were lost.

The libellant charged the master with the following faults: (1) In failing to take the usual and proper course up the lake. (2) In not keeping far enough from the shore to handle his tow and to come round in case of a sudden squall or high wind from the west; and in leaving the deck to his mate without sufficient cause. It was also charged in this connection that the master was intoxicated during the afternoon and evening.

Moore & Canfield, for libellants.

H. H. Swan, for claimants.

BROWN, J. I will proceed to consider the several allegations of negligence charged against the master of the propeller.

1. In regard to the general course of the tow in leaving Buffalo. The usual and ordinary course up the lake from Buffalo to the mouth

of the Detroit river is W. by S. $\frac{1}{4}$ S., considerably to the northward of the course actually taken. This would carry the tow close to Long Point, and thence in a straight course to the narrow channel between Pointe Au Pelee and Pointe Au Pelee island. Had Captain Towle adopted this course, it is very probable that he could have taken shelter behind Long Point and weathered out the gale, as several other vessels did which left Buffalo about the same time. But the wind was from the S. E., the season was late, and the weather treacherous. By taking the course along the S. shore he could secure much smoother water, and would easily have been able to make the harbor of Erie, had not the wind kept canting to the westward and increasing in violence. There is some testimony tending to show that a S. E. wind at that season of the year frequently, but not invariably, changes to a gale from the S. W. or W.; but as the wind was light when the tow left Buffalo, I think it is demanding too much of the master to require him to forecast the weather for the following day. We have no right to expect in him greater weather wisdom than is found among the most experienced and scientific observers.

There is a great conflict of testimony as to the propriety of the course taken by the tow in leaving Buffalo. Some vessels which left on the same day took the northerly route and gained shelter behind Long Point. Others took the southerly route and made the harbor at Erie before the gale struck them. I think it is clearly one of those cases where the master might, in the exercise of sound judgment and reasonable discretion, have taken either course without being chargeable with negligence. His choice, of course, was largely dependent upon the season of the year, the state of the weather, the velocity of the wind, the probability of a storm, and the proximity of harbors of refuge, and we are not inclined to review his judgment in that particular. The disaster which befel him undoubtedly tends to show that he made the wrong selection, but the propriety of his action must not be determined by the result. He can only be chargeable with negligence when he takes a course which good seamanship would deem unauthorized and reckless. "The owner of a vessel does not engage for the infallibility of the master, nor that he shall do in an emergency precisely what, after the event, others may think would have been the best." *The Hornet*, (*Lawrence v. Minturn*,) 17 How. 100; *The Star of Hope*, 9 Wall. 230; *The W. E. Gladwish*, 17 Blatchf. 77, 82, 83; *The Mohawk*, 7 Ben. 139. *The Clematis*, 1 Brown, Adm. 499.

Libelants also claim in this connection that the propeller could either have crossed the lake and taken refuge under Long Point, or could have come about and returned to Buffalo as the master saw the storm approaching. I do not think he was bound to do this. So long as he could make his way against the wind he was as likely to make the harbor of Erie in safety as he was to make Long Point; indeed, it would seem, with the wind blowing a gale from the S. W., there would

have been lack of good judgment in the master exposing himself to a beam wind and sea, by attempting to cross the lake. Whether he should attempt to turn about and make the harbor of Buffalo was also a question upon which he was at liberty to exercise his judgment. He deemed it a more prudent course to proceed directly to Erie, and I am by no means satisfied that he was not correct.

2. In not keeping further from the shore as the propeller approached Erie. It is charged in this connection that Capt. Towle was under the influence of liquor that afternoon, and left the deck at the time he was most needed, to a mate who had no knowledge of the shore at that point. There was no question made of Capt. Towle's general competency, and I can see nothing to criticize in his management of the steamer after he took command. The charge of intoxication rests upon his admission that he drank in a saloon on the day he left Buffalo; that he had sent on board a jug of whisky as a part of the sea-stores which he kept in his room, and that there was an empty whisky bottle found on the floor the morning after the accident. Webster, the steward, who found the empty bottle, testified that the captain's appearance that night indicated to him that he had been drinking; that his eyes were red, and he looked stupid. But he says he saw nothing otherwise to indicate that he had been drinking, and that this appearance might have been owing to his facing the storm. This is also corroborated by the testimony of one or two others of the crew, who confessed to having quarreled with Capt. Towle. It is denied, not only by Capt. Towle himself, who swears that he drank nothing that day, and that there had been no whisky in the bottle for three months, but by all the rest of the crew, who swear that they never saw or heard of his drinking too much while upon the propeller. It is pertinent in this connection to notice that the pleadings give no intimation that such an accusation was contemplated, nor was it suggested by the libellant in his testimony before the steam-boat inspectors at Port Huron, who inquired into the cause of the loss. Upon the whole, it does not seem to me that the offense has been proven. So grave a charge as this ought to be substantiated by something more than trifling incidents which are quite consistent with another theory, and the testimony of two or three disaffected men, contradicted, as it is, by nearly the entire crew.

The most serious question in the case is whether the propeller kept her tow as far away from the shore as she should have done under the circumstances. As I have already observed, I do not think the master was bound to contemplate the contingency of turning about and going to Buffalo, or of crossing the lake under a beam wind and seeking shelter at Long Point, when he was already so near to Erie, but he was bound to keep far enough from shore to escape the danger of running upon the reef at that point as the wind and sea then were. Capt. Towle's watch ended at noon, but as the weather was heavy he remained on deck until 5 o'clock, when he left

the propeller in charge of the mate, an experienced seaman, but not very familiar with the approach and entry to the harbor at Erie. Between 7 and 8 o'clock he came on deck again. The tow was then, as he claims, from a mile to a mile and a half from shore, with no indications of immediate peril. Libelants, however, claim that she had been allowed by the mate to drift to within a half a mile of the shore, and was nearer than was customary or safe for vessels in entering the harbor. There is a very considerable conflict of testimony upon this point. While I am disposed to give considerable weight to the testimony of Henry, the keeper of the light at the Beacon ranges; of Clark, who was in charge of the life saving-station; and of Pherrin, who lived about four miles from Erie and very close to the shore; at the same time it is entirely possible that their observations might have been made after the first squall had struck the tow and when she had undoubtedly gotten much to the southward of her proper course. The testimony of the crew of the propeller is substantially that she was kept upon the usual heading towards the Erie lights, and in the darkness and storm of that evening it must have been very difficult for those upon the tow to determine their distance from the shore. Libelant Slyfield admits he could not tell the distance. Upon the whole I do not think libelants have made out this branch of their case by a preponderance of testimony.

This includes all the charges of negligence which were urged upon the argument. In my opinion, the loss was occasioned by a peril of the sea. The disaster occurred during the prevalence of the worst storm of the season of 1880. All the ship-masters who were exposed to it united in pronouncing it a "living gale of wind," and one of the most sudden and violent within their memories. The report of the signal service filed characterized it as "a furious westerly gale; a thick, blinding snow storm." Such was its violence, at the very time the Donaldson was struggling off the shore, that the steamers which had taken refuge under Long Point were obliged to keep their engines working at full speed, and even then could not hold themselves up to their anchors, while at least one barge was lost there. In Erie harbor another powerful steam-barge, during the same squall, had to let go her barges, because she could not hold them. With such weather as this in sheltered roadsteads, it is easy to conceive the peril to which the Donaldson with her tow was exposed in making their way along the open lake, with furious squalls driving them directly upon a lee shore. While the conduct of the tow may not have been above a searching criticism, we think it quite apparent that it would have been useless to contend against the furious squalls from the N. W.; and that the propeller cannot be justly held in fault for abandoning her tow and seeking safety where she could find it. Indeed, it was not claimed but that the abandonment, when actually made, was not necessary to save the propeller.

3. But it is urged by libelants that even if the propeller be exoner-

ated from all charges of negligence in respect to the conduct of her tow upon that occasion, she is still liable for her proportion of the value of the lost barges, in general average,—that here was a common danger; a danger imminent and apparently inevitable, in which all participated; a voluntary jettison of the barges for the purpose of saving the propeller; or in other words, a transfer of the peril from the whole to a part of the tow; and that this attempt was successful; and therefore the propeller may be called upon for contribution. The proposition is a novel and interesting one. I know of no case in which it has even been discussed. Indeed, the very fact that no claim of this description has ever been made is worthy of suggestion as indicating the view generally taken by the profession. It is true there are in this case many of the elements which go to entitle the barges to a general average contribution, as stated in the leading case of *Barnard v. Adams*, 10 How. 270; still I know of no case wherein the principle of mutual contribution has been extended beyond the ship, her boats, tackle, apparel, furniture, and cargo. I understand the law of general average to be an outgrowth of the law-maritime as applied to the carriage of goods by sea. It is never applied to cases of a voluntary sacrifice of property upon land when made to preserve the property of others from a greater loss. For instance, if the house of A. be torn down, or is blown up in a conflagration, to save the houses of B., C., and D., A. has no right to contribution, be the evidence never so clear that the sacrifice was successful, and saved the property of B., C., and D. from destruction. Indeed, the cases have gone so far as to hold that the parties themselves who commit an act of depredation for the public safety are not liable in trespass. Says Judge DILLON, in his work upon Municipal Corporations, vol. 2, § 756:

“The rights of private property, sacred as the law regards them, are yet subordinate to the higher demands of the public welfare. *Salus populi suprema est lex*. Upon this principle, in cases of imminent and urgent public necessity, any individual or municipal officer may raze or demolish houses and other combustible structures in a city or compact town, to prevent the spreading of a destructive conflagration. This he may do independently of statute, and without responsibility to the owner for the damages he thereby sustains.”

It was said, so long ago as the reign of Edward IV., that “by common law every man may come upon my land for the ‘defense of the realm.’ ”

In the *Saltpetre Case*, 12 Coke, 13, it is said that “for the commonwealth a man shall suffer damage; as, for saving of a city or town, a house shall be plucked down if the next be on fire; and the suburbs of a city in time of war, for the common safety, shall be plucked down,—and a thing for the commonwealth every man may do without being liable to an action.”

In *Mouse's Case*, Id. 63, certain passengers upon a ferry-boat from Gravesend to London cast overboard a hogshead of wine and other

ponderous things to save the boat from being swamped in a violent tempest. It was held that as this was a case of necessity for the saving of the lives of the passengers, the defendant, being a passenger, was justified in casting the hogshead of the plaintiff out of the barge. See, also, *Governor, etc., v. Meredith*, 4 Term R. 794; *Respublica v. Sparhawk*, 1 Dall. 357; *Taylor v. Plymouth*, 8 Metc. 462; *Mayor, etc., v. Lord*, 17 Wend. 285; S. C. 18 Wend. 126. A like principle was applied in the Roman law, wherein it is said that if, by the force of the winds, a ship is driven against the cables of another, and the sailors cut these cables, no action will lie, if the ship cannot be extricated in any other way.

In the case of *The John Perkins*, 21 Law Rep. 87, Mr. Justice CURTIS decided a case which involved somewhat the same principle as the one under consideration. In this case one of the crew of a fishing schooner cut her cable in order to prevent a collision with another vessel and the destruction of both, and claimed a general average contribution for the loss of his cable and anchor. Judge CURTIS dismissed the libel, saying that, in his opinion, the only subjects bound to make contribution are those which are united together in a common adventure and placed under the charge of the master of the vessel, with authority to act in emergencies as the agent of all concerned, and which were relieved from a common peril by a voluntary sacrifice made of one of those subjects. The only opinion I have found to the contrary is that of Casaregis, an eminent civil law writer, who puts the case of the destruction of a vessel in port, lying near to another vessel which is on fire, to prevent the flames from spreading and being communicated to other vessels. He considers the compensation to the owner of the vessel thus destroyed as a proper subject of maritime contribution by the owners of the other vessels and cargoes which were saved from the impending peril. Disc. 46, No. 4563. I have found this opinion wholly irreconcilable with the opinion of Mr. Justice CURTIS above quoted.

From this review of authorities it is quite apparent that the doctrine of general average contribution arises from the peculiar relations existing between the ship and her cargo. Mr. Lowndes finds the underlying principle in the agency of the master to act for the owner of the cargo in cases of unforeseen danger. Lowndes, Av. 14-16. This would clearly have no application to the case of a vessel whose master remains in command of his own ship, and usually has no opportunity of conferring with the master of the tug in emergencies of this description. The master of the tug is in no sense the agent of the tow for any such purpose.

The difference between the relations of a ship to her cargo and those of a tug to its tow will not escape the observation of the most casual observer. Ordinarily, the master of the ship has but a single duty to perform, namely, the delivery of his cargo to the consignee; and for the time being, and for that purpose, the owner of the cargo

yields possession and abdicates his authority to the master. For the performance of this duty the master binds himself, his ship, and its owners by the most stringent obligations of the law. His undertaking is absolute that his ship is seaworthy; that he and his crew are competent and honest; that he will use due care in lading and unlading his cargo; that he will protect it from thieves; and will navigate his ship to her port of destination without unnecessary delay or deviation. Indeed, he is liable for every mishap to the cargo not attributable to the owner's fault, saving and excepting only the perils of the sea and the acts of public enemies. He cannot sell or hypothecate the cargo, except in case of urgent necessity, and not even then, without communication with the owner, if such communication be possible. Even if the vessel be wrecked, and his goods are cast upon the shore, neither he nor his crew are entitled to salvage for preserving them. Jones, Salv. 20.

On the other hand, if the cargo be once laden on board, the master has the right to carry it to its destination and detain it for payment of freight. Even if the voyage be temporarily interrupted or broken up, he has the right to tranship the cargo and forward it by another vessel. From the intimacy of their relations, from the common danger incident to their common adventure, and to prevent the master from sacrificing the cargo at the expense of the ship, there is attached the further anomalous feature that all sacrifices rendered necessary by the elements shall be borne mutually by the ship and cargo; whether the loss be occasioned by cutting away a mast or throwing overboard a bale of goods, it shall be borne by the owners of the ship and cargo in exact proportion to the value of their respective interests.

On the contrary, the obligations of the tug to her tow are discharged by the employment of reasonable care and skill. The master of the tug guaranties that she is seaworthy and properly equipped; that he will furnish the motive power and will use his best endeavors to take his tow to the place of destination in safety. He does not, however, take charge of the ship except so far as may be necessary to direct her course. In all other respects the master and crew of the tow have entire control of her movements, and may adopt such independent measures for her preservation and safety as their own judgment may dictate. He does not insure the ship against anything but the consequences of his own negligence, nor her cargo from the depredations of thieves or the barratry of the crew. If the performance of his contract be interrupted by any unforeseen or extraordinary peril not within the contemplation of the parties, such as the slipping or breaking of a line in a heavy sea, he is at liberty to treat the original contract at an end; and while he has no right to abandon his tow except to save his own vessel, he may recover salvage as if he were a stranger, if he has put his own vessel in peril to rescue her. *The Saratoga*, Lush. 318; *The Robert Dixon*, 4 Prob.

Div. 121; S. C. 5 Prob. Div. 54; *Roff v. Wass*, 2 Sawy. 389; *The J. C. Potter*, 3 Mar. Law Cas. 506.

As observed by Lord KINGSDOWN, in delivering the opinion of the privy council in the case of *The Minnehaha*, Lush. 335, 347:

"She may be prevented from fulfilling her contract by a *vis major*, by accidents which were not contemplated, and which may render the fulfillment of her contract impossible, and in such case, by the general rule of law, she is relieved from her obligations. But she does not become relieved from her obligations because unforeseen difficulties occur in the completion of her task; because the performance of the task is interrupted, or cannot be completed in the mode in which it was originally intended, as by the breaking of the ship's hawser. But if, in the discharge of this task, by sudden violence of the wind or waves, or other accidents, the ship in tow is placed in danger, and the towing vessel incurs risks and performs duties which are not within the scope of her original engagement, she is entitled to additional remuneration for the additional services if she be saved, and may claim as a salvor, instead of being restricted to the sum stipulated to be paid for mere towage."

The rule is the same with respect to pilots. *The Eolus*, 1 Asp. Mar. Law Cas. 516, and note; *The Hope*, (*Hobart v. Drogan*), 10 Pet. 108; *Akerblom v. Price*, 4 Asp. Mar. Law Cas. 441; *The Wave*, Blatchf. & H. 235.

It is not claimed that the distinctions here taken are decisive against the allowance of a general average contribution in cases like these. They do, however, show that the whole law upon this subject has arisen out of the anomalous relations between the ship and cargo—relations such as do not exist between a tug and tow. In my opinion, the law of general average is confined to those cases wherein a voluntary sacrifice is made of some portion of the ship or cargo for the benefit of the residue, and that it has no application to a contract of towage.

A decree will be entered dismissing the libels, with costs.

WHITTENTON MANUF'G CO. v. MEMPHIS & OHIO RIVER PACKET CO.
and others.

(Circuit Court, W. D. Tennessee. November 26, 1883.)

1. **REMOVAL OF CAUSES—REFLEADING—CONSTITUTIONAL LAW—TRIAL BY JURY.**
Where a suit at common law has been removed from a state court in which it has been conducted under the forms of procedure belonging to a court of equity, the constitution and laws of the United States require that there must be a repleading to conform to the practice of the federal court as a court of law.
2. **SAME—REMOVAL ACTS CONSTRUED—EFFECT OF THE REMOVED PLEADINGS.**
This repleading may require more than one suit, and on both sides of the docket, but this is unavoidable in a jurisdiction keeping up as persistently as the federal laws do the distinctions between law and equity; and the force and effect of the proceedings in the state court are preserved by moulding them to suit the requirements of the case in the process of distribution between the two jurisdictions.
3. **SAME—UNIFORMITY IN THE FEDERAL PRACTICE.**
It is only by this construction of the removal acts that the distinctions between law and equity jurisdiction can be observed in practice, and that uniformity secured which it is plainly their intention to enforce. There cannot be one practice for causes removed from the state courts and another for suits originally commenced in the federal court.
4. **SAME—SECTION 639, REV. ST.—ACT OF MARCH 3, 1875—PARTIAL REPEAL.**
The last clause of section 639, Rev. St., taken from the act of July 27, 1866, enacting that "the copies of the pleadings shall have the same force and effect in every respect and for every purpose as the original pleadings would have had by the laws and practice of such state if the cause had remained in the state court," has been repealed by the act of March 3, 1875.
5. **SAME—PLEADING UNDER THE TENNESSEE CODE.**
Although the Code of Tennessee does not permit an action to fail for any defect of form in pleading and allows a suit "upon the facts of the case," it does not authorize a suit at common law to be prosecuted in a court of law under the form of pleadings belonging to a court of equity.

Motion to Replead.

The plaintiff, under an act of the Tennessee legislature of March 23, 1877, c. 47, which enacts that the jurisdiction of all civil causes of action now triable in the circuit court, except for injury to person, property, or character, involving unliquidating damages, is hereby conferred upon the chancery court, which shall have and exercise concurrent jurisdiction thereof along with the circuit court, filed its bill in the chancery court of Shelby county to recover damages from the defendants for an alleged breach of contract by failure to deliver to the plaintiff in the same good order in which they were received for transportation about 1,000 bales of cotton. The bill, which is in the usual form of a bill in equity addressed to the chancellor, proceeds, in about 27 pages of manuscript, to relate in detail the purchase by plaintiff of the several lots of cotton; that these lots were, respectively, in the warehouse of the vendors, where they were selected, examined, sampled, etc., and found to be in good condition and shipping order; that, after the purchases, they were sent either to the Mammoth Cotton Compress Company or to the Union Cotton Com-

press Company to be compressed and prepared for shipment according to a contract between the plaintiff and said companies, at an agreed price; that after compression the bales were delivered to the defendant packet company for transportation to the plaintiff's mills in Massachusetts; that the defendant packet company executed bills of lading, which are set out by exhibits, etc.

The bill then states that the cotton was shipped to plaintiff's mills, and proceeds with particularity to state, on information and belief, the dates, names of the steamers of the packet company, the several lots, and the compress company from which received by the steamers, and other matters connected with the shipments; that the cotton reached plaintiff, but that "when so delivered the said cotton was not in good order and condition," describing the condition as received, etc.

The bill "charges," on information and belief, that "the cotton was carelessly and negligently exposed to the weather, without adequate protection or care by the said Mammoth and Union compress companies and the packet company, and that the damage and injury done to it were produced by, or the necessary result of, the negligence and want of care of said companies respectively, and while they so had custody," etc.

It then alleges that plaintiff notified the railroad company of its claim for damages, and subsequently notified the packet company and the compress companies, all refusing compensation, and avers that the whole damage done by the defendant companies amounts to \$5,000, and that the three defendants are jointly and severally liable for the same.

The bill further states that the receipts taken by the plaintiff from the compress companies respectively were delivered to the packet company, and that the plaintiff believes they are now under the control of defendants, or one of them, and prays "they be required to produce the same for the purposes of this suit and to be used on the hearing," etc.

Another allegation of the bill is that, since the transactions mentioned, the two compress companies have become merged into a new compress company; that plaintiff had endeavored to procure information necessary to enable him to determine when, and how, and by whom the damages to the cotton was done, by addressing a letter to the company, etc., and that no response had been made, the letter being exhibited and filed as part of the bill.

The bill also charges that the Merchants' Compress & Storage Company, in the place and stead of the other two compress companies, is, with the packet company, justly indebted to the plaintiff, "by reason of the damage done to the cotton aforesaid, in the sum of \$5,000 and interest."

The bill names the agent of defendant or its superintendent, and prays process to make the packet company and the compress company defendants; that they be required to answer; that the amount

of the damage be ascertained and fixed, and for the proper judgment or judgments and execution, and that, if necessary, attachment issue against the non-resident Ohio corporation,—the packet company,—and for general relief.

Subpoena issued, and was served, but no attachment. The compress and storage company appeared and demurred, assigning three grounds of demurrer, and the packet company also appeared and filed a separate demurrer on four grounds. Without disposing of these demurrers the plaintiff obtained leave to amend the bill, and by an amended bill, in about six additional pages of manuscript, states substantially that it is advised that the cotton was in the custody of the compress companies, as the agents of the packet company, from the time the bills of lading were signed until the same was delivered to the respective steamboats. The amended bill prays the same relief as the original bill.

After the amended bill was filed the plaintiff removed the case to this court, when the transcript was filed and docketed on the law side. The defendants moved that the plaintiff be required to replead according to the practice of the courts in suits at law.

H. C. Warinner and Metcalf & Walker, for the motion.

Randolph & McHenry, *contra*.

HAMMOND, J. In whatever form the subject has presented itself,—whether as a matter of jurisdiction, pleading, or practice, as to methods of relief, defenses, review, or what not,—the supreme and inferior federal courts have, with inexorable firmness, insisted upon preserving the *essential* distinctions between law and equity by administering them separately, as required by the constitution and laws of the United States. The cases are far too numerous for citation here, but will be gathered in a foot-note for consultation in support of this opinion. They commence with the organization of the courts, and are to be found in almost every volume of the reported decisions. It is a distinction that inheres in the system by virtue of constitutional commands, and it will be found upon close observation that the federal constitution has protected the right of trial by jury in a manner that imposes restrictions upon legislative power more effectual, perhaps, than those found in many of the state constitutions. It necessarily results from the requirement that, in all controversies of legal cognizance, there shall be preserved a right of trial by jury, and that no fact so tried shall be re-examined in any court otherwise than according to the rules of the common law, that the original trial shall be likewise according to those rules in all essential and substantial particulars. Merely taking the verdict of 12 men, no matter how, is not, in the sense of our federal constitution, a trial by jury; and it is impracticable, as well as impossible, to conduct the original trial according to rules unknown to the common law, and in subversion of them, and then, on re-examination by writ of error in an appellate jurisdiction, or, it may be, on motion for new trial, or otherwise, in

the tribunal of first instance, to obey this mandate of the constitution, and conduct those proceedings "according to the rules of the common law." Const. U. S. Amend. 7. The whole proceeding, from beginning to end, must be, *ex necessitate rei*, a common-law proceeding; not necessarily according to the precise forms of the common law,—reformation in procedure being open to legislation,—but always there must be a trial substantially according to the course of the common law.

Now, this consideration alone has convinced me, aside from all others, that when parties bring their "*suits at common law*" from a state court of equity, where, by state legislation, they have been permitted to conduct them under the forms of procedure known to those courts in ancient times, into this court, they must, in the nature of the case, by repleading, convert their "bills," exhibits, disclaimers, *pro confessor*s, answers, cross-bills, pleas, replications, petitions, affidavits, *jurats*, and the like into declarations and pleas according to the forms for trials of suits at common law prevailing, not only in this court, but as well in the law courts of the state of Tennessee. Even in the state court of equity, from which this suit comes, when a jury is demanded, as it may be, the trial is not on the bill, answer, etc., but, by statute, the parties are required to make up their issues in a separate writing for the jury, which is, in effect, what we require them to do here by repleading. Manifestly, that method of sifting out the issues to be tried is not open to this court, and it can only be accomplished by repleading.

It matters not that this may result in two or more separate suits, with some at law and some in equity. This comes from state legislation allowing the parties to litigate their several controversies in one suit, a method forbidden to this court, which must administer law and equity separately. If the parties deem this an advantage they should remain in the state court where it can be done. Nor is it practicable to have a different rule for a suit which is removed when the "bill" only has been filed, from one which is brought here at some later stage. It would be a hybrid proceeding, producing confusion, if not disadvantage, to the defendant, to allow the plaintiff to use an elaborate and voluminous "bill" as the vehicle for his case and confine the defendant to the simple form of a plea at law.

Acting on these views some years ago, in the case of *Levy v. Amer. Cent. Ins. Co.*, (not reported,) it was ruled by this court that there must be, in such cases, a repleading when the suit is removed; and the practice has been so until challenged in this case. In that case, as in this, the state chancery court had acquired jurisdiction under the act of March 23, 1877, *c.* 47, giving the equity courts jurisdiction concurrently with courts of law of all civil causes not founded in tort. Acts 1877, p. 119. And, it may be remarked, that in addition to this source of jurisdiction over purely common-law suits, the state chancery courts have, for a very long time, under our attachment

laws, and also by the statutes regulating their practice, acquired jurisdiction over all manner of civil causes of legal cognizance; as, for example, by a failure of the parties to object to the jurisdiction by special plea or demurrer, an answer being deemed a waiver of all objections to jurisdiction. The statutory provisions made for a finding of facts by a jury in all equity cases is considered an answer to all constitutional objections to such legislation. Tenn. Code, 4309, 4321; *Jackson v. Nimmo*, 3 Lea, 597; *Scott v. Feucht*, 1 Memphis L. J. 40; *Saudek v. Turnpike Co.* 3 Tenn. Ch. 473; 1 Memphis L. J. 3.

It was, therefore, an important question whether or not, when any of these causes, of which the state equity court had such a vast and almost inexhaustible jurisdiction, are removed to this court and go to the law side of our docket, as all concede they must, they shall be submitted to the jury on the voluminous records and pleadings in use in our courts of equity, (for they are all conducted in that form in the state court, and in this form they necessarily come here,) or the parties be required to replead according to the forms of a court of law. As before remarked they are not required to be so submitted in the state courts, the difficulty being overcome by statutory provisions requiring the parties, under the supervision of the chancellor, to draw up in writing, "according to the forms of a court of law," the issues of fact to be submitted to the jury. Tenn. Code, 3156, 4468. This provision is not, of course, available in this court, and the same end is reached, and can be reached, only by pleading *de novo*.

In the case of *Levy v. Ins. Co.*, *supra*, there was a suit in the chancery court on a policy of fire insurance under the form of a bill in equity, which, in addition to a claim for the loss suffered, prayed, as in the case now under consideration, for a discovery, by the agent of the company, of certain papers in his possession, these being the plaintiff's invoices, and also for an injunction to prevent him from sending them away. The defendant company filed an answer, and, as it might under the state statute, but not under the federal practice, made that answer a cross-bill, alleging fraud by the plaintiff in the procurement of the policy, for which it prayed to have the document canceled. Tenn. Code, 4323. The case was then removed by the defendant company to this court under the act of congress of March 3, 1875, (18 St. 470.) The plaintiff moved to docket the case on the law side of the court, for leave to file a declaration as at law and for a rule on the defendant to plead thereto. The defendant, on the other hand, moved to docket the case on the equity side of the court. It was held that the plaintiff should declare on his policy of insurance, according to our practice in cases at law, and the defendant plead thereto, and that if the plaintiff should find section 792 of the Revised Statutes inadequate to compel a production of the invoices, and should need discovery thereof or should need the injunction he asked, it was manifest that, under our federal practice, he must resort to the equity side of the court for that relief in aid of his

suit at law; while the defendant must, since we have in this court no statute permitting an answer to be made a cross-bill, and certainly no power in a court of law to grant the relief it asked, likewise resort, if need there be, to the equity side of the court with an independent bill or a cross-bill, according to our practice, in any suit the plaintiff might file on that side, to restrain the plaintiff's suit on the policy until it could be canceled for the alleged fraud.

Clearly, this was the only possible solution of the complication in a jurisdiction keeping up the distinctions between law and equity so persistently as the federal courts are required to do; and nothing but the anomalous legislation of Tennessee, which had no effect in the federal court, could unite all these matters in one suit, however desirable such a practice might be. Yet there is no need of any new cost bonds, or new process in any of these several suits in which this conglomerate state court suit must be divided, but only a distribution of them, according to the congenital demands of our own practice; and, if any orders have been made, or rights acquired, in the state court, these are all preserved in the federal court by a like process of distribution; not by giving to the pleadings exactly the same force and effect in every respect which they had in the state court, for that is impossible, if the union of all the causes of action in one suit be insisted on here as one of the rights preserved, but, in all other respects, saving their force and effect in this process of distribution by treating the bonds, process, pleadings, and orders as if they had been made in suits originally commenced in the federal court and the same proceedings had been taken there, and now moulding them into one or more suits on either side of the jurisdiction, as the circumstances of the case may require. This is precisely what we are commanded to do by the removal acts, and what they mean by directing that the pleadings, process, and other proceedings shall have the same force and effect here as in the state court, which requirement of the statute has been so much relied on in argument to defeat this motion, as it was relied on in the former case.

It is now argued,—as it was in that case,—with great earnestness, that these removal cases are, by force of the statute, on a different footing from those originally brought here, and that although the act of congress by its terms requires that “the cause shall proceed in the same manner as if it had been brought there by original process,” yet, by like positive command, “the copies of the pleadings shall have the same force and effect in every respect, and for every purpose, as the original pleadings would have had by the laws and practice of the courts of such state if the cause had remained in the state court.” Rev. St. § 639. It is a sufficient reply to this argument to say that nowhere is it manifest that congress intended to have one practice for original suits and another for removed suits, and the contrary intention of uniformity in all is apparent from the beginning of these removal acts to the present time. Moreover, there is no more ca-

capacity in our federal courts for mingling the separate jurisdiction of law and equity in causes removed than in those originally commenced, for it is a constitutional separation that must be preserved; and whatever may be the power of congress to preserve the substance and yet change the form of procedure, until some more specific machinery—like that already adverted to in the Tennessee state courts for submitting issues to a jury “according to the forms of a court of law” where there is such a commingled practice—is provided by congress, such a practice is impossible with us.

I have already pointed out a more reasonable interpretation of this language in the statute, but there is still another answer to the argument based upon it. It is to be observed that while a clause in section 3 of the act of March 3, 1875, enacts, as in section 639 of the the Revised Statutes, that the removal cause “shall proceed in the same manner as if it had been originally commenced in the said circuit court,” and section 6 of the same act, “that the circuit court of the United States shall, in all suits removed under the provisions of this act, proceed therein as if the suits had been originally commenced in said circuit court, and the same proceedings had been taken in such suit in said court as shall have been had therein in said state court prior to its removal,” nowhere does that act contain the last above-quoted clause of section 639 of the Revised Statutes, providing that the copies of the pleadings in the state court shall, *in every respect and for every purpose*, have the same force and effect as in the state court. It is clearly repealed by the repealing clause in section 10 of the act of March 3, 1875, (18 St. 470-473.) This repealed clause of section 639 of the Revised Statutes had its origin in the act of July 27, 1866, from which it was carried into the Revision, (14 St. 206, 307.) The act of March 3, 1875, returns to the language of the judiciary act of September 24, 1789, somewhat amplified, as amended by the acts of July 27, 1866, and March 2, 1867, but with this clause of the act of 1866 omitted. Rev. St. § 639; 1 St. 79; 14 St. 306, 558; 18 St. 471. And a critical examination of the cases cited in the foot-notes will show that the act of 1875 in the sections already cited, taken in connection with its section 4, which provides for the continuing force and effect of all *process, attachments, injunctions*, etc., bonds, undertakings, securities, etc., and all orders and other proceedings prior to removal, has, with the utmost care, expressed the judicial result of the construction of all the acts preceding it, including the omitted or repealed clause of the act of 1866, which was misleading in its language, and therefore omitted.

This last act of 1875, construed by the decisions, has a very plain meaning in respect to the subject of procedure after removal; and this is, that while every right and substantial advantage the parties had in the state court prior to removal is preserved to them with scrupulous care, in giving them the benefit of that right, the federal court

proceeds, and in the present state of legislation by congress must proceed, according to its own methods of procedure and rules of practice, and not that of the state courts, unless they be substantially the same. The federal court does not stickle for any mere idle or technical form, but will use on either side of the jurisdiction the removed pleadings as they stand, if by them and through them it can, acting independently of state regulation governing the suit before its removal, preserve the essential distinctions between legal and equitable modes of trial and the substantial rights of the parties growing out of those distinctions.

These are in suits of legal cognizance *a trial by jury*, not necessarily according to the precise forms, but substantially *according to the course* of the common law, and, in suits cognizable in a court of equity, a trial according to the practice of those courts as prescribed by our rules of practice. If the state court pleadings can be held, whatever their form, to accomplish this purpose, no repleading can be necessary, otherwise there must be a reformation of the pleadings and a recast of the litigation to accomplish that result, and this depends upon the nature of the particular suit and the relief sought by it as well as the form in which it has been conducted in the state court.

It is apparent that, in cases like this, there must be, by this rule, a repleading in this court, as there must have been, if the case were to be tried by a jury in the state court, had it remained there. But it is insisted that under the practice conformity act of June 1, 1872, (17 St. 197; Rev. St. § 914,) this court is bound to the state practice; that the Code of Tennessee abolishes all forms of actions, and allows the plaintiff to sue on the facts of the case; and that inasmuch as this "bill in chancery" states the facts it may, under the state practice, be treated as a sufficient pleading in a court of law. I have never known a common-law suit prosecuted under the forms of a "bill in equity" in a court of law in Tennessee. Such a proceeding would be as much of an anomaly in those courts as in the court of king's bench 100 years ago, notwithstanding our reformed pleadings under the Code. There is, therefore, no state practice like that suggested, imposed upon this court by the practice conformity act of 1872. On the same principle as that contended for, any letter or series of letters "stating the facts" and claiming damages, or any memorandum, deposition, affidavit, memorial, article in a newspaper or magazine, or other "statement of the facts" might be filed and treated as a declaration in a court of law. I do not understand the law of Tennessee to be so. The Code abolishes all forms of action so far as to obliterate the technical distinctions between them, but still requires *pleadings* in courts of law to be in the form of *declarations* and *pleas*, and the form of petition and answer or bill and answer is not recognized in the statutes nor used in practice. The models prescribed are those of the common law, stripped of useless verbiage and those technical char-

acteristics which distinguish them as actions of *assumpsit* or *ase*, *trespass* or *trover*, and the like, but they are yet in form and substance *declarations* and *pleas* and constitute a compact and admirable system of pleading, which it is a pity the legislature has spoiled by giving parties the option to plead "*as at common law*," and it would be the more a pity to give a further option of pleading *as in equity*, which we are asked to do in this case. Act 1859-60, c. 33, Tenn. Code, § 2917a.

It is true that no action is allowed to fail because of any defect in form; and any form complying substantially with the Code requirements would be sustained however inartistic; but, after all, the Code requires that the pleadings shall state "only material facts, without argument or inference, as briefly as is consistent with presenting the matter in issue in an intelligible form," and "in all actions at law the cause of action shall be stated clearly, explicitly, and as briefly as possible." Tenn. Code, §§ 2751, 2881. This would seem to preclude the argumentative and inferential statements of this "bill in equity" and its "exhibits," proper enough in a court of chancery, but not at all like the forms prescribed by the Code for a *declaration* in suits at law with which substantial compliance is required. *Id.* §§ 2939, 2940. Another section enacts that "Any pleading possessing the following requisites shall be sufficient: (1) When it conveys a reasonable certainty of meaning; (2) when by a fair and natural construction it shows a substantial cause of action or defense." *Id.* 2884. This means, of course, any pleading substantially in the forms prescribed by the Code; and the very next section requires the court to require a more specific statement, if the pleading be defective in the first particular above mentioned. *Id.* 2885. I do not doubt that, taken altogether, the Code requires, in suits at law, a pleading in the form of a *declaration*, but saves to the party stating the facts of his case, in any form whatever, his right of action, subject to the power of the court to compel him to reform the pleadings, if not already in substantial compliance with the requirements of the Code. Nor do I doubt, on the other hand, that, if taken in time, an objection to an action at law brought in a state law court, under the form of a bill in equity, would be sustained and the party required, as here, to put his pleading in the form of a declaration at law. *Id.* 2746-2753, 2863-2879, 2880-2940; 3 Meig, Dig. (2d. Ed.) 2140, 2133-2151; *Cherry v. Hardin*, 4 Heisk. 199, 203; *Stover v. Allen*, 6 Heisk. 614.

The pleadings in a court of equity are so ill-adapted to present the issues to a jury that I doubt if congress itself could impose them on a federal court of law without giving the act "an unconstitutional operation dangerous to the trial by jury." *Phillips v. Preston*, 5 How. 278, 289. It certainly could not, without some such contrivance as we have in the state courts of equity in Tennessee for sifting out

the issues and presenting them in a more simple form, less embarrassing to the prosecution or defense of a case before a jury.

Motion granted.

1. Consult on the subject of the distinctions between law and equity in procedure generally in the courts of the United States the following cases: *Wiscart v. Dauchy*, 3 Dall. 321; *Robinson v. Campbell*, 3 Wheat. 212; *U. S. v. Howland*, 4 Wheat. 114; *Wayman v. Southard*, 10 Wheat. 1, 41; *Parsons v. Bedford*, 3 Pet. 433; *Beers v. Haughton*, 9 Pet. 329; *Livingston v. Story*, Id. 652; *Parish v. Ellis*, 16 Pet. 451; *Phillips v. Preston*, 5 How. 278; *Bennett v. Butterworth*, 11 How. 674; *Neves v. Scott*, 13 How. 268; *Pennsylvantia v. Wheeling Bridge Co.* 13 How. 518; *Graham v. Bayne*, 18 How. 60; *Hipp v. Babin*, 19 How. 276; *McFaul v. Ramsey*, 20 How. 525; *Jones v. McMasters*, 8; Id. *Fenn v. Holme*, 21 How. 481; *Farni v. Tesson*, 1 Black. 314; *Noonan v. Lee*, 2 Black. 509; *Thompson v. Railroad Cos.* 6 Wall. 134; *Ins. Co. v. Welde*, 9 Wall. 677; *Walker v. Dreville*, 12 Wall. 440; *Ex parte McNeill*, 13 Wall. 236; *Tyler v. Maguire*, 17 Wall. 253; *Hornbuckle v. Toombs*, 18 Wall. 648; *Nudd v. Burrows*, 91 U. S. 426; *Indianapolis, etc., R. Co. v. Horst*, 93 U. S. 299; *Newcomb v. Wood*, 97 U. S. 581; *Van Norden v. Morton*, 99 U. S. 378; *Smith v. Railroad Co.* Id. 398; *Ex parte Boyd*, 105 U. S. 647; *Mayer v. Foulkrod*, 4 Wash. C. C. 349; *Baker v. Biddle*, Bald. 394; *Gier v. Gregg*, 4 McLean, 202; *Gordon v. Hobart*, 2 Sumn. 401; *Byrd v. Badger*, 1 McAll. 443; *Loring v. Downer*, Id. 360; *Shuford v. Cain*, 1 Abb. (U. S.) 302; *Lamar v. Dana*, 10 Blatchf. 34; *Montejo v. Owen*, 14 Blatchf. 324; *Garden City Co. v. Smith*, 1 Dill. 305; *Weed Sewing-machine Co. v. Wicks*, 3 Dill. 261; *Hall v. Mining Co.* 1 Woods, 544; *Benjamin v. Cavaroc*, 2 Woods, 168; *Kimball v. Mobile Co.* 3 Woods, 555; *Butler v. Young*, 1 Flippin, 276; *Beardsley v. Littell*, 6 Cent. Law J. 270; *Sage v. Touszky*, Id. 7; *Stone Cutter Co. v. Sears*, 9 FED. REP. 8; *Benedict v. Williams*, 11 FED. REP. 547; *Wertheim v. Continental Ry. & T. Co.* Id. 689; *U. S. v. Train*, 12 FED. REP. 852; *Steam Stone Cutter Co. v. Jones*, 13 FED. REP. 567.

2. Consult on the special subject of these distinctions in relation to matters of pleading and the removal of causes the following cases: *Gaines v. Relf*, 15 Pet. 9; *Minor v. Tillotson*, 2 How. 392; *Randon v. Toby*, 11 How. 493; *Green v. Custard*, 23 How. 484; *Gridley v. Westbrook*, Id. 503; *Partidge v. Ins. Co.* 15 Wall. 573; *The Abbottsford*, 98 U. S. 440; *Barrow v. Hunton*, 99 U. S. 80; *Hurt v. Hollingsworth*, 100 U. S. 100; *West v. Smith*, 101 U. S. 264; *Duncan v. Gegan*, Id. 810; *Jifkins v. Sweetzer*, 102 U. S. 177; *King v. Worthington*, 104 U. S. 44, 50; *Hewett v. Phelps*, 105 U. S. 393, 396; *Toucey v. Bowen*, 1 Biss. 81; *Akerly v. Vilas*, 3 Biss. 382; *Brownell v. Gordon*, 1 McAll. 207, 211; *Clarke v. Protection Ins. Co.* 1 Blatchf. 150; *Charter Oak Ins. Co. v. Star Ins. Co.* 6 Blatchf. 208; *Fisk v. Union Pac. R. Co.* 8 Blatchf. 299; *Dart v. McKinney*, 9 Blatchf. 359; *Merchants' Nat. Bank v. Wheeler*, 13 Blatchf. 218; S. C. 3 Cent. Law J. 13; *Bills v. Railroad Co.* 13 Blatchf. 227; *Oscanyan v. Winchester Arms Co.* 15 Blatchf. 79, 87; *La. Mothe Manuf'g Co. v. Tube Works*, Id. 435; *Stevens v. Richardson*, 20 Blatchf. 53; [S. C. 9 FED. REP. 191;] *Ins. Co. v. Stanchfield*, 1 Dill. 424; *Zinkelson v. Hufschmidt*, 1 Cent. Law J. 144; *Thorne v. Towanda Tanning Co.* 15 FED. REP. 289.

3. Consult, also, generally, the following text-books: Dill. Rem. Causes, (2d Ed.) 40, 42, 45, 46, 47; Bump, Fed. Proc. 180, 209, 237; Thatcher, Pr. C. C. 305-307, 309, 310; Spear, Fed. J. 473, 486, 521, 522, 747, 764.

LEO v. UNION PAC. RY. Co. and another.

(Circuit Court, S. D. New York. January 24, 1884.)

1. DEMURRER—INSUFFICIENCY OF COMPLAINT—CORPORATE POWERS, ETC.

The bill of the plaintiff, a stockholder in the defendant corporation, brought to restrain the corporation from employing its assets in excess of its corporate powers, *held* insufficient on demurrer on the ground that the allegations and statements should be more specific to show good cause for the relief sought.

2. CORPORATIONS—IN WHAT CASE THE MAJORITY RULES.

In corporations within the scope of the corporate authority the majority rules; beyond this they have no right to go, and one may insist upon stopping at the limits.

3. SAME.

Those who become members of a corporation consent to the rule of the majority within the powers of the corporation, but not beyond. As the right to restrain going beyond such powers depends upon the want of consent, if the consent is given the right ceases. Therefore, when such restraint is sought, due diligence, in the proper direction, to prevent what is sought to be restrained, must be shown as a part of the title to relief.

In Equity.

George Zabriskie and John E. Burrill, 'for orator.

John F. Dillon, for defendants.

WHEELER, J. This cause has been before heard on a motion for a preliminary injunction. 17 FED REP. 273. It has now been heard on demurrer to the bill. The question then was whether the defendants should be restrained pending the litigation; it now is whether there is anything in the bill which they ought to answer. The bill is brought by a stockholder to restrain the corporation from employing its assets in excess of its corporate powers; the other defendant is joined as president of the corporation for discovery merely, and no bad faith is alleged or charged. The prayer is that the corporation and its officers and agents be restrained, and for further relief. Any relief for the orator here must be wholly preventive. He could not, and does not ask to, undo what has been done. The avails of it, if held by the corporation, can only be reached through dividends common to all stockholders; if by others, only by proceedings against those who have them.

According to the bill, which is now to be taken as true, the corporation is made up of the Union Pacific Railroad Company, the Kansas Pacific Railway Company, and the Denver Pacific Railway & Telegraph Company. The Union Pacific Railroad Company, before the consolidation, having a definite line of road, exceeded its powers if what is now sought to be restrained is an excess, and in the same manner, by lending and advancing moneys to other railroad companies to be used in the construction, maintenance, and operation of their roads, and entered into obligations to furnish further amounts, and received in payment of moneys furnished from time to time stocks and bonds of such roads. Since the consolida-

tion the same course has been pursued; stocks and bonds to which the Union Pacific Railroad Company would have been entitled, have been received by the defendant, and it has lent and advanced its moneys and credit to the same and other organized railroad corporations for the purpose of, and of aiding in, the construction, maintenance, and operation of their roads. There is no description of the corporations so aided, except that the corporate names of some are stated without their source, whether from state or national authority, and some are stated to be unknown; nor of their lines of road except as branch and connecting roads. Nor is there any statement of the amount of such aid or of the payments therefor, except that it is stated as appearing from the report of the government auditor that the amount of stocks and bonds received from other roads was, by the Union Pacific Railroad Company, June 30, 1878, \$5,229,327.84; June 30, 1879, \$7,534,243.91; by the defendant, June 30, 1880, \$15,338,453.94, and that the orator is informed and believes that the defendant now holds of such bonds \$23,749,230.40, and of such stocks \$29,462,046.98. The orator has at different times been a stockholder to a large amount in the defendant company. He acquired his present stock, 100 shares, November 17, 1882; commenced to object to this course of the defendant the next day, and brought this suit December 22, 1882. In the amended bill now under consideration, it is alleged that at a general meeting of the stockholders, held March 9, 1883, at which the holders of 384,769 shares were present or represented, this course was unanimously approved of. Whether the orator was present at that meeting is not stated; neither is any effort by him with the stockholders, either separately or at any meeting, to induce them to change or desist from this course, set forth, or any attempt to stop it shown, except notifications and protests to the officers and agents of the company.

The orator could not, and does not claim to, have any right to relief on account of his former ownership of stock. Having parted with that and all rights belonging to it, he gained this as a new acquisition, and has such rights as appertain to him as the owner of it as he acquired it. There is no doubt, and no question is really made, but that a stockholder or partner in an enterprise has the right to prevent taking his interest into another and different enterprise without his consent. In corporations within the scope of the corporate authority the majority rules; beyond this they have no right to go, and one may insist upon stopping at the limits. *Colman v. Eastern Cos. Ry. Co.* 10 Beav. 1; *Salomons v. Laing*, 12 Beav. 339; *Beman v. Rufford*, 4 Eng. Law & Eq. 106; *Stevens v. Rutland & B. R. Co.* 29 Vt. 545. This right to stop the majority at the bounds of corporate power rests upon the control which every one has over his own property. Those who become members of a corporation, consent to the rule of the majority within the powers of the corporation, but not beyond. As the right to restrain going beyond depends upon the want of consent, if

the consent is given the right must cease. Therefore, when such restraint is sought, due diligence, in the proper direction, to prevent what is sought to be restrained, must be shown as a part of the title to relief. *Kent v. Jackson*, 14 Beav. 367; *Gregory v. Patchett*, 33 Beav. 595. The exercise of the rights of a stockholder to influence corporate action by vote and speech in corporate meetings, when opportunity was presented or could be had, would lie in the proper direction. Until such means should be exhausted or prevented, there would be no real oppression of the minority by the majority. *Hawes v. Oakland*, 104 U. S. 450. The transactions of which the orator complains, and the continuance of which he is seeking to prevent, have been going on in the Union Pacific Railroad Company since long before, and in the defendant company ever since, the organization of the defendant company. As he had been a stockholder before, and has derived his knowledge of what was being done from the auditor's reports, open to all stockholders at least, he must have known what had been and was being done in these respects when he purchased this stock and assumed his present *status* in the company. He does not allege that he was in anywise ignorant of these things. His vendor is not shown to have in all this time objected, and must be taken to have acquiesced. He purchased this stock knowing that the company was engaged in the enterprises he seeks to stop, and by taking it he consented to become a member of a corporation so engaged. Large outlays had been made, great liabilities had been incurred, and embarrassing complications would necessarily follow, stopping them in the midst. It would seem to be highly inequitable and unjust to allow such a small minority to step in and arbitrarily stop the great majority, acting in good faith, honestly even if mistakenly, and in strictness outside of their authority. If the company was about to undertake a new enterprise not involved with these which have been so long prosecuted, and outside of its corporate powers, such as building a new line of road or purchasing the stock of another line, so as to control it, and thereby extend its lines beyond its charter, the case might be very different.

It does not distinctly appear that the transactions in question are outside of the powers of the corporation. The Kansas Pacific Railway Company was a Kansas corporation, with powers amply sufficient, under the laws of that state, to do within that state all that is complained of as being done somewhere by the defendant. Comp. Laws Kan. § 4091. This corporation was consolidated with the others as it was, and as they were, and it is not easy to see any reason why the corporate powers of each were not carried into the consolidated company. *County of Scotland v. Thomas*, 94 U. S. 682. Not that the consolidated company has powers in all the states and territories where it exists co-extensive with those of the Kansas Pacific in Kansas, but it may have in Kansas all the powers which the Kansas Pacific had there. If it has, all these transactions may be, so far as

the bill shows, in that state, and within the powers authorized to be exercised there. The names of the corporations are given, but they are private corporations, although created for public purposes, and judicial notice cannot be taken of their location. Although the defendant is merely a railroad corporation, it must, from its nature and circumstances, have large implied powers, which are as well conferred as its express powers. *Nat. Bank v. Graham*, 100 U. S. 699. It is burdened with vast debts, which it was fully authorized to assume, falling due in such immense sums at a time that the ordinary revenues would be wholly inadequate to meet them. Large accumulations and investments must be made long beforehand, involving great financial transactions. Operations must be had wholly foreign to the management of the railroads themselves, and pertaining much more to the business of banking than that of a carrier. These operations, if entered into for the purpose of carrying on a banking business, would be wholly outside of the corporate power; but when done for the purpose of fulfilling the financial duties of the corporation, must be clearly within them. The purchase of the stocks and bonds of other railroads might be for this legitimate purpose as well as the purchase of government or other corporate securities. The orator has not shown that the purchases of stocks and bonds may not be of this proper class.

All these statements and allegations are in very general terms. Excess of chartered powers, in progress or intended, is in no particular pointed out. A decree according to the prayer of the bill would be scarcely, if any, more than a general injunction against going outside of the charters. Something more specific, and so specific that the court can see that it is unwarranted by the law of the existence of the corporation, and wrongful to the orator as a member of it, should be pointed out distinctly. The bill, as now considered, does not appear to be sufficient to require an answer.

The demurrer is sustained, and the bill adjudged insufficient.

BERRY and another, Assignee, etc., v. SAWYER and others.

(Circuit Court, W. D. Pennsylvania. September 14, 1882.)

1. EXPRESS AND CONSTRUCTIVE TRUSTS—PAROL AGREEMENT RESPECTING LAND.

A parol agreement by which one of several joint purchasers of land takes the title in trust for the others, imposes upon the grantee an express trust which does not fall within the meaning of a statute of limitations fixing a time for the enforcement of constructive trusts.

2. LIMITATION—BANKRUPT ACT—ADVERSE INTEREST.

The clause of the bankrupt act requiring all causes of action, "between an assignee in bankruptcy and a person claiming an adverse interest," to be prosecuted within two years, applies only when the interest has been actually adverse for two years; and the interest of a trustee, so long as he acknowledges the trust, is not adverse to that of his *cestui que trust*.

3. WITNESS—COMPETENCY—ACTION BY OR AGAINST EXECUTORS—PARTY TO THE RECORD.

Section 858 of the Revised Statutes, making both parties in actions by or against executors, administrators, or guardians incompetent to testify as to certain transactions, does not disqualify a person interested in the controversy unless he is an actual party to the record.

4. EQUITY PLEADING—RESPONSIVE ALLEGATIONS—HOW FAR CONCLUSIVE EVIDENCE.

The rule that responsive allegations in the answer to a bill in equity are conclusive evidence in favor of the respondent unless overcome by the testimony of two witnesses or their equivalent cannot be invoked when the answer is upon information and belief, or is discredited by circumstances.

In Equity.

Schoyer & McMurry, for complainants.

Malcolm Hay and *S. H. Geyer*, for respondents.

McKENNAN, J. This bill is filed by the complainants, as assignees in bankruptcy of N. P. Sawyer, against Jane Frances Sawyer, in her own right, and as executrix of the will of John H. Sawyer, and also against C. B. Seeley and Ormsby Phillips, as voluntary assignees of said John H. Sawyer. It alleges that N. P. Sawyer confessed judgments to a large amount in favor of John H. Sawyer, which are entered of record in Allegheny county, a large portion of which judgments were merely a security for advances and responsibilities to be thereafter made and assumed by said John H. Sawyer for the benefit of N. P. Sawyer, but which he did not make or assume; and that certain valuable real estate, fully described in Exhibit C, was purchased jointly by John H. Sawyer, N. P. Sawyer, and B. C. Sawyer, the title of which, for convenience of sale, was vested in John H. Sawyer, who held said title in trust for himself and the said N. P. and B. C. Sawyer; and that the said John H. Sawyer, in his life-time, sold considerable portions of said real estate and received the purchase money, but rendered no account thereof. And, therefore, praying that an account be taken of the proceeds of all sales by said John H. Sawyer in his life-time; that any surplus due to said N. P. Sawyer after paying his true indebtedness to John H. Sawyer, be paid to the complainants; and that the undivided one-third of the said real estate remaining unsold be conveyed to the complainants.

The answers of Jane F. Sawyer and Ormsby Phillips, upon information and belief, deny that the judgments confessed by N. P. Sawyer to John H. Sawyer were given, as stated in the bill, for future advances and responsibilities, but aver that they were founded upon an actual indebtedness by N. P. to John H. Sawyer, at the time. And they also, upon information and belief, deny the fiduciary character of the conveyances to John H. Sawyer of the real estate described. And they also aver that an act of assembly of the commonwealth of Pennsylvania, approved April 22, 1856, entitled, "An act for the greater certainty of title, and more secure enjoyment of real estate," provides, *inter alia*, "that no right of entry shall accrue or action be maintained to enforce any implied or resulting trust as to re-

alty, but within five years after such trust accrued, with the right of entry, unless such trust shall have been acknowledged by writing to subsist by the party to be charged therewith within the said period;" and therefore aver that, as more than five years have elapsed since the alleged trust accrued, the complainants are not entitled to have it enforced.

It is clear that the Pennsylvania statute operates exclusively upon the class of trust which is within its terms. Resulting trusts alone are named, and hence they only are within its scope. They are such as are implied by operation of law, as where one buys land in the name of another, and pays the purchase money, the legal implication is that the grantee of the title holds it in trust for the person who paid the purchase money. They belong to a distinct class from express trusts, which never rest in implication, but are the product of an express declaration or agreement. That the latter may be created by parol—as is now well settled—does not change their technical character or classification. The trust alleged in the bill is an express one, and therefore the respondents are not entitled to the benefit of the statutory limitation.

The complainants were appointed assignees in bankruptcy of N. P. Sawyer on the twentieth of November, 1876; John H. Sawyer died in July, 1877; and this suit was brought in November, 1879. It is therefore insisted that more than two years elapsed after the complainants' right of action accrued, and that the suit is barred by section 5057 of the Revised Statutes, (section 2 of the bankrupt act.) That section fixes the period of two years from the time when the cause of action accrued for the bringing of suits, at law or in equity, "between an assignee in bankruptcy and a person claiming an adverse interest touching any property or right of property transferable or vested in such assignee." A similar provision was contained in the bankrupt act of 1841, and that was held not to apply to controversies touching real estate until after two years from the taking of adverse possession. *Banks v. Ogden*, 2 Wall. 58. And in *Bailey v. Glover*, 21 Wall. 346, the limitation in the act of 1867 is held to apply to all judicial contests where the interests are *adverse* and *have so existed for more than two years*. And so, again, in *Seymour v. Freer*, 8 Wall. 202, the court say: "When there is no disclaimer the statute has no application to an express trust, such as we have found to exist in this case." Here the court found a trust to have existed which is strikingly similar in its main feature to the trust set up in this case.

If the averments of the bill as to the original existence of a trust are sustained by competent and sufficient proof, the applicability of the limitation will then depend upon whether, and at what time, there was a disclaimer of the trust by the trustee or his representatives, or whether and when the interests of the parties became adverse. The respondents have not offered any evidence; and there is nothing in the record to show that John H. Sawyer, at any time during his

life, denied the trust, or that his assignees and personal representative assumed an attitude adverse to it until 1879, within a year before the institution of this suit. It is true that John H. Sawyer held the legal title and made sales and conveyances of parts of the trust property, and received the purchase money therefor. This was not, however, inconsistent with the trust, but was in entire harmony with, and in pursuance of, its alleged object and terms. More than this, it is in proof that N. P. Sawyer and B. C. Sawyer occupied parts of the trust property for some years during the life of John H. Sawyer without paying any rent to him, or any claim for it on his part. Under these circumstances, it is clear that an adverse relation touching the alleged trust did not exist for two years between N. P. Sawyer and John H. Sawyer or his representatives; and hence that the statutory limitation is ineffectually invoked.

The testimony of N. P. Sawyer has been taken and offered, and it is indispensable to the complainants. His competency as a witness is objected to by the respondents. Although he is not a party to this suit, yet we think he has such an interest in its result as would disqualify him, unless he is rendered competent by section 858 of the Revised Statutes. That section, in the most comprehensive terms, removes all disqualifications to testify by a party to an action, or by one interested in the issue tried; but it provides "that in actions by or against executors, administrators, or guardians, in which judgment may be rendered for or against them, *neither party* shall be allowed to testify against the other, as to any transaction with or statement by the testator, intestate, or ward, unless called to testify thereto by the opposite party, or required to testify thereto by the court." Before the passage of this act two classes of persons were incompetent to testify, viz., parties to the issue, and persons interested in but not parties to it. In the body of the section this disqualification is removed, without restriction, as to both classes. The proviso, however, restricts the testimony of a "*party*" to the issue so as to exclude transactions with, or statements by, a deceased testator, intestate, or guardian, but does not impose any such limitation upon the competency of a witness interested in but not a party to the issue. This is the literal import of the whole section, and, we think, accords with its spirit and reason. We must therefore overrule the objection to the deposition of N. P. Sawyer, and take the whole of it into consideration. That testimony is of great significance. It sustains every material allegation of the bill. It establishes the trust alleged, explains its origin and nature, and states fully and clearly its objects and terms, and the reason of them, and what was done in pursuance of it. And it is materially reinforced by the testimony of Wade Hampton and Andrew Lyons, both of whom testify to acts and declarations of John H. Sawyer, as well as of N. P. and B. C. Sawyer, in his presence, in confirmation of the existence of a trust. No reason is apparent to us why this testimony should not be believed; and

so accepting it, we are brought to the conclusion that the title to the real estate described in the bill and exhibits was vested in John H. Sawyer for the joint and equal benefit of himself, N. P. Sawyer, and B. C. Sawyer, and that the unsold remainder of this real estate is held by his successors, subject to this trust.

But it is urged by the respondents' counsel that even if the evidence in support of the bill is to be taken as true, it is not sufficient to entitle the complainants to a decree; and the familiar rule in equity is invoked that the responsive allegations in an answer are conclusive evidence in favor of the respondent, unless they are overcome by the testimony of two witnesses, or that of one and proof of circumstances equivalent to the testimony of a second witness. This is the general rule when the negative averments in the answer are positive and are founded upon the knowledge of the respondent. The reason of it is, as stated by Chief Justice MARSHALL in *Clark's Ex'rs v. Van Riemdyk*, 9 Cranch, 160, that "the plaintiff calls upon the defendant to answer an allegation he makes, and thereby admits the answer to be evidence. If it is testimony, it is equal to the testimony of any other witness; and as the plaintiff cannot prevail if the balance of proof be not in his favor, he must have circumstances in addition to his single witness in order to turn the balance." And he affirms that the weight to be given to the answer is affected by the same tests which are applicable to a deposition, as, for instance, whether the respondent speaks from belief or knowledge. Both are only evidence, and must be weighed in the same scales. This qualification of the weight to be given to an answer upon information and belief is also strongly stated in the note to Mr. Bispham's *Adam's Equity*, on page 693, on the authority of numerous American cases. And in the note to section 849a, Story, Eq. Pl. (9th Ed.) it is thus stated: "An answer upon oath is not evidence for the defendant, which must be overcome by two witnesses, * * * (5) when the answer itself shows, or it is apparent from the defendant's situation or condition, that though the answer is positive, he swears to matters of which he could not have personal knowledge." In the same note it is further said, upon several authorities, that, where an answer upon oath is discredited as to one point, its effect as evidence, as to other points, is impaired or destroyed, according to the circumstances of the case.

The alleged trust property consisted of two parcels, one known as the Hitchcock property, purchased in the latter part of 1865; the other as the O'Hara property, which was purchased not long after the Hitchcock. As to the Hitchcock property, the largest requirement of the rule is fully met by the proofs presented by the complainants. The testimony of three witnesses as to the declarations and acts of John H. Sawyer touching the negotiation for its purchase, the contract for it, and the sales of a large part of it, clearly impress upon his title the fiduciary character contended for by the complainants. The proof in relation to the O'Hara property

is somewhat less plenary. It consists chiefly of the testimony of N. P. Sawyer. But considering that his testimony as to the trust agreement is corroborated by the testimony of Wade Hampton and Andrew Lyons touching the Hitchcock property; that the negative averments of the answers do not rest upon the personal knowledge of the respondents; that the answers are materially discredited upon one point at least by the complainants' proofs; and that N. P. Sawyer was in the occupancy and enjoyment of the O'Hara property for nearly 10 years without payment of or claim for rent,—we are of opinion that the weight of the answers as evidence is greatly impaired, and that the balance of proof is in favor of the complainants.

Upon the whole case, we think the relief prayed for ought to be granted against the respondents, except Seeley, and a decree to that effect will accordingly be drawn.

ACHESON, J. I sat with Judge McKENNAN at the hearing of this case, and have reached the same conclusions announced by him. I concur unreservedly in his opinion.

WEST PORTLAND HOMESTEAD ASS'N v. LAWNSDALE, Assignee.

(District Court, D. Oregon. February 21, 1884.)

1. CONVEYANCE—CONSIDERATION FOR.

A conveyance under seal is *prima facie* evidence of a sufficient consideration, and a mere stranger to the land cannot question it.

2. CASE IN JUDGMENT.

G. and C. were tenants in common of a tract of land which was surveyed and platted as Carter's addition to Portland, and then partitioned between the tenants in common by mutual conveyances, the one to C. containing a small park for the purpose of equalizing the partition, described therein as block 67, and afterwards changed said survey so as to materially diminish said park; and at the same time G. surveyed a tract of land adjoining the tract held in common, into lots and blocks, and together with his co-tenants platted the two tracts as one Carter's addition, and duly acknowledged and recorded the same, with a block numbered 67 in the G. tract, and the small park aforesaid, not numbered. *Held*, that the conveyance to C. of the park as block 67 did not affect the block 67 afterwards laid off in the G. tract, and that the assignee in bankruptcy of C. had no right, interest, or equity therein, and should be enjoined at the suit of G.'s grantee from selling the same as the property of C. and thereby casting a cloud on such grantee's title thereto.

Suit to Enjoin a Sale of Real Property.

C. P. Heald, for plaintiff.

George H. Durham and George H. Williams, for defendant.

DEADY, J. This case was before this court on a plea of the statute of limitations (section 5057, Rev. St.) to the original bill, filed on March 27, 1883, when the former was held good, (17 FED. REP. 205;) and also on a demurrer to an amended bill filed July 24, 1883, which

was overruled. *Id.* 614. The case has since been heard on such amended bill, the answer thereto, and the replication, exhibits and testimony, and the only question arising thereon is this: was the present block 67, in Carter's addition to Portland, conveyed to Charles M. Carter on September 6, 1871, by the partition deed to him of L. F. and Elizabeth Grover and others, of that date? If it was, this suit cannot be maintained, even if it was included in said deed by mistake, because the right to relief therefrom is barred by section 5057 of the Revised Statutes. But if it was not, then it is equally clear that the defendant, as the assignee in bankruptcy of said Carter, has no right or interest in the property, and may be restrained from selling it as such, and thereby casting a cloud on the title of the plaintiff thereto. This is a question of fact; and without discussing the evidence in detail it is sufficient to say that it is clear and convincing that this block 67 was not in existence—had not been laid off—when this deed was executed, and was not affected by it. Neither did the parties to this conveyance contemplate or understand that the title to this block was in any way involved in the partition of which it forms a part. For although the description in the conveyance—block 67, in Carter's addition to Portland—so far indicates this block as the property intended, as to make a *prima facie* case of identity, yet the plaintiff is entitled to show, and has shown beyond a doubt, that this is a mere coincidence, and that whatever property was intended to be conveyed by the description of block 67, in Carter's addition, it was not and could not be this block 67.

Whenever, for any cause outside of a deed, there arises a doubt in the application of the descriptive part thereof, evidence *dehors* the writing may be resorted to for the purpose of identifying the subject of the instrument and the understanding or intent in this respect of the parties thereto. And it matters not that it may not appear what property was intended to be conveyed by the description of block 67 in this deed, so long as it does not appear that it is the block in dispute. But there is very little room for doubt or controversy on the subject. When the parties had selected the blocks in the common tracts as laid out, up to and including 65, in the first survey, it was found that Mr. J. S. Smith and Charles M. Carter, had less in value, according to the agreed prices, than the other two; and so to equalize the partition, Smith took a small park and numbered it 66, while Carter took another one lying between Summit and East drives, and marked it 67, and the deeds to them were made out accordingly. The plat of this survey was photographed before this partition, and the original was burned in the great fire of 1872. The photographic copy is here, but without the numbers 66 and 67 on it. Soon after this survey and partition of the common tract, the ground, which was uneven and steep and covered with timber and brush, was burned over, and showed such irregularities of conformation as induced the parties to change the survey in some respects, whereby the park al-

lotted and conveyed to Carter, as block 67, was materially reduced in size, and on this account and from its situation regarded as almost worthless.

In platting the subsequent survey of the Grover tract the second survey of the common tract was included therein, and the whole acknowledged and recorded by all the parties thereto on November 4, 1871, as the plat of Carter's addition. In numbering the blocks on the Grover tract, the draughtsman, who was the same person in both cases, commenced at 66, the highest number on the original draught of the plat of the common tract being 65. Before the acknowledgment, however, attention was called to the fact that Smith had been allotted a park in that tract and received a conveyance of it from his co-tenants as block 66, and thereupon the block of that number on the Grover tract was numbered 66½, but the park allotted and conveyed to Carter as block 67 does not appear to have attracted the same attention, and the plat was acknowledged and recorded with only the one block numbered 67 on it—the one in the Grover tract. The probability is that, being comparatively worthless, it was overlooked. It was never listed for taxation; and Mr. Carter testifies that he owned the block adjoining it, and he preferred and so regarded it as public ground or street.

The theory of the defendant is that, although this park in the common tract was allotted and conveyed to Carter as block 67, yet when upon the resurvey this was nearly obliterated, that the parties—and particularly Grover and Carter—came to an understanding that there should be a block 67 laid off in the Grover part of the new Carter's addition, which should stand for and represent the block of that number and description in his deed of September 6th. But the parties to the transaction—Grover, Smith, and Carter—all testify positively that there never was any such agreement or understanding, or even any intention, that Carter should have block 67 in the Grover tract on any account or for any reason; and there is nothing in the case but surmise and conjecture to the contrary. About this time Carter wrote his name on the recorded plat of Carter's addition across all the blocks claimed by him therein, and this block 67 is not among them. If he then understood that it was his, why did he omit to mark it? The omission to do so, under the circumstances, is a deliberate admission that it was not his. He never listed it for taxation or paid any taxes on it. Lists of the property on which he paid taxes for several years after 1871, indorsed on the tax receipts, including sundry blocks in Carter's addition, are produced in court, and this block does not appear in any of them. Carter was one of the incorporators of the plaintiff, his name appearing signed to the articles on July 27, 1875, and as such he took the conveyance of this block from the grantors of the plaintiff. This was another deliberate admission that the property was not his, but of the grantors of the plaintiff. And all these admissions were made long prior to the bankruptcy and the

rise of this controversy, and could not, so far as appears, have been made collectively or for any ulterior purpose whatever. And if this surmise or conjecture is even admitted to be a fact, it is not apparent how this verbal understanding between Grover and Carter could have the effect to convey any land of the former to the latter, let alone that of his wife's. Nor was there any reason in right or justice for such an understanding or agreement between the parties. If the partition of the common tract was thought to have resulted unequally as to Carter, by reason of the contraction of the park allotted to him as block 67, Mr. Grover was under no more obligation to make up the deficiency than his two co-tenants, who had received an equal share with himself. The assumption that he would voluntarily undertake to make this deficiency good, and apparently more than good, out of his own or his wife's property, is unreasonable and incredible.

Nor is there any ground on which the plaintiff and its grantors are estopped to assert their title to this block as against Carter's assignee in bankruptcy. In the first place, there is no reason to believe that any of Carter's creditors ever gave him credit on the strength of the ownership of this block. In those days it was an unoccupied, out-of-the-way piece of property and of comparatively small value,—a mere drop in the bucket compared with the value of his estate and the volume of his financial transactions. He never was in possession of it; never laid any claim to it, or exercised any acts of ownership over it. There was no intention to deceive any one by means of the transaction, which occurred seven years before the bankruptcy, nor did it involve any such gross culpable negligence on the part of the plaintiff's grantors as the law considers equivalent to such intention; and more than all this, if any creditor ever was led to believe, from the record of the deed of September 6th to him, that the bankrupt ever owned a block numbered 67, in a Carter's addition to Portland, he would also see that it did not purport to be such a block according to the recorded plat of said addition," and he might also see from the record thereof that such plat was made and acknowledged quite two months after the date of such deed; and thereby he would be informed, or have good reason to believe, that such block must be number 67 on some other and prior, but unrecorded, plat of some other attempted Carter's addition.

It is also claimed by counsel for the defendant that the plaintiff is not a purchaser for a valuable consideration, and therefore cannot maintain this suit. But how that can be material in this controversy between the plaintiff, who appears to have the legal title and a stranger to the property, who does not appear to have any right, interest, or even equity in the premises, is not apparent. But the claim is not even sustained by the evidence. The conveyance from Grover and wife to the plaintiff, on August 11, 1875, purports to have been made in "consideration of the sum of \$30,000 to them paid. The

conveyance is under seal, and is *prima facie* evidence of the truth of this recital, or at least that it was executed for a valuable consideration. Code Civil Proc. § 743. And there is not a particle of evidence in the case to the contrary. The most that can be said is that it may be surmised from the evidence and the nature of the transaction that the formation of the plaintiff and the conveyance of this property to it was merely a means of putting it on the market, and that the only consideration which the grantors actually received from the conveyance was in the stock of the corporation. But admitting this to be a fact, the conveyance was nevertheless made upon a valuable consideration, the stock of the corporation standing for the property and having an equal value with it.

The plaintiff is clearly entitled to the relief, and there must be a decree for an injunction restraining the defendant, as prayed in the amended bill, and for the costs, and it is so ordered.

BRADLEY and others v. KROFT and another, Defendants, and WILLIAM J. COWEN, Garnishee Defendant.

(Circuit Court, W. D. Wisconsin. December Term, 1883.)

1. VOLUNTARY ASSIGNMENT—STATUTE OF WISCONSIN—PROOF OF CLAIM AFTER THE EXPIRATION OF THREE MONTHS.

The statutes of Wisconsin require all creditors of one who has made a voluntary assignment to file their claims with the assignee within three months after his appointment, upon pain of being debarred from participation in any dividends made after the expiration of the three months, and before their claims are actually filed; *held*, that there is nothing in the statute which prevents a creditor, who has failed to file his claim within three months, from filing and proving it afterwards and taking the benefit of the law.

2. SAME—UNLAWFUL PREFERENCE.

Accordingly, where a voluntary assignment of partnership property was made in trust for the payment of all partnership debts that should be proved "as provided by the statute," and afterwards in trust for the payment of individual debts, *held* that the assignment contained no unlawful preference, such as to debar from their rights the creditors of the partnership who did not file their claims within three months.

3. ACTION ON DEMAND NOT YET DUE—STATUTE OF WISCONSIN—PREREQUISITES—BOND.

The statute of Wisconsin, allowing an action to be maintained on a demand not yet due upon the filing of a bond conditioned in three times the amount of the claim, must be strictly complied with. The bond is a prerequisite to the right of action, and if it is defective in the first instance the fault cannot be afterwards healed by the substitution of a regular bond.

Decision of Motion for Judgments against defendants on the answer, and against garnishee defendant.

Tenney & Bashford, for plaintiffs.

L. M. Vilas, for defendants and garnishee.

BUNN, J. This action is brought by David Bradley & Co., a corporation existing under the laws of Minnesota, and a citizen of Min-

nesota, against the defendants, who are citizens of Wisconsin, upon certain promissory notes not due; and an attachment accompanying the summons was issued against defendants' property, under the provisions of chapter 233 of the General Laws of Wisconsin for the year 1880, and garnishee proceedings commenced against William J. Cowen, who, it is claimed, has property in his hands belonging to the defendants, and liable for their debts. The garnishee answers, denying all liability, or that he has any property in his hands belonging to the defendants. He also sets up facts showing that previous to the commencement of this action on November 14, 1883, to-wit, on November 5, 1883, the defendants, who were partners doing business at Menomonee, in Dunn county, under the firm name of Kroft & Severson, made a general assignment of all their stock and effects to the garnishee defendant in trust and for the benefit of their creditors, under the insolvent laws of Wisconsin; and that the said garnishee holds the property which it is sought by the garnishee proceedings to reach, under such assignment. The plaintiff moves for judgment against the garnishee upon his answer, and attacks the validity of the assignment. The question is, whether the assignment is valid under the laws of Wisconsin? If it is, then the motion must be denied.

The principal objections urged against the assignment are: (1) That it contains a preference in favor of creditors, which the statute forbids; (2) that it is conditional and does not appropriate the property of the assignors absolutely to the payment of their debts. If the assignment is justly obnoxious to these objections, or to either of them, it cannot be maintained.

By chapter 349, Laws 1883, § 1, it is provided that "any and all assignments hereafter made for the benefit of creditors, which shall contain or give any preferences to one creditor over another creditor, except for the wages of laborers, servants, and employes earned within six months prior thereto, shall be void."

The assignment is somewhat voluminous, and, in order to a proper understanding and construction of it, it is necessary that all the provisions should be considered together. The substance of those material to the inquiry is as follows:

The assignment recites that whereas the said assignors are indebted to divers persons in divers sums, which, by reason of difficulties and misfortunes, they have become unable to pay, and they being desirous of providing for the payment thereof by an assignment of their property and effects for that purpose, not exempt from execution, in consideration of the premises, etc., they do assign, convey, and set over to the assignee all their real estate and personal property, whether held by them as partners or individuals, except such as is exempt from execution; to have and to hold the same in trust that the assignee shall take possession of the partnership property, and, with all convenient diligence, sell and convert the same into

money, at public or private sale, as may be deemed for the best interest of the creditors, collect all the debts, and, out of the proceeds of such sales and collections, make such payment or payments to the partnership creditors, *pro rata*, and without preference, except as to laborers and servants, as is provided by law, subject to the orders and directions of the circuit court of said county, or the judge thereof, as provided by law; and that if, after the payment of all costs, and all partnership debts in full, as have been proved against them as such partnership or firm, as provided in chapter 80 of the Revised Statutes of Wisconsin, and the several acts amendatory thereof, any portion of such proceeds remain in the hands of such assignee, he shall pay and discharge all the private and individual debts of the assignors, or either of them, whether due or to grow due, provided the respective amounts of the individual debts of each does not exceed his portion, being one-half thereof of the surplus that may remain, after paying all of the said partnership debts, and, if it should, then his interest in such surplus to be divided, *pro rata*, among his individual creditors in proportion to their respective demands, which shall have been proved and filed as required by said chapter 80, Rev. St., and amendatory acts. There is a like provision in regard to the separate property of the individual partners, assigning it (all that is not exempt) to the assignee, without preference, for the benefit of (1) the private and individual creditors that have proved their claims, and (2) when they are satisfied, then to their partnership creditors, share and share alike, who shall have proved their claims, as before provided. Then follows a provision that "if, after payment in full, as aforesaid, there should remain in the hands or possession of the assignee, in trust, any portion of the proceeds of said sale and collections of said partnership property, or of said individual property, or of both, he shall return, reassign, and deliver the same to the assignors, according to their several rights."

The foregoing is a condensed statement of the provisions bearing upon the question of a preference in favor of creditors, and also upon the question of whether the assignment is conditional or absolute, these objections both turning upon the same question of construction.

The question is as to the proper construction to be placed upon them, and whether the effect of the provisions, taken as a whole, is to prefer one creditor to another, or to make the assignment conditional instead of absolute for the benefit of creditors. There is no claim that the assignment, in terms, prefers any creditor or creditors by name, over others. But the plaintiffs' contention is that the assignment only provides for the payment of such creditors as shall prove their claims within three months from the time of publication of notice to them by the assignee; and that the creditors who do not file affidavits of their claims within that time can not be paid at all under the assignment, but the property, after that, is to be returned to the assignee. And if this be the proper meaning of the assign-

ment, I think the contention must be sustained. But after a careful consideration of all its provisions, and in the light of the statute, I must say this seems to me a rather straitened construction, and that I find no such meaning in the assignment. The intention to be gathered from the whole instrument would clearly seem to be to provide for the payment of all who are entitled to be paid under the statute, share and share alike, whether partnership or individual creditors, and equitably according to their respective rights, as against the partnership and individual effects, and whether the claims are proved within three months or afterwards, under the statute, except as to such preference as the statute itself gives to those who prove their claims within three months. But to judge properly of the weight to be given the objection it will be necessary to refer to some provisions of the statute.

Section 1693, chapter 80, of the Revised Statutes, provides that "the circuit court, or the judge thereof, in vacation, shall have supervision of the proceedings in all voluntary assignments made under the provisions of this chapter, and may make all necessary orders for the execution of the same."

Section 1698: "Within twelve days after the execution of the assignment the assignee shall give notice of the making thereof, and of his post-office address; and that every creditor of such assignor is required to file, within three months, with such assignee, or the clerk of the circuit court, naming him and his post-office address, on pain of being debarred a dividend, an affidavit setting forth his name, residence, and post-office address, the nature, consideration, and amount of his debt claimed by him, over and above all offsets." Then the statute provides for a publication of the notice, and mailing a copy to each creditor.

Section 1699, among other things, provides that the assignee, after the expiration of three months, shall file with the clerk of the court proof of the publication, and a list of the creditors served, and also a list of the creditors who have filed an affidavit of their claim.

Section 1700 provides that "every creditor of the assignee [assignor] who shall not file such an affidavit of his claim within the time limited, as aforesaid, shall not participate in any dividend made before his claim is filed. Debts to become due, as well as debts due may be proved," a rebate of interest being allowed, etc.

Section 1701 provides that the assignee shall, within six months after his appointment or within such further time as the circuit judge or court shall allow, file in the circuit court a report setting forth a full statement of the property received, together with the names and residences of the creditors, the dividends made, and a full account of the receipts and disbursements.

The plaintiff contends that there is no provision in the law for a creditor to prove his claim after three months has expired, although he may file it and be entitled to payment; and that the effect of the

assignment is to provide only for the payment of those creditors who file proof by affidavit of their claims within the three months. But if this be so it must be by inference only, because there is no such provision expressed in the assignment. There is an express provision that out of the proceeds of sales and collections the assignee shall make payment to the creditors, *pro rata*, and without preference, except as to laborers and servants, as the law provides, subject to the order and direction of the circuit court or the judge thereof.

It is true, as before seen, that the assignment provides that if after payment of all costs and all debts in full, as have been proved against the assignors, as provided by said chapter 80 and the several acts amendatory, that if anything remain, it shall be returned to them; but this is not equivalent to a provision that none shall be paid who do not file proof of claim within three months. On the contrary, it appears the provisions for payment in the assignment are as broad as the provisions of the statute, and that any one who is entitled to file or prove his claim within the law is also entitled to payment under the assignment. The clear inference from the statute is that no absolute limit is placed upon the time when claims must be filed or proved. There is an inducement held out to such as file them within three months. But, except that other creditors not so filing the affidavit within that time are barred from sharing in dividends made previous to the filing of their claims, their right to file and prove their claims after three months has expired is just as clear under the law as is that of the more diligent class.

It is said there is no provision in the law for proving claims, though there may be for filing them, after the expiration of the three months. But the general provision, that debts to become due, as well as debts due, may be "proved," applies just as well to those "filed" after three months as those "proved" before, by the filing of an affidavit. The inference is irresistible that a creditor may both file and prove his claim after the time limited, and the only penalty for not proving before is that they are not entitled to previous dividends. It is clearly contemplated by section 1701 that the settlement of an estate under the act may require six months, or even longer, in the distribution, and under the general control and supervision of the circuit court. And the provision, that "every creditor who should not file such affidavit of his claim within the time limited, shall not participate in any dividend made before his claim is filed," contains the clear implication that he is entitled by proving up his claim afterwards, to participate in dividends made subsequently. And if he is entitled under the law to prove his claim and participate in dividends, he is also so entitled by the clear and positive provisions of the assignment. It will have been observed that the circuit court has general control and supervision of the estate and proceedings under the assignment; and I see nothing in the provisions of the assignment at all inconsistent with

a full and fair distribution of all the property and effects of the assignors, according to law.

The conclusion I have reached is that the assignment is valid in law, and that the answer of the assignee, as garnishee, sets up a good defense. The motion for judgment will therefore be denied.

I am also of opinion that the answer of the defendants Kroft & Severson sets up a good plea in abatement, and that the motion for judgment against them must be denied.

The action is upon promissory notes not due at the time of the commencement of the action.

Chapter 233, Laws 1880, provides that "an action may be maintained, and a writ of attachment issued, on a demand not yet due, * * * and the same proceedings in the action shall be had, and the same affidavit shall be required, as in actions upon matured demands, except that the affidavit shall state that the debt is to become due: provided that the undertaking * * * shall be conditional in three times the amount demanded."

The action was commenced on November 14, 1883, by the issuing and service of a summons accompanied by an attachment and undertaking, but the undertaking was not in three times the amount demanded. On November 17th a new undertaking was executed and served, such as the law required in such cases, but no new summons or attachment was issued, and no new service had. The amount of the debt demanded was \$603.56. The original undertaking accompanying the summons or attachment was for \$250. The undertaking executed on November 17th was for \$2,000. It is claimed by plaintiffs that they had a right to give that new undertaking, and that the giving of it cured the defect and made the service of the summons and attachment good from that time. But I am unable to concur in this view. The proceeding is special, and I think all the conditions of the statute should be complied with in order to uphold it. It was so held by the supreme court of Wisconsin in *Gowan v. Hanson*, 55 Wis. 341, [S. C. 13 N. W. Rep. 238,] and I fully concur in the construction therein given to this statute. The court there say:

"To our minds it is perfectly clear that the statute only authorizes the commencement of an action on a debt not due, for the purpose of an attachment, on condition that the requisite affidavit is made, and the proper undertaking executed and delivered. The giving of an undertaking for three times the amount demanded is as essential to the right to maintain the action as the making of the affidavit. Both things are absolutely necessary and requisite, when the debt is not due, and the omission of either is fatal to the action. This is the plain meaning of the statute; any other construction would do violence to the language."

The execution and service of an undertaking after the suit was begun could not relate back so as either to give the plaintiff a cause of action, as upon a demand already due, or to bring him within the provisions of the law for maintaining an action upon a contract *not*

due when the suit was commenced. This is the real difficulty with the plaintiff's case. It is not that there is a mere irregularity that may be cured by amendment or by a general appearance. The summons and attachment proceedings were regular in form, but the plaintiff had no cause of action, although he held the defendants' contract not due, and of which there had been no breach. A cause of action arises on a contract not from the date, but from the time of the breach. By common and universal law no action can be maintained until the contract is broken. By the laws of Wisconsin an action may be maintained so soon as the contract is delivered, and before any breach, but only upon certain precedent conditions, which were not observed in this case.

The action when begun was liable to the plea in abatement, which was afterwards put in, that the debt was not due, and the service of the new undertaking was not the commencement of another suit, and could not debar the defendant from his plea. The plaintiff, if he wished to avail himself of this extraordinary statute, should have begun his suit anew, and complied in all respects with its conditions. Nor was the defect waived by a general appearance. The case is in no way likened to that of a merely irregular or defective service, where the party defendant, in order to take advantage of the irregularity, must appear specially and move to vacate, and where a general appearance will be a waiver. Here the summons, attachment, and service are perfectly regular in form, and the affidavit for the attachment gives no clue to the fact that the debt is not due, but, on the contrary, states that it is due upon express contract. The real difficulty is that the plaintiff has begun his action prematurely; in other words, that he had no cause of action at the time of the commencement of the suit.

The course taken by the defendant was the proper course—to appear in the action and set up the facts by plea in abatement. I think his plea a good one, and the motion for judgment thereon is denied.

BANK OF THE METROPOLIS v. FIRST NAT. BANK OF JERSEY CITY.

(Circuit Court, S. D. New York. February 8, 1884.)

1. NEGOTIABLE PAPER—QUALIFIED INDORSEMENT—NOTICE.

An indorsement upon negotiable paper "For collection; pay to the order of A. B.," is notice to all purchasers that the indorser is entitled to the proceeds.

2. MONEY HAD AND RECEIVED—PRIORITY.

An action for money had and received lies against anyone who has money in his hands which he is not entitled to hold as against the plaintiff; and want of priority between the parties is no obstacle to the action.

At Law.

Francis Schell, for plaintiff.

Marsh, Wilson & Wallis, for defendant.

WALLACE, J. The plaintiff sues to recover the amount of certain checks of which it was the holder and owner, and which came to the defendant's hands and were collected by its sub-agent under the following circumstances: The plaintiff sent the checks to the Mechanics' National Bank of Newark, for collection, with the qualified indorsement, "For collection; pay to the order of O. L. Baldwin, cashier," Baldwin being the cashier of that bank. The Mechanics' National Bank of Newark sent the checks for collection to the defendant, pursuant to an existing arrangement between them by which each sent to the other commercial paper for collection, it being understood that the proceeds were not to be specifically returned, but were to be credited to the sending bank by the receiving bank, and enter into the general account between them, consisting of such collections and other items of account, and offset any indebtedness of the sending bank to the receiving bank. After the defendant received the checks in question, the Mechanics' National Bank of Newark became insolvent, and suspended payment, being indebted to the defendant under the state of the accounts between them in a considerable sum.

Upon these facts it is clear that the relations between the defendant and the Newark bank in respect to paper received by the former from the latter for collection were those of debtor and creditor, and not merely of agent and principal, (*Morse, Banks*, 52;) and the defendant, having received the paper with the right to appropriate its proceeds upon general account as a credit to offset or apply upon any indebtedness existing or to accrue from the Newark bank growing out of the transactions between the two banks, was a holder for value. Since the decision in *Swift v. Tyson*, 16 Pet. 1, it has been the recognized doctrine of the federal courts that one who acquires negotiable paper in payment or as security for a pre-existing indebtedness is a holder for value, (*Nat. Bank of the Republic v. Brooklyn City, etc.*, R. Co. 14 Blatchf. 242; affirmed, 102 U. S. 14;) and if the defendant had been justified in assuming that such paper was the property of the Newark bank, it would have been entitled to a lien upon it for a balance of account, no matter who was the real owner of the paper. *Bank of Metropolis v. New England Bank*, 1 How. 234. But the checks bore the indorsement of the plaintiff in a restricted form, signifying that the plaintiff had never parted with its title to them. In the terse statement of GIBSON, C. J., "a negotiable bill or note is a courier without luggage; a memorandum to control it, though indorsed upon it, would be incorporated with it, and destroy it." *Overton v. Tyler*, 3 Pa. St. 348. The indorsement by plaintiff "for collection" was notice to all parties subsequently dealing with the checks that the plaintiff did not intend to transfer the title of the paper, or the ownership of the proceeds, to another. As was held in *Cecil Bank v. Bank of Maryland*, 22 Md.

148, the legal import and effect of such indorsement was to notify the defendant that the plaintiff was the owner of the checks, and that the Newark bank was merely its agent for collection. In *First Nat. Bank v. Reno Co. Bank*, 3 FED. REP. 257, paper was indorsed, "Pay to the order of Hetherington & Co., on account of First National Bank, Chicago," and it was held to be such a restrictive indorsement, as to charge subsequent holders with notice that the indorser had not transferred title to the paper, or its proceeds. Under either form of indorsement the natural and reasonable implication to all persons dealing with the paper would seem to be that the owner has authorized the indorsee to collect it for the owner, and conferred upon him a qualified title for this purpose and for no other. Other authorities in support of this conclusion are *Sweeny v. Eastor*, 1 Wall. 166; *White v. Nat. Bank*, 102 U. S. 658; *Lee v. Chillicothe Bank*, 1 Bond, 389; *Blaine v. Bourne*, 11 R. I. 119; *Clafin v. Wilson*, 51 Iowa, 15. The defendant could not acquire any better title to the checks or their proceeds than belonged to the Newark bank, except by a purchase for value, and without notice of any infirmity in the title of the latter. As the indorsement of the checks was notice of the limited title of the Newark bank, the defendant simply succeeded to the rights of that bank.

It is insisted for the defendant that there was no privity between the plaintiff and the defendant respecting the transaction, because the defendant was not employed by the plaintiff, but was the agent only of the Newark bank; and it is argued that if the defendant is answerable to the plaintiff, so would be every other party through whose hands the paper might pass in the process of being collected. In answer to this it is sufficient to say that the defendant is sued, not as an agent of plaintiff, nor upon any contract liability, but upon the promise which is implied by law whenever a defendant has in his hands money of the plaintiff which he is not entitled to retain as against the plaintiff. It has long been well settled that want of privity is no objection to the action of *indebitatus assumpsit* for money had and received. See note a, Appendix, 1 Cranch, 367, where the authorities are collated.

As against the plaintiff, the defendant had no right to retain the proceeds of the checks as security or payment for any balance due to it from the Mechanics' National Bank of Newark, after a demand by the plaintiff. The plaintiff is therefore entitled to judgment.

WILSON and others v. SPAULDING, Collector.

(Circuit Court, N. D. Illinois. January 22, 1884.)

1. MISTAKE IN STATUTE—INTERPRETATION—LEGISLATIVE INTENT.

An act of congress, approved August 7, 1882, purports by its title to correct an error in section 2504 of the Revised Statutes; but in the body of the act the clause to be corrected is quoted as a part of "schedule M of section 25." Section 25 contains no schedule M, and bears upon an entirely different subject, and the language quoted is found in schedule M of section 2504. *Held*, that the act corrects section 2504.

2. STATUTE—TITLE.

The title of an act may be resorted to by the court, for the purpose of elucidating what is obscure in the provisionary part.

3. CUSTOMS DUTIES—WOOLEN KNIT GOODS.

Certain woollen knit goods *held* dutiable under schedule L, and not under schedule M, as corrected by the act of August 7, 1882.

At Law.

Storck & Schumann, for plaintiffs.

Gen. Jos. B. Leake, for defendants.

BLDGGETT, J. This suit is brought to recover duties paid by the plaintiffs, under protest, to the defendant, as collector of customs of the port of Chicago, upon certain woollen knit goods, shirts, and drawers imported by plaintiffs in September, 1882. The goods in question were charged with duty at the rate of 40 cents per pound, and 35 per cent. *ad valorem*, under the twelfth paragraph of class 3, schedule L, § 2504, which reads as follows:

"Flannels, blankets, hats of wool, knit goods, balmorals, woollen and worsted yarn, and all manufactures of every description, composed wholly or in part of worsted, the hair of the Alpaca goat, or other like animal, except such as are composed of wool, not otherwise provided for, valued at not exceeding forty cents per pound, twenty cents per pound; valued at above forty cents per pound and not exceeding fifty cents per pound, thirty cents per pound; valued at above sixty cents per pound and not exceeding eighty cents per pound, forty cents per pound; valued at above eighty cents per pound, fifty cents per pound; and, in addition thereto, upon all the above-named articles, thirty-five per centum *ad valorem*."

The only question in this case is whether the act of congress, approved August 7, 1882, entitled "An act to correct an error in section 2504 of the Revised Statutes of the United States," is applicable to and amends schedule M of said section 2504? By its title this act purports to amend section 2504, but the body of the first paragraph of the act reads as follows:

"The paragraph beginning with the words, 'clothing, ready-made, and wearing apparel,' under schedule M of section twenty-five of the Revised Statutes of the United States, be and the same is hereby amended by the insertion of the word 'wool' before the word 'silk' in two places where it was omitted in the revision of the said statute, so that the same shall read as follows:"

Then follows the paragraph as it would read when amended.

By the letter of the body of this act, it is an amendment of section 25 of the Revised Statutes. The subject-matter of section 25 is the time of holding the election for representatives and delegates to congress in the states and territories; while the subject-matter of this amendment is the rate of custom duties to be levied on certain kinds of imported goods. It is apparent from the reading that there is a mistake in the body of the act as to the section of the Revised Statutes it was intended to amend, it being clear that it was not the purpose of congress to amend section 25. The incorporation of this new matter into section 25 would not only be incongruous to the purpose of the original section, but it would be practically impossible to fit or adjust the new matter to the provisions of section 25, because there is no schedule M in section 25. The question is, can the court apply this act and make it operative, notwithstanding this obvious mistake? It is the duty of the court to so construe any act of congress, if possible, as to effectuate the intention of the legislature in enacting it, when that intention can be ascertained from the act itself. Now, it is clear from the body of the act that congress did not intend to amend section 25, and it is equally clear that the intention was to amend some section of the Revised Statutes regulating duties to be paid on imported goods, and an examination of the sections of the Revised Statutes regulating the duties on imported goods shows that section 2504 not only has reference to the duties on imported goods, but it contains a series of schedules identified by letters of the alphabet, among which is "schedule M," and as far as I have been able to find by such brief examination as my time would permit, this is the only section in the entire Revised Statutes which contains a "schedule M." We find also in this schedule a paragraph beginning with the words, "Clothing, ready-made, and wearing apparel," and corresponding in every particular with the paragraph which the act in question purports to amend by the insertion of the word "wool" before the word "silk" in two places. In other words, insert the word "wool" in two places before the word "silk" in the paragraph of schedule M, § 2504, and you make a new paragraph, which reads exactly as the act provides this paragraph in schedule M of section 25 shall read when amended.

But we are not left to the body and subject-matter of this act of 1882 alone to determine the intention of congress in enacting it. The title of the act is, "An act to correct an error in section *twenty-five hundred and four* of the Revised Statutes of the United States." It is urged, however, by counsel for complainant that the title is no part of the act. The use which may be made of the title in construing an act of congress is, I think, well settled by a line of uniform decisions in the supreme court. In *U. S. v. Fisher*, 2 Cranch, 358, that court, speaking by Chief Justice MARSHALL, said:

"On the influence which the title ought to have in construing the enacting clauses much has been said, and yet it is not easy to discover the point of

difference between the opposing counsel in this respect. Neither party contends that the title of an act can control plain words in the body of a statute; and neither denies that, taken with other parts, it may assist in removing ambiguity. Where the intent is plain there is nothing left to construction. When the mind labors to discover the design of the legislator it seizes everything from which aid can be derived, and, in such case, the title claims a degree of notice, and will have its due share of consideration."

So the same learned judge said in *U. S. v. Palmer*, 3 Wheat. 610:

"The title of an act cannot control its words, but may furnish some aid in showing what was in the mind of the legislator."

And in *Hadden v. Collector*, 5 Wall. 107, Mr. Justice FIELD, speaking for the court, said:

"The title of an act furnished little aid in the construction of its provisions. Originally, in the English courts, the title was held to be no part of the act. 'No more,' says Lord HOLT, 'than the title of a book is part of a book.' It was generally framed by the clerk of the house of parliament where the act originated and was intended only as a means of convenient reference. At the present day the title constitutes a part of the act, but it is still considered as only a formal part; it cannot be used to extend or restrain any positive provisions contained in the body of the act. It is only when the meaning of these are doubtful that resort may be had to the title, and even then it has little weight."

These authorities seem to fully sustain the right of the court to look at the title for the purpose of ascertaining the intent of congress, when the intent is doubtful or obscure from the body of the act. While, from the body of this act, read in connection with section 25, it is very clear that it was not the intent of congress to amend that section, yet it may be said to be doubtful from the body of the act itself what section it was intended to amend; but reading the body of the act and the title together, there can be no question what section the act is applicable to. I am therefore of opinion that the act of August 7, 1882, is an operative law, and was intended to amend and does amend schedule M of section 2504, so as to throw the goods in question into the twelfth paragraph of the third class of schedule L.

On argument, reference was made to the proceeding of the senate at the time the act in question passed for the purpose of showing that the omission of the words "hundred and four" from the first paragraph of the body of the act was not a mistake, but that attention was called to the omission. The debate on the bill as reported in the Congressional Record shows that on the last day of the session the bill came up for action in the senate, having passed the house, and some senators who would seem to have wished to defeat the bill insisted on amending it by inserting the words "hundred and four," so that it would read section 2504, but the friends of the bill believing that the effect of an amendment at that stage of the session would be to defeat the measure, insisted that an amendment was not necessary; that it was sufficiently apparent what part of the Revised Statute was to be affected by the proposed act; and that the executive officers and the courts would properly construe and apply it. This

citation of the debate in the senate only proves that the senators—that is, the majority who passed the bill—did not deem it ambiguous or incapable of application.

The issue is found for the defendant.

VERMONT FARM MACHINE Co. and others v. MARBLE, Com'r, etc.

(Circuit Court, D. Vermont. January 28, 1884.)

PATENT—PREVIOUS DESCRIPTION.

An inventor is not barred from obtaining a patent because his invention has been described, though not claimed, in a prior patent to the same inventor.

In Equity.

William E. Simonds and Kittredge Haskins, for orators.

WHEELER, J. The orators, on the thirtieth of March, 1880, filed an application for a patent for improvements in milk-setting apparatus, consisting, as finally amended, of nine claims, the last five of which have been allowed; the first four have been refused, because described, although not claimed, in a prior patent to the same inventors, No. 207,738, dated September 3, 1878. Prior public use to bar the patent is denied on oath by the applicants, and is not shown. The refusal rests solely, apparently, on the prior description, and *Campbell v. James*, 104 U. S. 356. What is said in that case, taken at large, would seem to show that a patent could not be granted for an invention described in a former patent to the same inventor. What was so spoken of there had been not only described but patented in the former patent. What was said is to be understood by reference to what it was spoken of. That part of that case relied upon in this rejection is where it is said:

"It is hardly necessary to remark that the patentee could not include in a subsequent patent any invention embraced or described in a prior one granted to himself, any more than he could an invention embraced or described in a prior patent granted to a third person. Indeed, not so well; because he might get a patent for an invention before patented to a third person in this country, if he could show that he was the first and original inventor, and if he should prove an interference declared." Page 382.

The latter part of this extract relates to the same subject as the former part. It expressly refers to patented inventions by others; and serves to show that patented inventions by the same inventor were intended where inventions embraced or discovered in his prior patent were referred to. The statute does not make prior description in a patent a bar, but being patented. Sections 4886, 4887, 4920. The court appears to have merely referred to the plain effect of these statute provisions. In *Battin v. Taggart*, 17 How. 74, it appears to have been expressly adjudged upon the same statute provisions as are in

force now, that an inventor might have a patent for an invention described in a prior patent to himself. The same seems to have been decided in *Graham v. McCormick*, 11 FED. REP. 859, on full argument and much consideration. According to the terms of the statutes the orators seem to be entitled to the patent for these claims. There does not appear to be any settled construction to control otherwise.

Let there be a decree for the applicant adjudging that he is entitled to receive a patent for the invention covered by these first four claims of his application.

REAY, EX'X v. RAYNOR and others.

(Circuit Court, S. D. New York. January 23, 1884.)

PATENTS FOR INVENTIONS.

Amended bill to cover reissue of patent allowed, though the patent alleged to be infringed by the first bill had expired before the amended bill was filed. Reissued letters patent No. 2,529, granted March 26, 1867, for improvements in envelope machines, *held* to have been infringed by the defendants as to the first, second, and tenth claims, and an injunction and accounting ordered.

In Equity.

Arthur v. Briesen, for oratrix.

Stephen D. Law and *John Van Santvoord*, for defendants.

WHEELER, J. The testator of the oratrix was the owner of reissued letters patent No. 2,529, granted March 26, 1867, upon the surrender of original letters patent No. 39,702, granted to him August 25, 1863, for improvements in envelope machines, which would expire August 25, 1880. The bill was brought June 12, 1880, upon the original patent, without referring to the reissue, to restrain the use of machines alleged to be infringements, and for an account. No motion was made for a preliminary injunction. An answer was filed setting forth the reissue August 16, 1880; the oratrix moved to amend the bill, and September 22, 1880, it was by stipulation amended to cover the reissue in place of the original. The defendants now move, on the authority of *Root v. Railway*, 105 U. S. 189, that the bill be dismissed for want of jurisdiction in equity, because the patent had expired before the amended bill was filed, upon which only the oratrix could have any equitable relief. *Dowell v. Mitchell*, 105 U. S. 430. The infringement is solely by the use of machines made before the bill was brought and continued ever since, and would be covered by the general allegation of infringement made in both the original and amended bills, if filed during the term of the patent, but the continued use after the expiration of the term would not be so covered by that general allegation in a bill filed after the expiration; special

allegations setting forth that the machines were infringements when made would be necessary. *Root v. Railway, supra; Amer. Diamond Rock Boring Co. v. Rutland Marble Co.* 2 FED. REP. 355. It is urged for the oratrix that the amended bill is to be considered for this purpose as if the original had been as it is amended, when filed, and for the defendants that it is to be considered as if it had been filed as an original bill when it was filed. The oratrix had the reissue when she brought her original bill, and must have intended to bring her bill upon the patent which she had, and not upon one which she did not have. Under these circumstances it would have been competent for the court to allow the amendment. That which could be done by the court without consent could well be done by the parties by consent. When done, it made the bill as it should have been at first, and, in effect, as if it had been so at first. Such amendment only was necessary as would make the bill what it should have been to be good when brought, not what would have been necessary to make it what it would have to be to be good at some other time. If the oratrix has shown a case for any equitable relief, she is, upon all the decided cases, entitled to have the bill retained for that, and such cogent relief as is necessary to do complete justice. *Dowell v. Mitchell, supra.*

The defendants set up that the reissue is too broad for the original. The original showed and described two arms, extending from a table in the interior of a machine under which the envelope blank is made to pass on its way to a creasing box in the rear,—one on each side of the box,—to or nearly to a line with the rear side of the box. No use for these arms was stated. In the reissue these arms are described as applied in such position that they extend parallel to the edges of the creasing box with their lower edges level with, or rather below, the top edge of the box so as to bear down on the ends of the blanks and hold them in position on the box to be creased, and as secured to the table or any other fixed part of the machine. No other reference to the table in connection with them is made. No claim was made in the original in respect to them. They are the subject of the new fourth claim. The original showed these arms only as extensions from the table. Their height in respect to the creasing box was not shown with accuracy otherwise than by reference to the table. As no function was ascribed to them their position could not be inferred from what they were to do. When they were described as in a certain position, with reference to the creasing box instead of the table, and as attachable to some other part of the machine when they would not be extensions of the table, and an office was ascribed to them, an invention different from that in the original was shown. This claim was too broad to be added at any time, and therefore void. *Gill v. Wells*, 22 Wall. 1; *Russell v. Dodge*, 93 U. S. 460. Besides, the reissue was taken out more than three years after the original, and would seem to be for that reason unreasonable and invalid. *Miller*

v. Bridgeport Brass Co. 104 U. S. 350. That this claim is invalid does not necessarily render the other claims of the original, reproduced in the reissue, invalid. *Schillinger v. Greenway Co.* 24 O. G. 495; [S. C. 17 FED. REP. 244;] *Gage v. Herring*, 107 U. S. 640; [S. C. 2 Sup. Ct. Rep. 820.] In the first claim in both, what is called a slide in the original is called a carrier in the reissue. The description of it or of its operation is not changed. The claim is in substance the same in both. Only the first, second, fifth, seventh, tenth, and twelfth claims, besides the fourth claim of the reissue, are said to be infringed. The fifth claim is merely for feeding the blanks under the table which supports the gum-box, instead of over it. The machinery described, some of which is the subject of other claims, does feed the blanks under that table. The claim is merely for that function or mode of operation of that machinery. As such, this function or mode of operation does not seem to be patentable apart from the machinery. *McKay v. Jackman*, 20 Blatchf. 466; 12 FED. REP. 615. Want of novelty of the other claims is alleged, and infringement of them is denied.

Envelope machines were in use before this invention. This inventor was entitled to and claimed a patent only for his improvements. Slides or platforms to hold envelope blanks, lifters, or pickers, to receive gum on their faces and take it to the proper place on the blank, and, by its adhesiveness, to lift them so they could be taken by carriers or conveyors, carriers or conveyors to take them to a creasing box, creasing boxes to crease them, and folding apparatus to fold them, were all then known. The seventh claim is for a balance weight connected with this form of conveyor; and the twelfth, for ribs on the face of the plunger which works in the creasing-box, and presses the envelopes after they are folded. The defendants are not found to make use of either of these devices, or what is the equivalent of either, in the working of this invention.

In this invention the lifters or pickers, after receiving gum on their faces, fall by their own weight upon a pack of blanks on a movable slide, which receives the pack and carries it to and holds it in the proper place, and lift the upper blank until it is disengaged by the table supporting the gum box, and taken by the conveyor under the table and steadied by it to the creasing box. This combination of the movable slide and falling lifters and arrangement of the table and conveyor form the subjects of the first and second claims. Also, a cam and roller, connected with the plunger, bring its face to a pressure upon the envelope to stick its folds firmly after it has been folded. This cam and roller, in combination with the plunger, are the subjects of the tenth claim. Careful and repeated examinations of the machines and patents put in evidence to show anticipations and want of novelty have failed to discover such combinations and arrangements as those covered by these three claims. The falling lifters, the arrangement of the table over the conveyor to steady the blank, and the combina-

tion of the cam and roller with the plunger, appear to be new with this invention. These claims, therefore, appear to be valid. The defendants' machines have the movable slide to carry the pile of blanks to the proper position under the pickers, the falling pickers, and the conveyor arranged under the table supporting the gum-box; they also have the cam and roller pressing the support of the envelope against the plunger, instead of the plunger against it, to press it. The support is the equivalent of the plunger for this purpose. Therefore, the defendants are found to infringe these three claims by the use of the machines made during the life of the patent in violation of the rights of the inventor; and it appears that they would continue the use if not restrained.

It is claimed that the inventor so conducted himself, by seeing machines similar to those of the defendants made without claiming that they infringed his patent, that neither he nor the oratrix, as his personal representative, could have any equitable right to restrain their use. It does not appear, however, that he led the defendants into any expenditure or course of conduct by his silence when he ought to have spoken which they would not have made or followed if he had spoken. The fact of the patent was open to them, as well as known to him. They could respect it, or take the risk of having what they did turn out to be an infringement. They chose the latter course, and he does not appear to have been responsible for their choice. The oratrix appears to be entitled to an injunction to restrain the use of so much of these machines as were infringements when they were made. *Crossley v. Derby Gas-light Co.* Webst. Pat. Cas. 119; 4 Law Jour. (N. S.) Ch. pt. 1, p. 25; *American, etc., Co. v. Sheldon*, 18 Blatchf. 50; [S. C. 1 FED. REP. 870;] Curt. Pat. § 436. The right to an account for past infringement follows.

Let there be a decree that the first, second, and tenth claims of the patent are valid and have been infringed, and for an injunction against the use of such parts of machines as were made in violation of those claims, and for an account, with costs.

REAY v. BERLIN & JONES ENVELOPE CO.

(Circuit Court, S. D. New York. January 23, 1884.)

PATENT FOR INVENTION.

Reay v. Raynor, ante, 308, followed.

In Equity.

Arthur v. Briesen, for oratrix.

S. D. Law, for defendant.

WHEELER, J. This suit is brought upon the same patent, in the same manner, and involving the same questions as to its mainte-

nance, as that of *Reay v. Raynor*, ante, 308. The cause is upheld for the same reasons, and the patent is sustained to the same extent, upon the same grounds, as in that case. Only the second, fourth and fifth claims are said to be infringed here. Of these only the second is held to be valid. The defendant appears to infringe this claim. Their machine has the arrangement of the table over the conveyor so that the blanks are held even and in place by the table while being carried by the conveyor to the creasing box, as described in that claim.

Let a decree be entered for the oratrix accordingly.

BELL and others v. UNITED STATES STAMPING Co.

(Circuit Court, S. D. New York. January 24, 1884.)

1. PATENTS FOR INVENTIONS—INFRINGEMENT.

It is no answer to an action for infringement of a patent, that all the parts of the patent were known before, if they were not known in that connection and arrangement.

2. SAME.

Letters patent No. 140,619, dated July 8, 1873, granted to John B. Firth, for an improvement in cake-pans, and now owned by the plaintiff, held, to be infringed by letters patent No. 255,045, dated March 14, 1882, and granted to Joseph Smith for a patty-pan.

In Equity.

George H. Fletcher, for orators.

J. L. N. Hunt and *C. R. Ingersoll*, for defendant.

WHEELER, J. This suit is upon letters patent No. 140,619, dated July 8, 1873, granted to John B. Firth, for an improvement in cake-pans, and now owned by the orators. The defenses are, want of novelty in the invention, want of invention in the patent, and non-infringement. The patent is for a cluster of cake-pans united to a plate having an aperture for each pan by a double-seam joint formed from the rim of the cup turned outward and the edge of the plate about the aperture turned upward, on the upper side of the plate. The defendants make and sell similar clusters, but the double-seam joint is formed of the rim of the pan turned outward and then inward, and of the edge of the plate turned downward on the underside of the plate, according to letters patent 255,045, dated March 14, 1882, and granted to Joseph Smith, for a patty-pan. The principal things of this sort preceding Firth's patent were clusters of cups fastened to frames, pans riveted through the bottom to a plate, pans put through apertures in a plate with their rims turned out flat and riveted to the plate; pits in steam-tables and in the bottoms of wash-boilers, fastened by double-seamed and soldered joints; and double-seam joints in use generally among wares of these kinds. This patented

invention is not of the pans, or the plates, or the seams, but of the whole manufacture. The nearest previous approach to it in kind was the cluster with the rims riveted to the plate; and the nearest in principle was the bottom of the wash-boiler. Such a bottom, with two or four pits, as the evidence shows were made, would be awkward to use for, and hardly suggestive of, these small cake-pans. The rivets in the riveted cluster might be the equivalent of the double-seam joint, as a mere mode of fastening pieces of sheet-metal together in some places, for some purposes; but it would not be the equivalent in this place for this purpose. An even and smooth union was required; the riveted joint was rough and uneven; the double-seam joint there was nearly all that was desirable in these respects; and although not a new thing it was new in this place, and more than mere mechanical skill was requisite to the construction and arrangement of the necessary parts for successfully putting it there. It is no answer to the patent that all the parts were known before, if they were not known in that connection and arrangement before. *Smith v. Goodyear Co.* 93 U. S. 486; *Wallace v. Noyes*, 13 FED. REP. 172.

The defendant insists that, if the patent is valid, as there were double-seam joints, and cake-pans, and clusters of cake-pans fastened in a plate before, it can only cover Firth's precise mode of uniting the cake-pans in a cluster to the plate by the double-seam joint. *Ry. Co. v. Sayles*, 97 U. S. 554. This is doubtless true; and the defendant would not be liable if his mode was left to the orators who own the patent. His mode is the use of the double-seam joint there. The defendant has not left that but has taken it. His mode of using it has been changed, and perhaps improved upon, and that improvement has been patented, and perhaps properly patented, but that gives no right to what was before patented.

Let there be a decree for the orators for an injunction, and an account, with costs.

MUNSON v. MAYOR, ETC., OF NEW YORK.

(Circuit Court S. D. New York. 1884.)

PATENTS FOR INVENTIONS — SUSPENSION OF INJUNCTION — PUBLIC INTEREST — INCONSISTENT CONTENTIONS.

After a final decree establishing an exclusive right to the use of a patent and awarding an injunction to protect it, the injunctions will not be suspended while the decree stands unreversed, unless some extraordinary cause outside of the interests of the parties is shown. Public necessity may be a cause for such suspension; but the defendant, after insisting that the invention is of no use and benefit, and thus defeating the orator's claim for substantial damages on account of infringement, will not be heard to allege that it is of such public importance as to warrant a court in suspending the injunction.

In Equity.

Royal S. Crane, for orator.

Frederic H. Betts, for defendant.

WHEELER, J. This cause has now been heard on a motion to suspend the injunction heretofore granted, during the pendency of an appeal from the final decree awarding to the orator a merely nominal sum for profits and damages, and a small balance of costs of the suit. After a decree on final hearing, establishing an exclusive right, and awarding an injunction to protect the right, the injunction is not suspended unless some extraordinary cause is shown to exist outside the rights of the parties established by the decree. *Potter v. Mack*, 3 Fisher, Pat. Cas. 428; *Brown v. Deere*, 6 FED. REP. 487. This patent is for a register to preserve for safety, and convenience of reference, paid bonds and coupons. The defendant used the patented register for this purpose as any corporation, partnership, or individual issuing and redeeming coupon bonds would. The use by the defendant is not public any more than such use would be, nor any more than any business transaction of the city is. The city is a public municipal corporation, and a large part of the public have a pecuniary interest in its financial transactions of all kinds, and this is all the interest of the public in this question. It does not affect the convenience, enjoyment, or business of the individuals composing the public, at all. It touches only the convenience of the officers whose duty it is to preserve the bonds and coupons safely, and refer to them when necessary. On the accounting it was insisted on behalf of the defendant that this convenience was of no value or benefit, and with such success that a decree has been entered to that effect. It does not now seem to be equitable and just, in view of that result, to allow that a deprivation of that convenience is too grievous to be borne. The orator, as the case now stands, is entitled to the exclusive use of his patented invention. If the injunction should be suspended during the appeal, and the decree be affirmed, the orator would be left to another accounting, either in a new suit or under some order in this one, which, if it should follow the former result, would be much worse than fruitless. The appeal really involves nothing, so far, but the costs of suit. There seems to be no reason why the orator's right to his monopoly should not be protected in the usual modes; in fact, it does not appear that they can be fully protected but by this injunction; the motion cannot therefore justly be sustained.

Motion denied.

DRYFOOS v. WIESE.¹

(Circuit Court, S. D. New York. January 24, 1884.)

1. PATENTS FOR INVENTIONS—INFRINGEMENT—CLAIMS IN REISSUES NOT FOUND IN THE ORIGINAL.

A claim of a second reissue of letters patent *held* invalid as going beyond the invention shown in the original. But where a new claim contained in a first reissue was brought forward into the second, it being valid in the first reissue, *held*, not avoided by the invalid claim of the second reissue.

2. SAME.

Complaint for infringement of reissued letters patent No. 9,097, granted February 24, 1880, to August Beck, assignor to the orator, for an improvement in quilting-machines, dismissed.

In Equity.

Edmond Wetmore, for plaintiff.

Gilbert M. Plympton, for defendant.

WHEELER, J. This suit is brought upon reissued letters patent No. 9,097, granted February 24, 1880, to August Beck, assignor, to the orator, for an improvement in quilting-machines. The original was No. 190,184, dated May 1, 1877. It was reissued in No. 8,063, dated January 29, 1878, and surrendered for the reissue in suit. The improvement was, and is stated in the original and reissues to be, for improvements on the quilting-machine shown in letters patent No. 159,884, dated February 16, 1875, granted to the same inventor. That machine was for quilting by gangs of needles in zigzag parallel lines, and was fed by cylindrical rolls having an intermittent rotary motion, which would move the cloth while the needles were out of it, and could be arranged to feed in straight lines, direct or oblique. The original of the patent in suit showed different mechanism for actuating the feed-rolls, so that the length of stitch could be varied at pleasure, and conical rolls having an intermittent motion to feed the conical bodies of skirts and skirt borders in a circular direction, when the needles were out of the cloth, as well as cylindrical rolls for straight goods, and other improvements upon other parts of the machine; and had claims for the feed mechanism, and improvements upon the other parts of the machine, but none of the conical feed-rolls. The first reissue further described the conical feed-rolls as made of such taper as to conform to the shape of the skirt or border to be quilted, and claimed the combination of the series of needles with the conical feed-rolls acting intermittently, in place of one of the other claims. The reissue in suit still further describes the conical feed-rolls as the embodiment of a feed device which extends substantially throughout the width of the conical strip of goods, and as it departs from the shorter curved edge and approaches the longer curved edge is adapted to have a proportionately increased range of feed-movement, so that it will feed the conical strip of goods in the requisite curved path evenly and without any injurious strain or drag, and further claims

¹ Affirmed See 8 Sup. Ct. Rep. 354.

the combination with the gang of sewing mechanism, and the cloth plate which supports the goods under them, of a feed device operating intermittently in the intervals between the formation of the stitches, which extends and operates substantially across the conical strip of goods, and which, as it departs from the shorter curved edge and approaches the longer curved edge of the goods, is adapted to have a proportionately increased range of feed-movement. The defendant is engaged in using a quilting-machine for quilting conical goods having a gang of needles, and short cylindrical feed-rollers at each edge of the goods which they feed in a circular direction by moving at different rates of speed constantly, the needles having a forward movement corresponding to that of the cloth while in it; and also one with a four-motion feed, which is capable of feeding in a circular direction by lengthening the feed at the longest edge of the goods; but is not shown to have been so used or intended to be so used. The validity of the reissue, and infringement of it, if valid, are denied.

Beck well appears to have meritoriously invented effective means for giving circular direction to the feed of quilting-machines, having gangs of needles for quilting several parallel seams. He set forth these means in the specifications and drawings of his original patent, and seems to have been well entitled to then have a patent for them, and for the combination of the mechanism with the gang of needles. But he does not appear to have been entitled to a patent for merely giving such direction to such feed-motion apart from the mechanism, nor to the process of operation of his mechanism for giving such direction. *McKay v. Jackman*, 20 Blatchf. 466; 12 FED. REP. 615. Neither could he claim the combination of mechanism not then known, or its processes with the needles. He invented his own mechanism, and the combination of that with the co-operating parts of the machine, and nothing more; and seems to have been entitled to a patent for those and no more. The first reissue was within a few months of the original, and before others appear to have done anything in that region of invention, and seems to have been well enough. *Meyer v. Goodyear Manuf'g Co.* 11 FED. REP. 891; *Hartshorn v. Eagle Shade-Roller Co.* 18 FED. REP. 90. The second reissue was more than two years after the original, but, whether too long after or not, was, in effect, for the combination of the gang of needles and cloth plate with any feeding mechanism which would reach across the cloth and feed the long side faster than the other. This was clearly beyond the invention shown in the original, and, except as to the mechanism shown in the original, beyond the invention in every way. This claim of the reissue is therefore wholly invalid. *Wing v. Anthony*, 106 U. S. 142; [S. C. 1 Sup. Ct. Rep. 93;] *James v. Campbell*, 104 U. S. 356. The new claim of the first reissue brought forward into the second, being valid in the first, is not avoided by the invalid claim of the second. *Schullinger v. Greenway Co.* 24 O. G. 495; [S. C. 17 FED. REP. 244;]

Gage v. Herring, 107 U. S. 640; [S. C. 2 Sup. Ct. Rep. 820.] The orator appears therefore to be entitled to a monopoly of the conical rollers in that combination. It is argued that the defendant's machines invade that monopoly. Those machines have not conical rollers, nor are they claimed to have any of his other mechanism. It is said that there is no invention in dividing the conical rollers into parts, and that the parts are the equivalent of the whole. This is not what the defendant does. The orator's machine gives the circular direction by mechanism that accomplishes that result in one way, the defendants by different mechanism that accomplishes it in a different way. That claim, therefore, is not infringed.

Let there be a decree dismissing the bill of complaint, with costs.

ADAMS and others v. HOWARD and another.

(Circuit Court, S. D. New York. February 6, 1884.)

1. **LETTERS PATENT—BASKET LANTERN.**

The validity of letters patent granted to John H. Irwin in 1865, for an improved basket lantern, sustained.

2. **RIGHT TO PART OF THE RELIEF SOUGHT WHEN THE REST CANNOT BE GIVEN.**

The expiration of a patent, pending a suit for its infringement, will defeat a prayer for an injunction, but not for an accounting, though the bill contains both.

3. **COSTS—WHERE BOTH PARTIES HAVE A DECREE.**

When two distinct causes of action are united, and one party prevails in each, costs will be allowed to neither.

In Equity.

Betts, Atterbury & Betts, for complainants.

Jas. A. Whitney, for defendants.

WALLACE, J. Infringement is alleged of two letters patent for improvements in lanterns, granted to John H. Irwin, one May 2, 1865, and the other October, 24, 1865, both of which have been assigned to the complainants. The second patent only is infringed upon the construction of the claims of the first patent adopted and expressed at the hearing of the cause, which limits it to a lantern having two horizontal guards connected by a hinge or catch, whereby the lantern may be opened at or near the middle of the globe. Infringement of the second patent is not contested. The claim is to be construed as one for a loose globe lantern, in which the globe is protected by a basket of guards, and is held in place by the top of the lantern when the lantern is closed, the basket being hinged at its upper horizontal guard to the top of the lantern, and opened by a spring catch opposite the hinge. The special utility of the device over the lantern of the first patent consists in the protection of the loose globe against

accident, in case the catch is accidentally unlocked, as when unlocked the basket will prevent the globe from falling out.

It is insisted that there is no patentable novelty in the improvement, but, as was suggested at the hearing of the cause, assuming that Irwin's first patent was granted before the lantern of the second patent was invented, it is believed that the change made in the last lantern was not such an obvious one as to negative the exercise of invention. As the lantern of Irwin's first patent approximates to that of the second far more closely than any other preceding device, it is unnecessary to examine further into the prior state of the art. The difference between the lantern of the second patent and that of the first consists only in a new location of the hinge and spring catch, and the employment of a horizontal guard to form the upper rim of the basket for the purposes of this new location. This change of location seems to have been a very simple thing after it was made. But simple as it may have been, it remedied a grave defect in the lantern of the first patent; and the advantages which it introduced were immediately recognized by the public. Others who were actively experimenting in the same field of improvement failed to discover how readily this change could be made and what advantages would result by its being made.

The defense that the patent is anticipated by the lantern described in the prior application for a patent by Anthony M. Duburn is not tenable, because there is no evidence, except his application for a patent, that he ever invented such a lantern. It was conceded by his solicitors upon the application that the model accompanying his application would not answer for use as a lantern, although it was sufficient to illustrate the construction of the device; and the examiner in charge condemned the model as inoperative. As there is no evidence in the case to show that such a lantern as was described in the application and illustrated by the model was ever actually constructed by Duburn, sufficient does not appear to defeat the novelty of Irwin's invention.

It will not be profitable to consider in detail the numerous objections urged by the defendant to the complainant's title to the patent. The conclusion reached is that the complainant Adams is vested with the title to the patent which was acquired by the Chicago Manufacturing Company, October 6, 1866, together with the right of action of that company to recover for infringements since that date. This title is, of course, subject to the license which had been granted by that company to Archer and others to make and use the invention in this state and elsewhere. The complainant Dietz has acquired an undivided third interest in this license by the transfer of Pancoast of March 24, 1881. No objection having been taken by demurrer or the answer to the non-joinder of the other two owners of this license, such non-joinder can not now be insisted on to defeat a decree. If these parties are within the jurisdiction of the court, which does not

appear, a decree can be made without affecting their rights, and which will completely adjust the rights of all the parties to the suits as between themselves. In this view the recovery by Dietz must be limited to one-third of the damages and profits, by reason of the making, and using of the invention, accruing since March 24, 1881. The case does not disclose such laches on the part of the owners of the patent as should defeat an accounting. While infringements by various parties and for considerable periods have been shown to have taken place during the life of the patent, the circumstances fail to establish acquiescence in the instances where the infringement was known to the owners of the patent.

No doubt is entertained of the propriety of decreeing an accounting, although the patent has expired since the commencement of the suit, and although for that reason there should not be an injunction. The jurisdiction of a court of equity having been legitimately invoked by the complainant, he will not be sent away without redress, merely because all the redress to which he was originally entitled cannot now be awarded to him. Under such circumstances, the court will retain the cause in order to completely determine the controversy. *Gottfried v. Moerelin*, 14 FED. REP. 170.

Inasmuch as the complainants have united two distinct causes of action in their bill, and upon their allegation that the defendants' lanterns infringed both the letters patent, have compelled the defendants to litigate both, and as to one of these causes of action the defendants have prevailed, neither party should recover costs as against the other. *Strickland v. Strickland*, 3 Beav. 242; *Crippen v. Heermance*, 9 Paige, 211; *Elfelt v. Steinhart*, 11 FED. REP. 896, 899.

A decree is ordered for complainants in conformity with this opinion.

SCHALSCHA v. SUTRO and others,

(Circuit Court, S. D. New York. February 6, 1884.)

LETTERS PATENT—PERFORATED CIGAR.

Letters patent No. 186,628, for a cigar with a hole in the end, cover only cigars manufactured by the machine described in the specifications. It is no infringement to punch a hole in the cigar with a pencil.

In Equity.

Edmonds & Jerome, for complainant.

Hamilton Cole, for defendants.

WALLACE, J. The claim of the patent to Schalscha (No. 186,628, granted January 3, 1877) is "a cigar constructed as described, with a longitudinal opening, H, in its drawing end, and the end of the wrapper, A, secured permanently within the aperture, as and for the pur-

pose set forth." Read with the description, however, the claim must be limited to one for the cigar when made by the machine described in detail by the patentee as employed by him for the purpose, or a substantially similar machine. No mode of making such a cigar is disclosed in the specification except by means of the machine described. The machine is described with particularity, and the mode of operating it; and among the advantages enumerated as the result of the invention are those which could only result from the employment of the particular machine. There is no evidence that the defendants' cigars were made by a machine; on the contrary, the proof is that the hole in the tip was punched by a pencil.

The bill is dismissed.

MUNSON and another v. HALL.

(*Circuit Court, S. D. New York.* February 6, 1884.)

PATENTS—IMPROVED PAPER BOX.

The distinctive characteristic of letters patent No. 124,319, for an improved paper box, consists in the closed corners; and a box of which the end can be turned down is not an infringement.

In Equity.

Munson & Philipp, for complainants.

James A. Hudson and Frederic H. Betts, for defendant.

WALLACE, J. The complainants letters patent (No. 124,319, granted to Beecher and Swift, assignors, March 5, 1872) describe an improved paper box of the class which are provided with tubular sliding covers, and commonly used for containing matches, etc. The box is made from a blank sheet of paper cut and creased so as to form a bottom, two side flaps, two end flaps provided with projecting end pieces, and two corner pieces which may be used or discarded at pleasure. The side flaps are turned up to form the sides, and the end flaps are turned up to form the ends, after which the corner pieces are folded around the side flaps, and the projecting end pieces are turned down into the top of the box. The specification states that "after thus folding the several parts together they are united by pasting the overlapping corner pieces to the side flaps, the whole forming a strong and durable box." The inventors point out two objections to the boxes previously in use, and which are obviated by their improvement. One of these is insufficient strength and rigidity owing to the absence of the corner pieces. The other is the liability of the contents to escape if one end of the box should accidentally project slightly from the tubular cover.

There are two claims: (1) The combination with a paper box

adapted to a tubular cover of the projecting end pieces arranged substantially as and for the purposes described; (2) a paper box constructed substantially as described, with overlapping corner pieces, and with overlapping end pieces partially covering the end of the box. Infringement is alleged of the first claim only. The defendants use a blank cut and creased like complainants' blank, except without any corner pieces, which they fold into box form with sides and ends and projecting end pieces, and thus make a receptacle to hold cigarettes which is not pasted at the corners, but in which the whole end can be opened without removing the receptacle from the tubular cover. It is a loose receptacle adapted to expose the whole end while the body remains within the tubular cover. The complainants' patent is for a different thing. It is for a box in which the parts are united at the ends and sides. If made without the corner pieces it is "joined together at the corners to form the sides and ends of the box," as the pre-existing boxes are described in the specification to have been made, but has the projecting end pieces to prevent escape of the contents by accidental exposure. If made with the corner pieces it has the additional strength and rigidity which they confer upon it. No wider scope can be given to the claims in view of their terms, the descriptive position of the specifications, and the specific improvements over the existing boxes which were contemplated by the inventors.

The bill is dismissed.

MATTHEWS v. IRON CLAD MANUF'G Co.

(Circuit Court, S. D. New York. February 8, 1884.)

PATENTS FOR INVENTIONS—EVIDENCE—JUDGMENT—STRANGERS TO THE SUIT.

A decree obtained by the plaintiff in an action to recover for the infringement of his patent cannot be introduced in an action against a stranger to the former suit for the purpose of proving acquiescence in the plaintiff's use of the patent.

In Equity.

Briesen & Steele, for complainant.

Betts, Atterbury & Betts, for defendant.

WALLACE, J. The defendant moves to expunge from the proofs certain decrees introduced by the complainant, obtained in actions in which he was complainant, adjudicating the validity of the patent upon which the present suit is brought. These decrees were obtained in suits against infringers to which the present defendant was not a party, or privy. The evidence was introduced against the defendant's objection, and is now insisted on as tending to show acquiescence in the rights of the plaintiff under his patent. If it were necessary for the complainant to show that he had asserted his rights

under the patent, before the present suit, doubtless the records would be evidence that he had brought suits and prosecuted them to final judgment. They are not competent, however, as admissions of third persons, because the defendant cannot be prejudiced by such admissions. The effect of such decrees is considered by Mr. Justice NELSON in *Buck v. Hermance*, 1 Blatchf. 322, where he held that, although admissible upon motions for a provisional injunction in which the ordinary rules of evidence do not obtain, they are proceedings *inter alios*, and therefore not competent on a trial upon the merits.

The motion is granted.

TIME TELEGRAPH Co. v. HIMMER and others.

(Circuit Court, S. D. New York. January 30, 1884.)

PATENTS—ESTOPPEL.

The inventor of a certain mechanism assigned the improvement to his employers, by whom it was patented. While in the same employ he ordered a mechanism to be made which he represented as a modification of the patented invention. After leaving the service of his employers he manufactured machinery identical with what he had previously ordered to be made. *Held*, that he, and those in privity with him, were estopped to deny that the mechanism in question was covered by the patent.

In Equity.

B. S. Clark, for complainant.

Roscoe Conkling and E. N. Dickerson, Jr., of counsel.

Turner, Lee & McClure, for Himmer and Carey.

B. F. Lee, of counsel.

WALLACE, J. The peculiar facts of this case authorize the granting of a preliminary injunction as to some of the defendants, although the complainant's patent is of recent date, and has never been adjudicated. The defendant Himmer was the inventor and assignor to the complainant of the improvement in electric clocks, described and claimed in the letters patent of the complainant. While he was in the employ of the complainant as its superintendent he ordered certain clock mechanism to be made, which was identical in parts and arrangements with that now sought to be enjoined, representing it to be one of the modifications of the invention secured by the patent. Special tools and dies were obtained to construct this mechanism, and the complainant's officers, assuming that the complainant was protected by the patent, have embodied this mechanism in their clocks, and introduced them to the public. After Himmer left the complainant's employ he induced the manufacturers who were then making this clock mechanism for the complainant, to supply him with the various parts sufficient to make a number of complete

clocks. These have been put together by him, (or his wife, in whose name the clock-making business is carried on,) and through the agency of the defendant Carey, who seems to have been cognizant of all the facts, and to be the principal prompter of the transaction, are now being introduced to the public in competition with the complainant's clocks. Upon these facts Himmer is estopped, for the purposes of a motion like this, from contesting the validity of the patent, or denying that the clock mechanism he employs is covered by the claims of the patent. He cannot be heard to assert either of these defenses after inducing the complainant to acquire the patent and engage in making and selling clocks under it, such as he now undertakes to make and vend. Carey occupies no better position than Himmer does. He is Himmer's *alter ego* in the scheme of pirating the complainant's rights. His general denial of community of interest with Himmer goes for nothing, in view of the facts and circumstances which are set forth in the complainant's affidavits, and which are sufficient to call upon him for a full and explicit disclosure of his relations with Himmer, in order to exonerate himself.

No case is made for an injunction against the defendants other than Himmer and Carey. As to Himmer and Carey, an injunction is granted; as to the other defendants, the motion is denied.

GIBBS v. HOEFNER and others.

(Circuit Court, N. D. New York. February 1, 1884.)

1. PATENTS—UTILITY.

A patent will not be declared void for inutility if it possesses any utility whatsoever, even the slightest.

2. SAME—LICENSE TO USE NOT ASSIGNABLE.

A license to use a patented process at the licensee's place of business, and to associate others with him in such use, is not assignable.

In Equity.

James S. Gibbs, complainant in person.

Adelbert Moot, for defendant.

COXE, J. The complainant, who is owner of a three-fourths interest in letters patent issued for an improvement in the manufacture of soap, seeks to recover the gains and profits which have accrued to the defendant Hoefner by reason of his alleged infringement. The other defendants are the owners of the remaining one-fourth interest and were impleaded because they declined to join with the complainant. No personal claim is made against them. The patent expired April 25, 1882. Two defenses are interposed upon the merits. The defendant insists—*First*, that the patent is void for want of utility; *second*, that he has not infringed.

1. Was the invention useful within the meaning of the statute? In order to answer the question in favor of the defendant it must be determined that it possessed no utility whatever. If it was useful in any degree, no matter how infinitesimal, the court would not be justified in declaring the patent void. *Lowell v. Lewis*, 1 Mason, 183, 186; *Earle v. Sawyer*, 4 Mason, 1, 6; *Seymour v. Osborne*, 11 Wall. 516, 549; *Wilbur v. Beecher*, 2 Blatchf. 132, 137; *Lehnbeuter v. Holt-haus*, 105 U. S. 94; *Bell v. Daniels*, 1 Fisher, 375; *Shaw v. Lead Co.* 11 FED. REP. 711; *Wheeler v. Reaper Co.* 10 Blatchf. 189; *Vance v. Campbell*, 1 Fisher, 485; Sim. Pat. 92, 93; Walk. Pat. 52, 53.

Tested by this rule it cannot be said that the patent was void for want of utility.

In addition to the presumption arising from the patent itself, there is evidence that the patented process worked with greater rapidity and produced a larger quantity of soap from the same amount of material than the methods formerly used. One of the witnesses testified that by the new process the work of three days could be accomplished in one, and the principal witness for the defense admits that the yield is slightly more than by "the open-kettle process." If the court were required to determine on this proof which of the two methods referred to is the better, it is not improbable that it would have to conclude that the weight of evidence is decidedly in favor of the older process. But such is not the question.

If the defendant is right in his contention that no merchantable article could be manufactured by the use of the patented process, he will have little difficulty in convincing the master that the award of damages to the complainant should be characterized by unusual frugality. To quote from Walk. Pat., *supra*:

"Patents are never held to be void for want of utility, merely because the things covered by them perform their functions but poorly. In such cases no harm results to the public from the exclusive right, because few will use the invention, and because those who do use it without permission, will seldom or never be obliged to pay for that use, anything beyond the small benefit they may really have realized therefrom."

2. Did the defendant infringe? It is admitted that for several months the patented machine was used in defendant's factory, but he insists that he had the right to use it by reason of his contract with M. B. Sherwood, Jr., and Sherwood's contract with the complainant. On the ninth of June, 1873, the complainant granted to Sherwood a license, known as a "shop right," to operate the patented process at Buffalo, and at all times to associate with him such party or parties as he might desire. In June, 1878, Sherwood, by a written instrument, agreed to deliver to the defendant a bill of sale of all the patented machinery, etc., used in making soap, and give him the right to use it in Erie county so far as he had the power to do so. The consideration was the sum of \$800, which the defendant agreed to pay as follows: \$100 on the execution of the instrument, \$100 in 30

days thereafter, \$200 when the profits amounted to that sum, and the remaining \$400 when half the profits reached that amount. It is unfortunate that at this time the defendant did not obtain a license from the complainant; he was doubtless misled as to his rights and supposed he was purchasing not only the apparatus but the right to operate it. The court, however, must construe the contract according to its true legal import. Sherwood could, of course, convey no more than he himself possessed. What he possessed was a "shop right" for Buffalo, a mere personal license. It was not assignable and gave him no right to authorize others to use the process, except in the manner expressly stipulated. *Rubber Co. v. Goodyear*, 9 Wall. 788; *Troy Fact. v. Corning*, 14 How. 193; *Searls v. Bouton*, 12 Fed. Rep. 140. After the agreement was executed the machine and fixtures were owned by the defendant. They were operated in his place of business. Sherwood had no title to them; he was not a partner of the defendant or associated in business with him in any legal sense. His only interest was to see that the defendant paid him the \$800 pursuant to the terms of the contract. Upon this proof I am constrained to hold that the defendant has infringed.

The other defenses of a technical character have been carefully examined but it is thought that none of them are well founded.

It follows that there must be a decree for the complainant with a reference to a master.

REED and another v. HOLLIDAY.

(Circuit Court, W. D. Pennsylvania. January 31, 1884.)

1. COPYRIGHT—ACT OF CONGRESS.

The act of congress secures to the proprietor of a copyright the "sole liberty" of printing, etc., and vending the copyrighted book, and this is inconsistent with a right in any other person to print and vend material and valuable portions of said work taken *verbatim* therefrom.

2. SAME—INFRINGEMENT—TEXT-BOOKS—KEY FOR USE OF TEACHERS.

A key, purporting to be for the use of teachers, to copyrighted text-books which contain an original method by which instruction in the English language is made interesting and effective by the use of sentences formed into diagrams under certain rules and principles of analysis, in which key are transcribed from the original works, diagrams, and also all the lesson-sentences arranged in diagrams according to said rules, is an infringement of the copyright.

3. SAME—INJUNCTION—WHAT MUST BE SHOWN.

Upon an application for an injunction to restrain infringement, it is not necessary to show that the piratical work is a substitute for the original.

4. SAME—INTENTION.

Intention is a matter of no moment if infringement otherwise appears.

5. SAME—INJUNCTION—WHEN GRANTED.

If a plaintiff shows infringement of his copyright the court will grant an injunction without proof of actual damage.

In Equity. *Sur* motion for preliminary injunction.

W. F. McCook for complainants.

Wm. Blakely for defendant.

ACHESON, J. The plaintiffs are the proprietors of the copyright—secured to them according to the provisions of the act of congress—of two text-books, for the use of schools, of which they are the joint authors and compilers, entitled “Graded Lessons in English” and “Higher Lessons in English,” which contain an original method by which instruction in the English language is made interesting and effective by the use of sentences formed into diagrams under certain rules and principles of analysis within the easy comprehension of pupils. The general method employed is the arrangement of a single sentence in each lesson in the form of a diagram, and it is required of the pupils that a number of other sentences contained in each lesson shall be written out by them in the form of diagrams in accordance with the laws of the English language as laid down, explained, and amplified in said works. It is shown that these text-books have been favorably received and extensively used by practical educators in different parts of the country, and that the sales thereof have been large and remunerative to the plaintiffs. The defendant has published, exposed to sale, and sold, and continues so to do, a work called “A Teacher’s Manual to accompany Reed & Kellogg’s English Lessons, as prepared by Robert P. Holliday.” This work purports to be a key to the plaintiffs’ text-books, for the use of teachers and private students. It is a volume of 236 pages, (including preface, remarks, and index,) of which 188 pages consist of sentences formed into diagrams. Forty of these diagrams, forming a distinguishing feature and characteristic of the plaintiffs’ said works, are exact copies therefrom, and the remainder are made up by transcribing from the plaintiffs’ works literally, and in the order in which they there appear, the lesson-sentences composed or selected by the plaintiffs, and arranging these sentences in diagrams upon the principles and under the rules laid down by the plaintiffs in their above-named works.

The defendant shows that teaching grammar with the aid of diagrams did not originate with the plaintiffs, and that the system appears in works anterior to theirs; for example, in “Burt’s Practical English Grammar” and “Clark’s Practical Grammar.” This is not controverted. All that the plaintiffs claim is that the particular method set forth and explained in their works is original. But the defendant has not contented himself with copying the plaintiff’s diagrams merely. He has appropriated bodily the lesson-sentences composed or compiled by them, and which constitute substantial parts of their works. True, the defendant has not copied the whole, and perhaps not the larger portion, of either of the works of the plaintiffs. He has, however, incorporated in his book material portions of each, and this constitutes infringement, (*Folsom v. Marsh*,

2 Story, 100; *Greene v. Bishop*, 1 Cliff. 186,) unless the defendant can justify himself upon some principle consistent with the entirety of ownership which the author has in his copyright. This the defendant attempts to do. He alleges that his book is not intended to supersede the plaintiffs' work, or to infringe their copyright; that it is a mere key to accompany the plaintiffs' text-books, and to be used in connection therewith; and that in fact it does not supersede them. Intention, however, is a matter of no moment if infringement otherwise appears. *Roworth v. Wilkes*, 1 Camp. 98; *McLean v. Fleming*, 96 U. S. 245. Nor is it necessary to show, upon an application for an injunction to restrain infringement, that the violation of the copyright is so extensive that the piratical work is a substitute for the original work. *Bohn v. Bogue*, 10 Jur. 420. The act of congress secures to the proprietor of the copyright the "sole liberty" of printing, etc., and vending the copyrighted book, and this certainly is inconsistent with a right in any other person to print and vend material and valuable proportions of such work taken *verbatim* therefrom. What difference, then, does it make that the defendant's work takes the form of a *key* to the plaintiffs' text-books? By what right may he thus appropriate the fruits of the plaintiffs' talents, labors, and industry? Granted that the defendant has produced a serviceable key to aid the instructor. This no more entitles him to take to himself, and publish the literary matter covered by the plaintiffs' copyright, than does the fact that a second inventor has made an improvement on a patented machine give him the right to use such machine during the life of the first patent.

The defendant, in opposition to the present motion, asserts, further, that the plaintiffs sustain no damages by reason of the sale of his work, but, on the contrary, are benefited thereby, as the key promotes the sale of the original works. The opinion of at least one witness coincides with this theory. But the plaintiffs entertain a very different view of the effect of the sale of the key, and they allege that it will prove highly detrimental to them in this, that the fact that a full key to all the work to be done by the pupils using these text-books is on public sale, and within reach of the pupils, will impair the popularity, usefulness, and sale of said works. I confess that this strikes me as a consequence very likely to follow the general sale of the defendant's book. But, at any rate, the defendant has no right to subject the plaintiffs to such risk. Moreover, if a plaintiff shows infringement of his copyright, the court will grant an injunction without proof of actual damage. *Tinsley v. Lacy*, 32 L. J. Ch. 536. The motion for a preliminary injunction must prevail.

Let a decree therefor be drawn.

THE ST. LAWRENCE.

(District Court, W. D. Pennsylvania. January 23, 1884.)

1. WHARVES—RIGHT TO MOOR VESSELS.

The right of mooring vessels at public wharves is as much to be protected as that of navigation itself, but it is to be exercised with due regard to the rights of passing vessels, and any unnecessary encroachment upon the channel-way which greatly imperils passing craft is without justification.

2. SAME—POSITION OF STEAM-BOAT.

A steam-boat lying at a wharf-boat at the public landing of Pittsburgh, threw her stern out in the way of a descending coal-tow, when she might have lain broadside to the wharf-boat, and thus afforded a sufficient passage-way for the tow-boat and tow. A collision occurring, *held*, that the steam-boat was answerable to the owner of a coal-boat thereby lost.

3. SAME—COLLISION WITH TOW.

In case of a collision between a descending coal-tow and a vessel wrongfully obstructing the channel-way, the previous fault of another vessel, in striking and throwing out of shape the coal-tow, is not to be imputed to the tow-boat, if the latter were free from blame.

4. SAME—MUTUAL FAULT—DAMAGES RECOVERABLE FROM EITHER VESSEL.

An innocent party who sustains loss by reason of the concurrent negligence of two vessels may pursue and recover the entire damages from either wrong-doer.

In Admiralty.

Knox & Reed, for libelants.

Barton & Son, for respondents.

ACHESON, J. The St. Lawrence, a steamer plying in the Pittsburgh and Cincinnati trade, early on the morning of March 31, 1883, came into the port of Pittsburgh, landing at the Phillips wharf-boat, which lies at the public wharf, her usual place for receiving and discharging cargo and passengers. This wharf-boat is at the north shore of the Monongahela river, 840 feet below the Smithfield Street bridge. The head of the St. Lawrence was to the wharf-boat, and she lay quartering out in the river, her stern projecting into the coal-boat channel. A barge at the lower end and two tow-boats immediately above the wharf-boat prevented the St. Lawrence, upon her arrival, from getting broadside against the wharf-boat. Andrew Hazlett, the mate of the St. Lawrence, testifies, however, that these tow-boats moved away between 8 and 9 o'clock that morning. The Monongahela river was rapidly rising to a coal-boat stage, when the St. Lawrence came into port, and by 7 o'clock had reached a stage of 9 feet, and by 10 o'clock that morning had reached 11 feet. The rise was altogether out of the Monongahela river, and hence the current was exceedingly rapid. Descending coal-tows customarily used the span between the first and second old piers of the Smithfield Street bridge, and at that particular time it was the only open span, the others being then closed by piles and trestle-work, the bridge being in process of reconstruction. The "Robinson fleet" of coal-boats, etc., consisting of upwards of 40 pieces, lay in the river moored to the

third pier of the bridge, and extending down past the St. Lawrence, or nearly so. This fleet, which had been there for some time, greatly narrowed the passage-way for descending tows. The St. Lawrence still further contracted this passage-way, and her projecting position reduced the space between her and the fleet to 200 feet or less. From the Smithfield Street bridge down to a point below the Phillips wharf-boat, the natural direction of the current is in towards the north shore, and this tendency, on the occasion in question, was rather increased by the obstruction at the bridge already mentioned and the Robinson fleet. It is shown that on a Monongahela rise, the proper method for a tow-boat with a coal-tow, to run this part of the river, is by flanking; i. e., setting the tow-boat quartering with her head down stream and in towards the north shore, then backing against the cross current and floating downward. This of course requires more space than does steering or running head on.

Under all the evidence, I find without hesitation that the St. Lawrence, in the quartering position in which she lay, occupied and was an obstruction to a considerable portion of the working channel used by tow-boats having coal-tows in charge, and which in the then condition of affairs it was necessary for them to use, and that her position was one of great peril both to herself and descending tows. This is substantiated not only by the general testimony but by what actually occurred in the space of a very few hours. Hazlett, the mate, states that the St. Lawrence was struck by the tow-boats Sam Robinson and the Tide, (he thinks,) and it is in proof that she was also struck by the tow-boat Blackmore, and all this before the disaster out of which this suit grew. Between 9 and 10 o'clock that morning James T. Fawcett went to the St. Lawrence and warned her master, Capt. List, that she was lying right in the channel, endangering both herself and descending coal-tows; and immediately after the Blackmore struck her (which it would seem was about half an hour before the disaster under investigation) J. Sharp McDonald gave Capt. List a like warning and advised him to take his boat altogether away from that place.

In anticipation of a coal-boat rise the libelants had employed the tow-boat Abe Hays to take certain coal-boats belonging to them from the Tenth Street bridge down to the foot of Brunot's island, there to be made up in a tow for Louisville. During the forenoon of March 31st, the Abe Hays took in charge one of these coal-boats and proceeded with it down stream. When she had reached a point some 200 feet above the Smithfield Street bridge, the tow-boat Acorn struck her, but doing her no serious damage, and not injuring the coal-boat. The effect of the stroke was to put the Abe Hays somewhat out of shape to run the bridge, but her pilot states she had recovered herself when she passed under the bridge; and I think the evidence favors the conclusion that she was kept in proper position and rightly handled below the bridge, and throughout was free from fault. Never-

theless the head of her coal-boat struck the wheel, or immediately forward of the wheel, of the St. Lawrence, passing under her guard. The effect of the collision was to so injure the coal-boat that it sank in a few minutes, and, with its cargo of coal, became a total loss. Immediately after this collision the St. Lawrence changed her position, moving up broadside against the wharf-boat. I am well satisfied from the proofs that had she taken this position sooner, the Abe Hays and her tow would have passed down safely and this loss have been avoided.

The collision occurred about 11 o'clock A. M. Now, it clearly appears that at an earlier hour the tow-boats which lay above the wharf-boat had moved away, and there was nothing to prevent the St. Lawrence from taking, before the catastrophe, the position she took afterwards. Indeed, between the time the Blackmore struck her and the approach of the Abe Hays she might have made this change in her position. That she did not sooner do so—especially in view of the collisions which had already occurred, and the warnings given her master—was entirely inexcusable.

Experienced river men testify that, under the peculiar circumstances then existing, ordinary prudence required the St. Lawrence to avoid, or go away from the Phillips wharf-boat altogether, and take a position at the city wharf, lower down, which the evidence indicates was available to her. Coal-boat rises, as is well known, are often of short duration, and the river must be "taken at the flood" by outgoing coal-tows. There is therefore great force in the argument urged by the libelants' counsel, that it was the duty of the St. Lawrence to yield the whole space between the wharf-boat and the Robinson fleet—none too large for the requirements of the occasion—to descending tows, (*The Exchange*, 10 Blatchf. 168,) but it is not necessary to decide whether or not such was her duty.

The culpability which makes the St. Lawrence justly answerable to the libelants' for the loss of their property, consisted in her unnecessarily encroaching upon the ordinary coal-boat channel by throwing her stern out in the way of descending tows, when she might have lain broadside to the wharf-boat, and thus afforded the Abe Hays a sufficient passage-way.

Undoubtedly the mooring of vessels at public wharves is a well recognized right, as much to be protected by the law as that of navigation itself. But it is to be exercised with due regard to the rights of passing vessels. An unnecessary encroachment upon the channel-way, which greatly imperils passing craft, is without justification. It may have been more convenient to the St. Lawrence to receive and discharge her cargo with her bow to the wharf-boat, but this is a poor excuse for putting in needless jeopardy descending tows.

It is, however, asserted that the Abe Hays had not sufficient power to control and manage her tow, in the then stage of the river and

strong current, and that it was negligence to employ her for the service she undertook. But this defense, I think, is not made out. This employment was her ordinary business, and while she was less powerful than some other tow-boats, she was reasonably fit for the work. On this occasion she had in charge but a single coal-boat, which she had sufficient power to manage had the channel-way which she had a right to use been unobstructed. It is quite true that after she had passed the Smithfield Street bridge, (where her pilot first discovered the projecting position of the St. Lawrence,) she had not power to back up stream, and thus avoid the danger. But tow-boats with coal-tows descending the Monongahela and Ohio rivers are not expected, and ordinarily have not the ability, to back up stream, or even to hold their tows against a strong current. *Fawcett v. The L. W. Morgan*, 6 FED. REP. 200. The coal is taken out on freshets, the tow-boat guiding the tow.

It is further claimed on the part of the defense that the Abe Hays, having gone up the river at about 8 o'clock on the morning of March 31st, in sight of the place where the St. Lawrence lay, was chargeable with notice of her position, and therefore was in fault in coming down at all. But the Abe Hays went up without any tow, and the St. Lawrence was not in her way. Her master and pilot state that they do not remember to have observed the St. Lawrence; but if they did, they may well have supposed that she had just come into port or was about to leave. At any rate, they were not bound to assume that she would continue to lie in her then position for several hours, and after coal-tows had commenced coming down.

Again, it is insisted that the disaster was brought about by the previous collision between the Acorn and Abe Hayes. The evidence, however, leads me to a different conclusion. Moreover, in that matter the Acorn was exclusively to blame. Therefore, if her stroke did put the Abe Hays out of shape and thus contributed to the misfortune, her fault is not to be imputed to the innocent vessel.

But did it appear that the Abe Hays was guilty of contributory negligence, what then? The libelants were not her owners nor answerable for her misconduct. Now, it is a recognized principle of law that an innocent party who sustains a loss by reason of the concurrent negligence of two vessels may pursue and recover the entire damage from either wrong-doer. *The Atlas*, 93 U. S. 302; *The Franconia*, 16 FED. REP. 149. And herein is to be found the answer to the suggestion (if true) that the Robinson fleet wrongfully narrowed the coal-boat channel.

The evidence shows the value per bushel of the coal to be as stated in the libel, and as to quality there seems to be no controversy.

Let a decree be drawn in favor of the libelants for the amount of their claim, with interest from March 31, 1883, and costs.

THE FRANK C. BARKER, Her Tackle, etc.

(District Court, D. New Jersey. February 2, 1884.)

1. SEAMEN—DESSERTION—DISCHARGE.

In consequence of a disagreement between the master of a vessel and his seamen about the amount of wages due them, the mariners were ordered to go to work or go on shore. They agreed to go ashore if he would give them orders for their wages, stating that they would regard themselves in that case as discharged. The master gave them the orders, and the sailors left the vessel. *Held*, that they were discharged, and were not to be looked on as deserters.

2. ENTIRE CONTRACT—DISCHARGE—RECOVERY OF WAGES EARNED.

Upon the wrongful discharge of a workman engaged under an entire contract, he is entitled to recover his wages during actual service.

3. STATUTORY REMEDY NOT EXCLUSIVE.

The remedy afforded seamen by sections 4546 and 4547 of the Revised Statutes is not exclusive, and the usual process *in rem* against the vessel is still open to them.

In Admiralty. Libel *in rem* for wages.

Bedle, Muirheid & McGee, for libelants.

E. A. Ransom, for respondents.

NIXON, J. A careful reading of the voluminous testimony in this case shows that the unfortunate misunderstanding between the owners and the crew, leading to the present controversies, has arisen from the double-faced dealing of the master, Raynor. It must be borne in mind that seamen of this class are generally ignorant; and are often imposed on, and that such imposition makes them suspicious. The libelants were hired at \$25 a month and a bonus of three cents for every 1,000 fish caught during the season. There seems to have been no very definite arrangement when their wages were to be payable. The owners testify what their understanding was, and what instructions they gave to the master in regard to the hiring of the crew. But there is no evidence that any hint was given to the libelants that the payment of three cents per thousand on the fish taken was contingent on their remaining to the end of the season, or that no payment was to be made on account until the season ended, or that the men would be expected to have deducted from their wages all that was expended for grub above three dollars a week. On the contrary, I think it is a fair inference, from the testimony, that the libelants thought at the time of their hiring that their wages would be paid monthly, and the bonus, or fish-money, as it was earned, and as they desired to have it.

It appears that some of the crew had been employed in the same business the previous year by the same master and no suggestion was then made that they would receive nothing on account of the bonus until the end of the season's work, or that they would be charged anything on account of their grub, whatever the cost of providing it might be. But after the season's work was fully under way news came to the ears of the libelants that these new terms were to be im-

posed. In the controversy over it which followed, the master seems to have taken sides with the men, when with them, and with the owners when away from the crew. About the first of July some of the libelants went to the master for payment on account of the bonus, or fish money, earned, as they had done the year before. It was agreed that they would estimate the number caught to that date at 500,000. But when the owners were applied to they refused to pay anything, stating for the first time that all earnings would be withheld till the close of the season. This was followed shortly afterwards with the other claim in regard to the expenses for the grub. They at once demanded, both of the master and of the owners, that these questions, and especially the latter, charging them for any part of their board should be definitely settled. The owners and master were wrong in attempting to incorporate new terms into the contract for hiring without the consent of the libelants, and the latter were right in insisting upon an amicable adjustment of the differences, or upon a separation.

The libelants were peremptorily told to go to work or to go ashore. They agreed to the latter if they were paid off in full to date. Elliott says that, when he was ordered to go ashore, he replied that he would go if the captain would give him an order for his money. Upon receiving his order the other men asked for theirs, also, and they were given. Pages 74, 75. The master assented to the payment, and gave them orders upon the owners to that effect. The orders were taken to the owners, who, on a subsequent day, handed to the captain, for them, checks for the month's wages then due, but not including their earnings for the number of fish caught. The libelants found that the checks were drawn to their order, and in full for all claims. They declined to use them, and filed libels forthwith for the wages and fish money due to the date of the master's orders. The proctor of the respondents claims that this was a desertion, and the libelants, that it was a discharge. Were the libelants discharged? This question is often determined affirmatively by circumstances, in the absence of direct proof. *Granon v. Hartshorne, Blatchf. & H.* 458; *The David Faust*, 1 Ben. 187. The proof is clear that the libelants considered themselves discharged by the act of the master. While they were parleying in regard to being charged for the expenses of their grub, exceeding three dollars a week, and properly insisting that the question should be settled without further delay, and when the master ordered them to go to work or go ashore, they agreed to the latter, provided he would give them an order upon the owners for what was due to them, and at the same time stated that they should look upon such an order as a discharge. With express knowledge as to how the libelants regarded the proceeding, he gave them the order for the wages due, with which they went to the owners for payment. I must hold the giving of such an order, under the circumstances, as a discharge of the libelants.

This view of the case renders it unimportant to determine whether the men were shipped for the season or from month to month, and whether the bonus was payable at the end of the season or by the month. If they were discharged by the master they should receive what they had earned up to the date of the discharge, whether due under the original contract or not. But it may be conceded that I am in error in regard to the discharge of the libelants, and still they are entitled to a decree. The respondents testify to the instructions which they gave to the master in regard to hiring the crew. But the master was examined, and he does not pretend to have carried them out in his negotiations with the men. Not one of them was told that the bonus was to be withheld until the end of the season, or that any deductions would be made from their wages for board if the expense exceeded three dollars per week. On the contrary, the testimony of Elliott is uncontradicted that during the previous years he had been in their employ, and that the wages were paid monthly, and the bonus as it was earned and whenever it was asked for. On page 29 of his evidence he states that when the hiring took place he said to the master: "I suppose we get the monthly pay the same we did last year, every month?" "Yes," said he: "And the bonus when we want it?" says I; says he, "Yes." While I am not disposed to wholly justify the conduct of the men, great allowance should be made for them under the provocation of an attempt to impose upon them new and unexpected obstacles to receiving their hard-earned wages. The proctor of the respondents at the hearing claimed that three of the libels should be dismissed because they were filed within 10 days after the alleged discharge of the libelants. He contended that the remedy afforded by sections 4546 and 4547 of the Revised Statutes was exclusive, and that the provision therein made for an application to a judge, commissioner, or justice of the peace, must be observed in all cases except where the vessel was about to go out of the jurisdiction of the court. But this is not the construction which the courts have ordinarily given to these sections. It is held that the remedy is cumulative and not exclusive, and that, notwithstanding these provisions, the courts of admiralty remain open to seamen for the usual process *in rem* against the vessel whenever they prefer to pursue that course. *Murray v. Ferryboat*, 2 FED. REP. 88; *The William Jarvis*, Spr. Dec. 485; *The M. W. Wright*, 1 Brown, Adm. 290; *The Waverly*, 7 Biss. 465.

Let a decree be entered for the libelants, and a reference, unless the parties can agree from the testimony already taken upon the amount of wages due.

THE SALLY.¹*(District Court, E. D. Pennsylvania. December 24, 1883.)***ADMIRALTY—COLLISION BETWEEN FLOATING BARGE AND SAILING VESSEL—DUTY ON MEETING IN NARROW STREAM.**

Where a barge, floating with the tide up a narrow creek, had her bow stuck in rubbish near the bank and her stern swung across the creek by the tide, and a collision with a sloop under sail coming down the creek might have been avoided by the man on the barge reversing his pole so as to turn the stern completely around, *held*, the barge was in fault in holding her stern against the tide and thereby making a collision inevitable.

In Admiralty. Hearing on libel, answer and proofs.

Libel by the owners of the canal barge Henry S. Pence, against the sloop Sally. The libelants claimed that on July 18, 1883, while the barge Henry S. Pence was floating up the Woodbury creek, and had proceeded about half a mile from its mouth, she was struck upon the starboard side by the sloop Sally, although the sloop had ample time and sufficient water to go astern of the barge. The respondent contended that as the sloop, proceeding down the creek, rounded a curve, the barge was seen about 100 yards distant, directly across the creek, floating up with the tide; that the barge was insufficiently and negligently manned by only one man, who was using a pole on her starboard side near the stern, and paid no attention to the approach of the sloop, although several men upon the shore called out to him. The sloop at once starboarded her wheel, and tried to go under the barge's stern expecting that the barge would allow her stern to drift up, but the man on the barge held her stern with the pole, making a collision inevitable.

John A. Toomey, for libelant.

Edward F. Pugh, for respondent.

BUTLER, J. The libel must be dismissed. Whether the barge was sufficiently manned, and, if not, whether this had anything to do with the result, need not be considered. Her position in the creek, barring the channel, was improper and inexcusable. Her bow appears to have been interfered with by rubbish at the side of the stream, and her stern swung around, under the influence of the tide. I do not think the wind had anything to do with it. Whether it had or not does not seem, however, material. Her stern would have gone completely around if her master had not prevented it. Desiring to right his boat, he held her stern against the tide with his pole. This was proper at the time he commenced it, and doubtless would soon have relieved the bow and turned it up stream. His mistake, however, was in continuing it after the sloop came into view. Had he reversed his pole and added his strength to the force of the tide, he would have opened the channel before the sloop reached him. As it was his duty

¹ Reported by Albert B. Guilbert, Esq., of the Philadelphia bar.

to do this, the sloop was justified in supposing he would, and going forward. Seeing that he still held his boat across the stream he was cautioned to let her stern go, and every proper effort made to arrest the sloop's headway. He persisted, however, in his folly, and was struck. That the accident occurred in this way, and from this cause, seems very clear from the evidence on both sides. Directly after, the master of the barge repeatedly admitted his fault, and exonerated the sloop.

A decree must be entered dismissing the libel, with costs.

THE ASHLAND.¹

(Circuit Court, E. D. Louisiana. December, 1883.)

1. PRACTICE—APPEAL—REMITTITUR.

Where a judgment was rendered by the district court against claimants for an appealable amount, and thereafter proctor for libelants offered to enter a *remittitur* of so much of the judgment as to reduce it below the appealable amount, and the district court refused to allow the *remittitur*, *held*, that it was within the discretion of the district judge to allow or refuse to allow the *remittitur* to be entered.

Ins. Co. v. Nichols, 3 Sup. Ct. Rep. 120, followed.

2. SAME.

A *remittitur* comes too late when offered to be entered after an appeal has been allowed.

On Motion to Dismiss Appeal in Admiralty.

R. King Cutler, for libelants.

A. G. Brice, Joseph P. Hornor, and F. W. Baker, for claimant.

PARDEE, J. It appears from the transcript that on June 7, 1883, the judgment was rendered in the district court for \$51. On the same day a motion for appeal was made and allowed. June 9th a bond was given and accepted. June 11th the decree was signed by the district judge, and on the same day a *remittitur* of one dollar "was filed, but not entered on the minutes, nor allowed by the court." The motion to dismiss must be overruled and refused because (1) the *remittitur* was not allowed by the court. *Alabama Gold Life Ins. Co. v. Nichols*, 3 Sup. Ct. Rep. 120. (2) It came too late after an appeal was allowed and perfected.

Order accordingly.

¹ Reported by Joseph P. Hornor, Esq., of the New Orleans bar.

DOTY and another v. JEWETT and others.

Circuit Court, N. D. New York. February 16, 1884.)

1. JURISDICTION OF CIRCUIT COURTS—REVIEW OF PROCEEDINGS IN DISTRICT COURT—WAIVER OF JURY.

The circuit courts of the United States have no jurisdiction to review any question raised by a bill of exceptions in an action at law in a district court, where the facts have been found without the aid of a jury, since there is no warrant in the statutes for the waiver of a jury in the district courts.

2. SAME—APPEAL—BILL IN EQUITY—ACTION AT LAW—WRIT OF ERROR.

Proceedings in equity in the district courts can be reviewed in the circuit courts only upon appeal, and not upon writ of error. If a writ of error is taken, the court of review can only treat the case as an action at law.

3. SAME—LIMITED BY STATUTE.

The circuit court has no jurisdiction to revise judgments of the district court in any other way than the statutes prescribe; and no agreement of the parties can give it such authority.

At Law.

Thomas Corlett, for plaintiffs in error.

Ruger, Jenney, Marshall & Brooks, for defendants in error.

BLATCHFORD, Justice. This is an action brought in the district court of the United States for the Northern district of New York, by the plaintiffs in error against the defendants in error. The first pleadings of the plaintiffs calls itself a complaint and is sworn to as a complaint. It sets forth the copartnership of Albert Jewett and William Johnson, as Jewett & Johnson; an indebtedness of the firm to the Phoenix Mills, a corporation, of \$6,208.51, for goods sold and moneys advanced; the adjudication of the corporation as a bankrupt; the appointment of the plaintiffs and said Johnson as its assignees; an assignment to them; the death of Johnson; the insolvency of Jewett; the want of copartnership assets of Jewett & Johnson to pay any part of said debt; the absence of any other remedy for the plaintiffs to collect the debt, except against the estate of Johnson; the granting of letters of administration on his estate to the defendants Angeline C. Johnson and Stephen B. Johnson; the non-payment of any of the debt; and its existence as a debt against the estate of Johnson, enforceable by the plaintiffs. The prayer is for judgment against Jewett, surviving partner, and against the other defendants as administratrix and administrator, for \$6,208.51, with interest. Jewett put in a separate answer containing three distinct defenses, to which the plaintiff put in a replication, which treated the answer as consisting of three pleas, and itself contained two separate pleadings, each of which concluded to the country. The other defendants put in a separate answer containing five separate defenses, to which the plaintiffs put in a replication, which treated the answer as consisting of five pleas, and itself contained five separate pleadings, each of which concluded to the country. Each of the replications speaks of the plaintiffs' initial pleading as a "declaration."

v.19,no.6—22

The case is before this court on a writ of error. The record shows that the action was tried by consent, in the district court, before that court held by the district judge, without a jury; that a jury was duly waived by the parties; that the judge heard evidence, both parties appearing; that he made certain decisions to which the plaintiffs excepted; and that he dismissed the complaint on the ground of a bar by a statute of limitations. A bill of exceptions was signed, and a judgment was entered dismissing the complaint on the merits, and awarding costs to the defendants. The plaintiffs brought a writ of error. No other questions are sought to be reviewed, except those arising on the bill of exceptions. It was held by this court, in *Town of Lyons v. Lyons Nat. Bank*, 19 Blatchf. C. C. 279,¹ that no question arising on a bill of exceptions could be considered by this court on a writ of error to the district court, in an action at law, where the facts were found by the district court without a jury. The question was there fully examined, and the following authorities were cited and reviewed: *Guild v. Frontin*, 18 How. 135; *Suydam v. Williamson*, 20 How. 432; *Kelsey v. Forsyth*, 21 How. 85; *Campbell v. Boyreau*, Id. 223; *U. S. v. 15 Hogsheads*, 5 Blatchf. C. C. 106; *Blair v. Allen*, 3 Dill. 101; *Wear v. Mayer*, 2 McCrary, 172; [S. C. 6 FED. REP. 658.] It was held that the question is one of the power and authority of the court, and is not such a question of practice, or such a form or mode of proceeding, as is embraced in section 914 of the Revised Statutes, which adopts for the circuit and district courts of the United States, in suits at law, the practice of the state courts; and that there is nothing in section 914 which extends or affects the power of this court, as it before existed, on a writ of error to the district court. The want of power consists in this: that section 566 of the Revised Statutes requires that issues of fact, in actions at law in the district courts, shall be tried by a jury, and there is no statutory provision for the waiver of a trial by jury in such actions, and no special statutory power conferred on this court to consider any question raised by a bill of exceptions in such an action not tried by a jury.

It is urged for the plaintiffs in error that in regard to the representatives of Johnson the suit is in the nature of a suit in equity, as the complaint alleges the insolvency of Jewett. The answer to this is that the plaintiffs, by their pleadings, have treated the action throughout as a suit at law. By section 4979 of the Revised Statutes jurisdiction is given to the district courts of suits at law and in equity brought by an assignee in bankruptcy against any person claiming an adverse interest touching any property or rights of the bankrupt transferable to or vested in the assignee. Under the rulings of the supreme court in *Jenkins v. International Bank*, 106 U. S. 571, [S. C. 2 Sup. Ct. Rep. 1,] the present suit is either a suit at law or a suit in equity, within the provisions of section 4979. If

¹8. C. 8 FED. REP. 369.

a suit in equity, it would be commenced by bill, and the proceedings would be in conformity to the rules of equity practice established by the supreme court, as required by general order No. 33 in bankruptcy. This has not been done. The plaintiffs, in their replication, call their own first pleading a declaration, and the defendants' pleading pleas, and their replication consists of five pleadings, each of which concludes thus: "and this the said plaintiffs pray may be inquired of by the country," etc. Moreover, they waived a trial by jury, and they made a bill of exceptions, and they sued out a writ of error, all badges of a suit at law, and not of a suit in equity. By section 4980 of the Revised Statutes it is provided that "appeals may be taken from the district to the circuit courts in all cases in equity, and writs of error from the circuit courts to the districts courts may be allowed in cases at law arising under or authorized by this title." The fact of the taking of a writ of error establishes that this is a case at law, so far as this court is concerned. If it were a case in equity, a review by this court would have to be by appeal, in order to give this court jurisdiction.

It is urged that the trial by the court took place as it would have done in an equity suit; and that, as the case is one reviewable in one or the other of the two modes, the objection to the mode may be waived by the other side, and such waiver has taken place in this case. Some authorities under the state practice in New York are referred to. But the question is one of jurisdiction. The agreement of parties cannot authorize this court to revise a judgment of the district court in any other mode of proceeding than that which the law prescribes, nor can the laws or practice of a state, in regard to the proceedings of its own courts, authorize this court or the district court to depart from the modes of proceeding and rules prescribed by the acts of congress. *Kelsey v. Forsyth*, 21 How. 85, 88; *Merrill v. Petty*, 16 Wall. 338, 347; *U. S. v. Emholt*, 105 U. S. 414, 416.

As the district court had jurisdiction of the subject-matter and of the parties, and as there is no error in the record, and as nothing found in the bill of exceptions can be considered, the judgment must be presumed to be right, and must be affirmed, with costs. *Campbell v. Boyreaut*, 21 How. 223, 227; *Town of Lyons v. Lyons Nat. Bank*, 19 Blatchf. C. C. 279, 289; [S. C. 8 FED. REP. 369.]

MARTIN v. BALDWIN and others.

'Circuit Court, D. California. February 4, 1884.)

JURISDICTION OF FEDERAL COURT—PENDENCY OF CAUSE IN STATE COURT.

Pending a suit in a state court for the partition of land, a court of the United States having concurrent jurisdiction may refuse to entertain a suit between the same parties or their successors by purchase, *pendente lite*, when the issues and interests involved in the two cases are the same.

The facts are stated in the opinion.

W. S. Woods, for complainant.

Latimer & Morrow, for defendants.

SAWYER, J., (*orally*.) This is a suit for partition of a ranch, Camilo Martin bringing the suit against Baldwin and Garvey for partition, alleging that he owns a certain portion, and that Baldwin and Garvey own the remaining portions. The plea sets up that W. and F. W. Temple commenced suit in the district court for the district of Los Angeles county, against Baldwin, one of the defendants in this suit, and several other defendants named, being the other owners at the time, for a partition of this same ranch; that said suit is still pending in the superior court for the county of Los Angeles; that it embraces the identical object and subject-matter involved in this suit; that since the commencement of that suit, the plaintiff in this proceeding, Camilo Martin, has purchased the interest of the Temples, and now owns the same interest that the Temples did; that Garvey has purchased the interest of some of the other defendants in the suit; and that Camilo Martin, the complainant in this suit, and Baldwin have also purchased the remaining interest of the other defendants in the suit, so that now Martin, Garvey, and Baldwin are owners of the entire ranch; that though there are other parties to the former suit for partition, yet the parties to the present suit have succeeded to their interests, *pendente lite*, and are now the only parties in interest; that the same interests are now involved, the parties to this suit having purchased in subsequently to the bringing of the former suit and the filing of notice *lis pendens*, and are, therefore, in privity with those other parties; that this suit involves precisely the same questions that the former suit does; and that the judgment or the decree in the former suit would be binding upon all the world. Section 1908 of the Code of Civil Procedure says:

"The effect of a judgment or final order in an action or special proceeding before a court or judge of this state, or of the United States, having jurisdiction to pronounce the judgment or order, is as follows: * * * (2) In other cases, the judgment or order is, in respect to the matter directly adjudged conclusive between the parties and their successors in interest by title, subsequent to the commencement of the action or special proceeding, litigating for the same thing, under the same title, and in the same capacity."

Precisely the same relief is to be had in one suit as in the other, and the judgment in the first suit would be binding upon all the par-

ties. It is true that these are different jurisdictions, that is to say, one is the jurisdiction of the United States and the other of the state court, and in ordinary cases the pending of the suit in one of these tribunals would not abate a suit pending in another. But these suits are for partition of the same land, and the two courts might reach a different result and there be no error in either proceeding upon which the judgment could be reversed. The parties would find themselves in a very embarrassing position if the judgments should be different in the different courts and both of them be valid. The jurisdiction of the two courts is concurrent. The proceeding is in the nature of a proceeding *in rem*. Where two courts have concurrent jurisdiction in a proceeding *in rem*, and one court obtains possession of the *res*, ordinarily it would be entitled to proceed to judgment without interference from the other court. Certainly, one court would not be entitled to take the *res* out of the possession of another court of concurrent jurisdiction, which, in the exercise of its lawful authority, has obtained the actual, physical possession of the thing in suit. It seems to me that the same principle should apply to a suit for partition. The action is local, and the courts, having concurrent jurisdiction, must necessarily exercise the same territorial jurisdiction, although the courts may be courts of different sovereignties. The proceeding being in the nature of a proceeding *in rem*, the court first obtaining legal possession or control of the *res* ought, by comity at least, if not otherwise, to be permitted to proceed to an adjudication without interference by the other court. As a matter of sound legal discretion and comity, I think the court is authorized to abate the suit in this court on the ground of the pending of the other suit in the state court, even if the party pleading the matter of abatement is not entitled to have it abated as a matter of strict legal right. The complainant cannot complain, for he purchased pending the former suit, and the notice of *lis pendens*, filed in pursuance of the statute, informed him of the condition of the lands. He purchased into a lawsuit in regard to lands already in the legal control of another court. This court, at the commencement of that suit, had no jurisdiction whatever of the case,—the parties being then all citizens of California,—and complainant took his interest *cum onere*.

Let the plea be sustained.

BRUCE and others v. MANCHESTER & K. R. R. and others.

(Circuit Court, D. New Hampshire. February 14, 1884.)

1. **COURTS OF CONCURRENT JURISDICTION—JURISDICTION ACTUALLY ACQUIRED.**
Of two courts having concurrent jurisdiction of any matter, the one whose jurisdiction first attaches acquires exclusive control of all controversies respecting it involving substantially the same interests.
2. **SAME—FORECLOSURE OF MORTGAGE ON RAILROAD.**
Accordingly, where the supreme court of New Hampshire decreed the foreclosure of a deed of trust and mortgage of a railroad, and the property was actually sold, *held*, that the circuit court of the United States could not entertain a bill to enforce the operation of the road by trustees for the benefit of its stockholders, although the bill was filed before the sale, and the sale when made was declared to be subject to the result of the suit in the circuit court.
3. **RECEIVER—POSSESSION OF THE COURT.**
The possession of a receiver is the possession of the court appointing him, and cannot be divested by a court of co-ordinate jurisdiction.
4. **EVIDENCE—ADMISSIBILITY—RECORDS.**
The admissibility of copies of a record in evidence does not render the record itself inadmissible.

In Equity.

F. A. Brooks, for complainants.

S. N. Bell, Briggs & Hull, Wm. E. Chandler, and Wm. L. Foster, for defendants.

CLARK, J. The Manchester & Keene Railroad was incorporated by the legislature of New Hampshire, July 16, 1864. On the twenty-ninth of May, 1878, it issued its bonds to the amount of \$500,000, bearing date July 1, 1876, and payable July 1, 1896, with 6 per cent. interest, semi-annually. To secure the payment and interest of these bonds, it mortgaged its road and franchises, and all the property connected therewith, to Cornelius V. Dearborn, J. Wilson White, and Farnum F. Lane, trustees. By this mortgage it was stipulated that if said railroad failed for a period of six months to pay the interest of said bonds, upon a request of a majority of the holders, the trustees might declare the principal of the bonds to be payable forthwith, and make demand therefor, and for arrears of interest, and upon failure of payment of the same, within 10 days after demand, might sell the railroad, property, and franchise by public auction, and make due conveyance of the same. The railroad made default in the payment of its interest, and on the twenty-ninth day of April, 1880, Samuel W. Hale, Henry Colony, John Y. Scruton, and William P. Frye filed a bill of complaint in equity in the supreme court of New Hampshire against the Nashua & Lowell Railroad, the Manchester & Keene Railroad, and Dearborn, White, and Lane, trustees. The bill alleged that the complainants were bondholders of the Manchester & Keene road, and, among other things, that by reason of the want of care and proper management of the directors and trustees, the interest of said bonds had become overdue, and been unpaid for more than two years, though demanded, and the road itself was unused, neglected, and rapidly go-

ing to ruin. It prayed, among other things, that a receiver might be appointed for the protection and preservation of the road; that two of the trustees, Dearborn and White, might be removed, and others appointed in their places; and that a foreclosure of the mortgage might be made. Of this bill of complaint the supreme court of New Hampshire took immediate cognizance, and appointed a receiver to take possession of the road. On the eighteenth day of August, thereafter, it removed two of its trustees, Dearborn and White, and appointed James A. Weston, George A. Ramsdell, and John Kimball in their places, and that of Lane, who had resigned, and they afterwards became parties to the bill. The bill was then amended so as to allow other bondholders to come in and constitute the same a proceeding of all the bondholders who should desire to become parties thereto; and they did so come in, among others the Nashua & Lowell Railroad, which had been made party defendant in the bill. At the September trial term of the court, 1880, a hearing was had upon the bill, and the pleadings connected therewith, and certain questions of law were reserved and transferred to the full bench of the supreme court. These questions were heard at the March term, 1881, decided, and the case remanded for a decree in accordance therewith; and at the May trial term next following, a default and breach of the condition was adjudged to have taken place, and a decree entered that a foreclosure be made by a sale at auction of the road, its franchise and property, and that notice be given by publication for the presentation by the bondholders of their bonds before August 5, 1881.

At the September term, (September 2, 1881,) an order was made allowing the bondholders to hold a meeting for the choice of trustees, if they desired; and that if no such meeting was held within 10 days, the trustees which had been appointed by the court should proceed to foreclose the mortgage by a sale according to the decree of the court at the preceding May term. No such meeting of the bondholders was held, and on the twentieth day of September, 1881, in accordance with the order of the court, the trustees advertised said road, its franchises and property, for sale at public auction, Wednesday October 26th, at 12 o'clock noon, at which time the property was sold subject to the result in this suit. November 21st the trustees made report of the sale to the court, and the sale was ratified and approved. On the twenty-fourth of October, 1881, two days before the sale of the road under the order of the court was to take place, and with full knowledge of the proceedings in the supreme court of New Hampshire, either by themselves or their attorney, the complainants in this case filed their bill against all the parties complainant in the New Hampshire court; and Charles H. Campbell, who was advertised as auctioneer to sell the road, alleging that they were bondholders of said road; that the road was in default of the payment of its interest, and the condition of the mortgage broken; and asking this court to order an account to be taken of what is due

and owing to all the holders of said bond secured by the mortgage of May 29, 1878, and now payable; and that said Manchester & Keene Railroad may be ordered to pay and satisfy the same at some short day, to be fixed by the court, together with the costs of suit, and in default thereof that the said Lane, White, and Dearborn, as trustees under said mortgage, or that such other persons, if any there be, who may or shall have succeeded to the office of trustees under said deed of trust, in pursuance of the terms of said deed, in the place and stead of said Lane, White, and Dearborn, by lawful right may be required by order of this court to take possession of said Manchester & Keene Railroad, and of all the property embraced in said mortgage, and either operate the same personally, and take the earnings thereof, or else to lease said railroad to be operated by others, at a rental, for the benefit of said bondholders, as is provided in and by said deed of trust, and that the said Hale and Colony and Frye and Scruton and Campbell, and any other person or persons who may become the pretended purchasers of said railroad at such pretended sale, may be restrained from resisting the said Lane, White, and Dearborn in discharge of their duties under said mortgage pursuant to the order of this court.

To this bill of complaint the Manchester & Keene Railroad has made answer, setting forth the proceedings of the supreme court of New Hampshire, its orders and decrees in relation thereto, the sale of the road, and the foreclosure of the mortgage. Other parties defendant have made answer, but as no relief is claimed against them, those answers are not material to the decision of this case. The Boston & Lowell Railroad have withdrawn as complainants, and the remaining complainants make no denial or question of the jurisdiction of the supreme court of New Hampshire in the premises. The question then comes distinctly, whether, upon the bill and answer as thus stated, this court should grant the relief prayed for, and the answer must be that it should not. The subject-matter of the two suits—the one in the New Hampshire supreme court and the one in this court—is substantially the same: the Manchester & Keene Railroad, and its default in the payment of the interest on its bonds secured by the mortgage of May 29, 1878, and the relief of its bondholders. The relief asked was somewhat different, but the subject-matter the same. Over this matter the two courts have concurrent jurisdiction, and the rule has been established, by a long line of almost unbroken decisions, that in all cases of concurrent jurisdiction the court which first has possession of the subject-matter must decide it. Chief Justice MARSHALL thus announced the rule in *Smith v. McIver*, 9 Wheat. 532, and it has been followed in many cases since. *Mallett v. Dexter*, 1 Curt. 178; *The Robert Fulton*, 1 Paine, 621; *Ex parte Robinson*, 6 McLean, 355; *Board of F. Missions v. McMasters*, 4 Amer. Law Rev. 526; *Ex parte Sifford*, 5 Amer. Law Rev. 659; *Parsons v. Lyman*, 5 Blatchf. C. C. 170; *U. S. v. Wells*, 20 Amer.

Law Rev. 424; *Crane v. McCoy*, 1 Bond. 422; *Blake v. Railroad*, 6 N. B. R. 331; *Levi v. Life Ins. Co.* 1 FED. REP. 206; *Hamilton v. Chouteau*, 6 FED. REP. 339; *Ins. Co. v. University of Chicago*, Id. 443; *Walker v. Flint*, 7 FED. REP. 435; *Wire Co. v. Wheeler*, 11 FED. REP. 206; *Ins. Co. v. Railroad*, 13 FED. REP. 357; *The J. W. French*, Id. 916; *Stout v. Lye*, 103 U. S. 66.

The jurisdiction of the supreme court of New Hampshire first attached, and it had the right to proceed to the final determination of the cause, to the exclusion of this court upon the same subject-matter.

In *Peck v. Jenness*, 7 How. 612, Mr. Justice GRIER, delivering the opinion of the court, says: "It is a doctrine too long established to require a citation of authorities, that when a court has jurisdiction it has a right to decide every question which occurs in the cause, whether its decisions be correct or otherwise; its judgment, till reversed, is regarded as binding on every other court; and that where the jurisdiction of a court, and the right of the plaintiff to prosecute his suit in it, have once attached, that right cannot be arrested or taken away by proceedings in another court." "This rule," says the court, "is founded not only in comity, but in necessity. If one could adjudge and the other reverse, the contest might go on until parties tired, justice was delayed, and the courts were in contempt."

Again, when the bill of complaint was filed in this case, the Manchester & Keene road was in the hands of a receiver appointed by the supreme court of New Hampshire. The possession of that receiver was the possession of that court, and this court could not divest or disturb that possession, as it must do if it granted the relief prayed for. *Taylor v. Carryl*, 20 How. 583; *Hagan v. Lucas*, 10 Pet. 100; *Freeman v. Howe*, 24 How. 450; *Buck v. Colbath*, 3 Wall. 334; *Walker v. Flint*, 7 FED. REP. 435.

It is contended by the complainants that the sale of the road by the trustees under the order of the court of New Hampshire was made subject to the result in this suit, and therefore the relief prayed for should be granted; but that contention cannot be assented to. The decree of the court of New Hampshire was absolute, and without condition, that a foreclosure of the mortgage should be made by a sale of the road. That decree this court cannot reverse or set aside, as it practically must do if it now grants the relief prayed for by the complainants. The court of New Hampshire ordered the trustees to sell the road; this court is asked to order the trustees to run or lease the road for the benefit of the complainants. The one is inconsistent with the other. The sale of the road was operative to foreclose the mortgage, and transfer the road to the purchaser, divested of that incumbrance; and if so, this court cannot treat the mortgage as still subsisting, and take the road out of the possession of the purchaser or of its present owner.

An objection was made at the hearing that the original records of the court of New Hampshire, produced by the clerk, were not com-

petent evidence; that copies should have been produced. This objection the court overruled. Copies of record are admitted from necessity, because the originals cannot be produced. The originals are the best evidence, and the admission of copies does not exclude the originals when they can be produced. In *Cats v. Nutter*, 24 N. H. 108, it was held that where a copy of a record is admissible in evidence, the record itself is equally admissible. So, in *Jones v. French*, 22 N. H. 64. The papers admitted as evidence were not an extended record; none had been made, but various orders and decrees of the court, and in such case, in proceedings in equity, the original papers and docket entries will be deemed the record. *U. S. Bank v. Benning*, 4 Cranch, C. C. 81.

On consideration the ruling of the court was correct, and the bill in this case should be dismissed.

**BARTLETT and others v. HIS IMPERIAL MAJESTY THE SULTAN OF
TURKEY and others.**

(Circuit Court, S. D. New York. February 25, 1884.)

PRACTICE—SERVICE OF PROCESS ON ATTORNEY—SUIT FOR INJUNCTION.

In a suit to enjoin the prosecution of an action at law, if the defendant cannot be found in the district, process may be served upon his attorneys in the legal action.

In Equity.

Goodrich, Deady & Platt, for plaintiffs.

Tracy, Olmstead & Tracy, for American National Bank, for the purposes of this motion only.

WALLACE, J. The theory of this bill is that the complainants, as warehousemen, having been sued by the defendants severally in actions at law, to recover the possession of personal property in the custody of complainants as such warehousemen, are entitled to compel the defendants to interplead and relieve complainants from the burden of the several litigations at law. As part of the relief prayed for, the complainants seek to enjoin the defendants from their proceedings at law. For reasons which it is not now necessary to state, it may be doubtful whether the complainants can maintain their bill. The question now is, however, not whether the bill is good upon demurrer, but whether the complainants are entitled to secure the appearance of the defendants who cannot be served with process, because they cannot be found within the district by service of process upon the attorneys for the defendants in the suits at law in this district. This has long been recognized as good practice when the suit

in equity is brought to enjoin proceedings at law. As the subpoena has already been served upon the defendants' attorneys, an order authorizing such service will be granted upon presenting a sufficient affidavit.

WALLAMET IRON BRIDGE CO. v. HATCH and another.

(Circuit Court, D. Oregon. March 3, 1884.)

1. BILL OF REVIEW.

An application to file a bill of review, without the performance of the decree, ought to be made to the court by petition and on notice to the adverse party, and if it appears that the performance of the decree would destroy the subject of the litigation, it ought to be allowed.

2. SAME—HEARING.

On the hearing of a bill of review the court can only consider the errors of law apparent on the face of the record, and a fact found or determined by the decree is presumed to have been sufficiently proved by the evidence.

3. THE WALLAMET RIVER A NAVIGABLE WATER OF THE UNITED STATES.

The Wallamet river, though wholly within the state of Oregon, by means of its connection with the Columbia river, forms a highway for interstate and foreign commerce, and is therefore a navigable river of the United States, and subject, as such, to the control of congress.

4. NAVIGABLE WATERS IN OREGON ARE COMMON HIGHWAYS.

The act of February 14, 1869, (11 St. 383,) admitting Oregon into the Union, which declares that the navigable waters therein shall be "common highways and forever free" to the citizens of the United States, is not a compact made with or condition imposed upon the state in consideration of its admission into the Union, but is, so far, an absolute and valid regulation, made by congress in pursuance of its power over the navigable waters of the United States, as a means of interstate and foreign commerce, which it might as well have enacted before or after as at the time of such admission.

5. OBSTRUCTION TO "COMMON HIGHWAY."

Congress, by the act of 1869, having declared the Wallamet river "a common highway," the state cannot authorize any one to build a bridge across the same, which, under the circumstances of the case, will needlessly impede or obstruct the navigation thereof.

6. JURISDICTION OF THE UNITED STATES CIRCUIT COURT.

The Wallamet river being declared "a common highway" by congress, the question of what constitutes a needless and therefore unlawful obstruction thereto arises under a law of the United States, and therefore the United States circuit court has jurisdiction to hear and determine a suit involving the same.

7. THE ORDINANCE OF 1787.

Semble, that the clause in the fourth article of the compact in the ordinance of 1787, concerning the navigable waters of the Northwest territory, was not abrogated or superseded by the formation of states therein and their admission into the Union.

Bill of Review.

George H. Williams and *Rufus Mallory*, for plaintiff.

Walter W. Thayer and *John M. Gearin*, for defendants.

DEADY, J. This is a bill of review, filed May 27, 1883, and brought to reverse the final decree given in this court on October 22, 1881, in a suit between the parties hereto, commenced by the de-

¹Reversed. See 8 Sup. Ct. Rep. 811.

defendants herein, on January 3, 1881, to obtain an injunction restraining the plaintiff herein from further constructing a bridge across the Wallamet river, at the foot of Morrison street, in Portland, upon the ground that such a bridge as said plaintiff was then engaged in building was an unnecessary and unlawful hindrance and obstruction to the navigation of said river,—particularly with seagoing vessels,—because of the insufficient character and improper position of the piers and the lack of width in the draw; that said bridge would be a public nuisance, injurious, and damaging to the rights and interests of defendants herein, as the owners and lessees of valuable wharf property in Portland, a short distance above the site of said bridge, and contrary to the act of congress of February 14, 1859, (11 St. 383,) which provides “that all the navigable waters of said state [Oregon] shall be common highways.” An application was made to the district judge on the bill, and affidavits, and counter-affidavits for a provisional injunction, and after a hearing, in which the corporation maintained its right to build the bridge in question, under and by authority of an act of the legislature of Oregon, of October 18, 1878, authorizing the Portland Bridge Company, a corporation formed under the laws of Oregon, or its assigns, to build a bridge, “for all purposes of travel and commerce,” across the Wallamet river, between Portland and East Portland, “at such point or location on the banks of said river” as it might select, “on or above Morrison street, of said city of Portland:” “provided that there shall be placed and maintained in said bridge a good and sufficient draw of not less than 100 feet in the clear, in width, of a passage-way, and so constructed and maintained as not to injuriously impede and obstruct the free navigation of said river, but so as to allow the easy and reasonable passage of vessels through said bridge.”

On March 28, 1881, an order was made continuing the application for an injunction until the April term, and until the circuit judge should be present; and restraining the corporation in the mean time as prayed for in the bill. *Hatch v. Wallamet I. B. Co.* 7 Sawy. 127; [S. C. 6 FED. REP. 326.] On April 11, 1881, the corporation put in its answer to the bill, alleging that it was a corporation duly formed under the laws of Oregon, and the assignee of the Portland Bridge Company aforesaid; and admitted that it was building the bridge, as alleged, under authority of the act of the legislature aforesaid, except that the draw was 105 feet in the clear, instead of 100, and that the piers were sufficient and at right angles with the current; and denied the same was or would be any hindrance or obstruction to the navigation of the river, or any injury to the defendants herein. At the April term the application for a provisional injunction was further heard upon the bill, answer, and further affidavits and counter affidavits, before the circuit and district judge, the counsel for the plaintiff herein then conceding that the law of the case had been correctly

ruled on the former hearing before the district judge, (*Hatch v. Wallamet, I. B. Co., supra*), and that the only question in the case for the consideration of the court was whether, under the circumstances, the proposed bridge was an unreasonable use of this common highway; and on April 17th an order was made allowing the provisional injunction restraining the corporation, as prayed for in the bill. *Hatch v. Wallamet I. B. Co.* 7 Sawy. 141; [S. C. 6 FED. REP. 781.] Subsequently, the cause was put at issue by the filing of a replication to the answer, and testimony taken by both parties, and at the October term it was finally heard before the circuit judge, who, on October 22, 1881, gave a decree therein for the defendants herein, perpetually enjoining the corporation as prayed for in the bill, and also requiring it to remove the material already placed in the river in the construction of the piers. From this decree an appeal was allowed to the plaintiff herein on October 22, 1883.

An application was made for leave to file the bill of review, without first performing the decree requiring plaintiff therein to remove the unfinished piers from the river. The application was based upon a petition or allegation in the bill, stating the grounds thereof. Upon notice to the adverse party it was heard and allowed upon the ground that the performance of the decree, in this respect, would involve large expense and the destruction, so far, of the subject of the litigation, so that if the decree is reversed for error, the plaintiff herein will, nevertheless, suffer an irremediable loss, as in the case of the cancellation of a bond in obedience to a decree. Story Eq. Pl. § 406; *Davis v. Speiden*, 104 U. S. 83. But I think the better method of making the application is by a separate petition for that purpose, against which the adverse party may show cause and the matter be fully heard and determined thereon. The right to file the bill may depend upon a question of fact not determined or affected by the proceedings or decree in the case, as the pecuniary ability of the party to pay a given sum of money, and therefore the application should be made in such manner as will best enable the parties to be fully heard in the premises. The rule requiring the performance of the decree is said to be "administrative" rather than "jurisdictional," and therefore a bill filed without such performance or leave would give the court jurisdiction to review the decree; and if the adverse party did not move to strike it from the files, he would be held to have waived the objection. *Davis v. Speiden, supra*, 85.

The defendants herein demur to the bill, for that there are no errors in the record, nor any sufficient matter alleged in the same, to require a reversal of the decree. The bill contains an assignment of errors, 11 in number, most of which are predicated upon the reasons given in the opinion of the court allowing the provisional injunction, rather than the decree itself, and all but one are simply variations of the allegation that the court erred in deciding that the act of congress of February 14, 1859, was in any degree a limitation or re-

straint upon the power of the state to obstruct or authorize the obstruction of the navigation of the river, by the construction of a bridge of any character across the same. The exception is the assignment No. 4, which alleges that the court erred in deciding as a matter of fact that the bridge in question is or will be a nuisance and serious impediment to the navigation of the river. This is a proceeding to review the former determination of this case and obtain a reversal of the decree then given therein for errors of law apparent on the face of the record,—the pleadings, proceedings, and decree,—without reference to the evidence in the case. Story, Eq. Pl. § 407; *Shelton v. Vankleeck*, 106 U. S. 532; [S. C. 1 Sup. Ct. Rep. 491.] No question is made but that the allegations of the original bill are sufficient to authorize the decree; and the law presumes that the evidence was sufficient to sustain it. It follows, then, that for the purpose of this proceeding it must be considered settled that this bridge, as and where it was being built, is and would be, as a matter of fact, a serious and unnecessary impediment and obstruction to the navigation of the river, by reason of which the defendants herein suffered and would suffer, as riparian proprietors, special damage. But whether such obstruction is also unlawful is the question, and the only one, properly arising on this bill of review. The assignment of errors in law, as has been stated, are in effect that the act of 1859 has no application to the case; that congress has made no provision on the subject of the navigation of the river; and that therefore the whole question of the lawfulness of the proposed structure arises under the state law, and is without the jurisdiction of this court.

The argument of counsel for the corporation, in support of this conclusion, is, in substance and effect:

(1) The Wallamet river is wholly within the state of Oregon, and therefore not within the power of congress to regulate or conserve its use as a vehicle, or means of interstate or foreign commerce. Now, this proposition has no countenance or support in either reason or authority. In fact, and for all the purposes of commerce, the Wallamet river is a part of the Columbia, of which it is an important affluent or branch. Together they form, or help to form, a continuous highway between Oregon and the other Pacific states and territories and foreign countries; therefore, in contemplation of the constitutional grant of power to congress over the subject of commerce between these states and countries, and for the purpose of regulating the same, it is the property of the nation—a navigable water of the United States. The authorities from *Gibbons v. Ogden*, 9 Wheat. 1, to *Miller v. City of New York*, 3 Sup. Ct. Rep. 234—a period of 60 years—are uniform and unqualified on this point.

In *Gilman v. Philadelphia*, 3 Wall. 724, Mr. Justice SWAYNE says:

“Commerce includes navigation. The power to regulate commerce comprehends the control for that purpose, and to the extent necessary, of all the navigable waters of the United States which are accessible from a state other than

those in which they lie. For this purpose they are the public property of the nation, and subject to all the requisite legislation by congress. This necessarily includes the power to keep them open and free from any obstruction to their navigation, interposed by the states or otherwise; to remove such obstructions when they exist; and to provide, by such sanctions as they may deem proper, against occurrence of the evil, and for the punishment of the offenders."

In *The Daniel Ball*, 10 Wall. 557, it was held that Grand river, a comparatively insignificant water lying wholly within the state of Michigan, but emptying into the lake of that name, and only navigable 40 miles from its mouth to Grand Rapids, for a boat of 123 tons burden, is a navigable water of the United States, and subject to its control as a highway of commerce, interstate and foreign, on account of its junction with Lake Michigan, of which it forms a part. In delivering the opinion of the court, Mr. Justice FIELD said (page 563) the common-law test of the navigability of a river—the ebb and flow of the tide therein—does not apply to the rivers of this country:

"Those rivers must be regarded as public, navigable rivers in law which are navigable in fact; and they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water; and they constitute navigable waters of the United States within the meaning of the acts of congress, in contradistinction from the navigable waters of the states, when they form in their ordinary condition, by themselves or by uniting with other waters, a continued highway over which commerce is or may be carried on with other states or foreign countries in the customary modes in which such commerce is conducted by water."

In *Escanaba Co. v. Chicago*, 107 U. S. 678, [2 Sup. Ct. Rep. 185,] it was held that the Chicago river, lying wholly within the city of Chicago, and a little local stream, compared with the Wallamet, is a navigable water of the United States, because it leads into Lake Michigan; and in *Miller v. City of New York*, *supra*, the same rule was applied to the East river, a water wholly within the state of New York, but connecting the Hudson and the sound, and therefore a highway of interstate and foreign commerce. Mr. Justice FIELD delivered the opinion of the court in both these cases, and referred to and relied on the above citation from the opinion of the court in the case of *The Daniel Bell*. See, also, *Hatch v. Wallamet I. B. Co.*, *supra*.

(2) That if congress has the power to regulate the navigation of the Wallamet river, as a navigable water of the United States, it cannot do so by a special act, as the statute of 1850, applicable alone to the waters of Oregon, but only by a general law, which shall operate uniformly upon all such waters in the United States. And this proposition is also without a shadow of foundation in either reason or authority. It is rather late in the day to question the right of congress to exercise its authority over the navigable waters of the United States, specially,—from time to time and place to place,—as

it may consider the exigencies of commerce to require. Congress has been making appropriations from time to time, for years, to maintain and improve the navigation of the Wallamet river, but on this theory of its power all such acts are void and usurpations of power, unless a like provision was made at the same time for every other navigable water of the United States. In the last 15 or 20 years congress has legislated largely on the subject of bridges over the Ohio, Mississippi, and Missouri rivers, prescribing when, where, and how they may or may not be built, (*Hatch v. Wallamet I. B. Co., supra*;) and although important interests have been unfavorably affected by such legislation, it was never before suggested that it was invalid for want of such uniformity. It has also legislated specially upon the subject of a bridge over the East river in New York; and although the legality of this structure has since been contested from the circuit to the supreme court of the United States, (*Miller v. City of New York, supra*;) no one appears to have ever questioned the legality of the act of congress authorizing its erection and prescribing its character and location, on this or any other ground.

The vice of the argument in support of each of these propositions is the assumption that the navigable waters within a state are exclusively the waters of such state, and therefore congress has no power over them; or, if it may legislate concerning them in the interest of commerce, it can only do so by such general legislation as shall limit or affect the power of each state in the premises equally, so as to preserve, as it is said, its "equal footing in the Union with the other states." But, as we have seen, this theory of the matter is founded upon a total misapprehension of the relation of the national and state governments to the subject and to one another. For the purposes of commerce, and the exercise of the power of congress over that subject, every navigable water in the Union which of itself, or by means of its connections, forms a continuous highway for interstate or foreign commerce, is primarily the navigable water of the United States, over which it has the same power for the purposes of such commerce as if it was wholly in a territory or the District of Columbia. When and how far congress will exercise this power is a question for its determination in each case, looking to the public convenience and general welfare. In the exercise of this, as in the case of other congressional powers, no such thing as uniformity of action is desirable or attainable; and it is also to be considered that what is lawful may not always be expedient.

(3) That congress has no power, in the admission of a state into the Union, to impose, by compact or otherwise, any limitation or restriction on its powers or rights as a state, under the constitution; and therefore the act of 1859, admitting Oregon into the Union, so far as it attempts to restrict its power over the navigable waters within its limits, is void and of no effect. But admitting the premises, the conclusion does not follow. Although the grant of power to

congress to admit new states into this Union (U. S. Const. art. 4, § 3) is unqualified, yet it is well established by the supreme court that congress cannot admit a state upon any other than an equal footing with the other states therein, and therefore cannot, as a consideration of such admission, make any valid compact or enactment which shall deny to such state within its limits the municipal powers common to the others. *Pollard v. Hagan*, 3 How. 233; *Permol v. New Orleans*, Id. 609; *Strader v. Graham*, 10 How. 92. The act of 1859, admitting Oregon into the Union, contains (section 4) four propositions to the people of Oregon concerning the public lands therein, which, in consideration of a valuable grant of public land, they accepted by an act of the legislature of June 3, 1859. Or. Laws, 101. But the admission of the state was not conditioned upon the acceptance of these propositions, and in fact preceded it. Nor did the state, in accepting it, undertake to relinquish any power or right that belonged to it, as a state of the Union, unless it is the right to tax "non-resident proprietors" higher than "residents." Therefore, this portion of the act is valid, without reference to such acceptance, as a congressional enactment respecting the disposition of the public lands in Oregon. U. S. Const. art. 4, § 3; *Pollard v Hagan*, 3 How. 224.

But the clause in section 2 of the act of 1859, declaring the navigable waters in Oregon to be "common highways," is no part of these propositions, and does not even purport to derive its force or vitality from this or any compact, but solely from the fact that it is an act of congress, duly passed by it in pursuance of its power to regulate commerce. The admission of the state and the enactment of the regulation are simply coincident in point of time. The one was admitted unconditionally and the other enacted absolutely; and the regulation might have been enacted on the day before or the day after the admission, or at any time since as well as then. But even if it had been made a condition of the admission of the state into the Union that the people thereof should consent to this regulation, it would nevertheless be valid, as an act of congress, because that body had the power to pass it without their consent. Their consent would add nothing to its force or validity. In the leading case on this subject of *Pollard v. Hagan*, *supra*, the court say (page 229) of the following declaration contained in the compact entered into between the United States and Alabama, upon the admission of the latter into the Union, "that all navigable waters within the said state shall forever remain public highways, free to the citizens of said state and the United States, without any tax, duty, impost, or toll therefor, imposed by the said state," (3 St. 492,) that it was nothing more than a regulation of commerce, and, as such, a valid and binding act of congress, without reference to the supposed compact or the consent of the people of Alabama.

(4) That the provision in section 2 of the act of 1859—"all the navigable waters of said state [Oregon] shall be common highways

and forever free, as well to the inhabitants of said state as to all other citizens of the United States, without any tax, duty, impost, or toll therefor"—was not intended, and should not be construed as a restriction or limitation on the power of the state to impede and obstruct the navigation of the Wallamet river at its pleasure, but only on its power to impose a toll upon any citizen of the United States on account of such navigation. This clause had its origin in the fourth of the articles of compact of the ordinance of 1787, for the government of the Northwest territory, in which it was provided that "the navigable waters leading into the Mississippi and the St. Lawrence, and the carrying places between the same, shall be common highways and forever free, as well to the inhabitants of said territory as to the citizens of the United States, and those of any other states that may be admitted into the confederacy, without any tax, impost or duty therefor;" and has been applied to the states admitted to the Union since the formation of the constitution, and formed out of territory other than that included in the ordinance, it being generally supposed, until a comparatively late day, that these articles of compact, and particularly the clause in question, continued in force in the states formed out of such territory, except so far as altered by "common consent." *Strader v. Graham*, 10 How. 97, McLEAN and CATON, JJ.; *Palmer v. Com'rs Cuyahoga Co.* 3 McLean, 226; *Columbus Ins. Co. v. Curtenius*, 6 McLean, 209. It is admitted that the provision does prohibit this state from imposing any tax or toll on any citizen of the United States on account of the navigation of the river. But the authority of the national government to restrain the state in this particular is no clearer than it is to prevent the state from authorizing or causing obstructions to the navigation of the river that may as effectually deprive the citizen of the United States of its use as a highway as any tax or toll could.

Counsel for the plaintiff herein contend that the words "common highways forever free," taken in connection with the rest of the sentence, show that the paramount purpose of this legislation "was to prevent any discrimination between the citizens of the United States," in the imposition of tolls on account of the navigation of the river. But there is no ground for this construction, for plainly the clause does not rest with the prohibition of discrimination in the imposition of such tolls, but goes further, and prohibits them altogether, as well in the case of the citizens of the state as of the United States. But the clause contains two distinct provisions—the one an absolute prohibition against the imposition of tolls for the navigation of the river, and the other a declaration that the river shall remain a "common highway" for the use of all the citizens of the United States. The two things are separate and distinct, and one is not to be considered the mere adjunct or amplification of the other, because it is found in the same sentence. The maxim, *noscitur a sociis*, does not apply. And if either provision can be considered as subordinate to the other, it is

the one against tolls. A highway is a public way upon which all persons have a right to pass; and a public river is such a way, since it is open to all the king's subjects. Rap. & Law, Law Dict., "Highway;" 2 Smith, Lead. Cas. 175.

A declaration or act of the congress of the United States that a navigable water thereof shall be a "common highway," imports, *ex vi termini*, that such water shall not be closed up or obstructed by dams, booms, bridges, or otherwise, so as to materially impede or hinder the navigation of the same. And being a highway, no toll can be charged for travel thereon, except by consent of the sovereign power which declared and made it such,—the congress of the United States,—and they have been forbidden it to be done. The plain purport and effect of the statute is this: (1) The Wallamet river is declared and made a "common highway" for the use of all the citizens of the United States; and (2) it shall be a "free" highway, upon which no toll, tax, or impost shall be charged. Being a "common" highway, it is open to all citizens; and being also "free," it is open to them without toll or tax. From these premises, the conclusion follows that any obstruction to the navigation of this river, which materially impairs its use as a "common highway," is contrary to the act of congress, and therefore illegal, whether authorized by the legislature of the state or not. It also follows that a case involving the question whether any bridge or other structure is such an obstruction, is a case arising under a law of the United States, and therefore within the jurisdiction of this court. Act of 1875, (18 St. 470.) The court then had jurisdiction to hear and decide the question whether this bridge is or would be such an obstruction to the use of this highway as is forbidden by the act of congress. Whether it properly decided the question or not is a matter depending upon the circumstances of the case as disclosed by the evidence, and cannot be considered in this proceeding. The way to determine that is by an appeal from the final decree in the original case to the supreme court, where the whole question can be considered on its merits. And in this connection it should be remembered that the court did not decide that the act of 1859 prohibited the erection of *any* bridge across the Wallamet. It prohibits, of course, the erection of a low, solid bridge, for that would be an impassable barrier—a complete closing of the highway. And it is equally certain that it does not prohibit the erection of a high, suspension bridge under which vessels navigating the river might pass without hinderance or delay. Neither does it prohibit a low bridge, properly constructed with a good and sufficient draw, through which vessels may pass without unnecessary danger or delay—the commerce, size, and condition of the river, as well as the state of the art of such bridge building being taken into consideration. It is well known that all highways, whether of land or water, are subject to be crossed by other highways. The commerce of the country cannot be conducted on parallel lines. But where and in what manner such crossing shall

be made or allowed depends largely upon the particular circumstances of each case. *Hatch v. Wallamet I. B. Co.*, *supra*.

But the court found upon the evidence that, all the circumstances considered, the draw of the proposed bridge was altogether inadequate; that it ought to be at least 150 feet wide on either side of the pivot pier, as provided in the act of congress of June 23, 1874, (18 St. 281,) authorizing the Oregon & California Railway Company to bridge the river at this place; and therefore it was a material as well as needless obstruction to the navigation of the river, causing danger and delay to the passage of vessels thereon. Neither did the court hold that such a bridge was even authorized by the act of the legislature of October 18, 1878. That act requires not only that the bridge shall have a draw of not less than 100 feet in width, but that it shall be "so constructed and maintained as not to injuriously impede and obstruct the free navigation of said river, but so as to allow the easy and reasonable passage of said vessels through said bridge.

Upon this point the conclusion of the court was that the legislature did not intend to declare that a draw of only 100 feet in width is sufficient, or to authorize the construction of a bridge otherwise than with a draw sufficient for the easy and safe passage of vessels, whether that must be one or two hundred feet in width, but that if it did, the act was invalid, because contrary to the act of congress, which on this point is the supreme law of the land. *Hatch v. Wallamet I. B. Co.*, *supra*.

And in this connection the court is reminded by counsel for the plaintiff herein "that it is a delicate duty for a court to declare an act of the legislature invalid." Of course, the court will not do so unless the conflict between it and the act of congress is plain. And for this reason the act of the legislature is to be construed, if it reasonably can, so as to prevent such conflict, and make it harmonize with supreme law. But really it is well to remember, in a case like this, that the interested parties who prepare and procure the passage of an act granting themselves some special privilege or franchise like this are more responsible for it than the members of the legislature. The average member, having no special interest in the matter, and knowing little, if anything, about it, but seeing that the act contains a plain provision that the bridge shall be built with a good and sufficient draw anyhow, with that understanding gives his consent to its passage; and I think it ought to be so construed by the court. Considered in this, its true light, the act is only a license to the corporation named therein, or its assigns, to build a draw-bridge at this point, subject to the act of congress of 1859; or, in other words, so as not needlessly to impede or obstruct the navigation of the river, considered as a "common highway." Beyond this the legislature could not go, and it is not to be presumed that it so intended.

The decision in *Escanaba Co. v. Chicago*, *supra*, so much relied on by the plaintiff herein, is not in conflict with these views. In a legal

point of view, the case is not new, though it contains some wholesome suggestions upon the application of the law to the facts and circumstances of that case, which are peculiar and altogether different from this. A small bayou, called a river, with a current less than a mile an hour, not a mile in length below its two branches, not exceeding two miles in length each, not naturally over 150 feet in width, and lying in the heart of a great city, was deepened and widened so as to serve as a canal or convenient water-way, whereon to move the lake boats from the harbor in the lake outside, into which it drained, to the docks and warehouses along its banks. Over it there are a number of draw-bridges, erected by public authority, on which pass daily great numbers of people, particularly in going to and returning from their business and employment in the morning and evening. Amer. Cyclo. Chicago. The city, by the authority of the state, and with a view of preventing the inconvenience resulting from the unregulated and conflicting use of the bridges and the water-way, passed an ordinance requiring the draws to be closed for the benefit of the land travel for one hour in the morning and evening, and limiting the period during which a draw might be kept open for the passage of vessels to 10 minutes at any one time. The suit did not involve the right to build the bridges, nor the sufficiency of the draws. The right of the city on both these points was taken for granted, and the only question made and decided was whether, under the circumstances, this was a reasonable regulation, one that did not needlessly obstruct the use of the water-way, and the court, if I may be allowed to say so, very properly and wisely held that it was. The case was brought in the circuit court of the United States upon the assumption that the provision of the fourth article of compact of the ordinance of 1787, whereby the navigable waters of the Northwest territory were declared "common highways" was still in force in Illinois, and therefore the reasonableness of the city ordinance, when judged by this United States law, was a federal question, and the national courts had jurisdiction of the case, and the decision was actually made upon this hypothesis. But the learned justice who delivered the opinion of the court went further, and said that by the admission of Illinois into the Union "on an equal footing with the original states in all respects whatever," the ordinance ceased to have any effect within her limits, and therefore there was no law of the United States regulating the use of the navigable waters of the United States within the state of Illinois, and therefore the latter was the judge of what was reasonable in the premises.

The cases cited in support of this latter conclusion are *Pollard v. Hagan*, 3 How. 212; *Permoli v. New Orleans*, Id. 589; and *Strader v. Graham*, 10 How. 82. By the first one, as we have seen, it was simply held that congress cannot, by any compact or condition made with or laid upon a state on her admission into the Union, restrain or limit her municipal power as such state, but that, if the subject of

the compact or condition is within the power of congress to enact or regulate, without the consent of the state,—as to declare that the navigable waters therein shall be “common highways,”—it is good as a law. In *Permoli's Case* the court only held that so much of the articles of compact as secured religious freedom to the inhabitants of the territory of Orleans—the same having been specially extended there by congress—ceased to have any force or effect therein upon the admission of the territory into the Union as the state of Louisiana, because the subject of religious freedom in a state was beyond the power of congress, and exclusively within that of the state. In *Strader's Case* it was decided on a writ of error to the supreme court of Kentucky that the condition of a negro held as a slave in that state, and who had been allowed to visit Ohio, but afterwards returned, was, after such return and in said state, a question arising solely under the laws of Kentucky, and therefore not within the jurisdiction of the supreme court. But, in delivering the opinion of the court, Mr. Chief Justice TANEY, referring to some sort of claim that had been made in the argument that the provision in the articles of compact of the ordinance of 1787, prohibiting slavery in the Northwest territory, of which Ohio was a part, had some bearing on the question of the *status* of the negro, denied that it could have any effect outside of such territory; and then took occasion further to say that the ordinance was no longer in force, even in Ohio, where it had been superseded by the organization and admission of the territory into the Union as a state, and added that it had been so decided in the cases of *Permoli v. New Orleans* and *Pollard v. Hagan*, *supra*. But this statement, though true generally, and in the light in which the chief justice was considering the articles—that is, so far as they trench upon the municipal power of the state, or were inconsistent with its control over its domestic affairs,—was not otherwise accurate or correct. And for this reason both Justices McLEAN and CATRON, while assenting to the decision that the ordinance had no application to the case, in any view of the matter, and that the court had no jurisdiction to review the judgment of the Kentucky court, protested against this *dictum* of the chief justice, the latter putting his dissent especially on the navigation clause of the fourth article of the compact, and saying:

“For thirty years, the state courts within the territory ceded by Virginia have held this part of the fourth article to be in force and binding on them respectively; and I feel unwilling to disturb this wholesome course of decision, which is so conservative of the rights of others, in a case where the fourth article is nowise involved, and when our opinion might be disregarded by the state courts as *obiter* and a *dictum* uncalled for.”

And as we have seen, the only question decided in *Permoli's Case* was that the clause in the compact securing religious freedom to the inhabitants of the territory was necessarily superseded upon its admission into the Union as a state, while it is admitted that the principle

of this ruling would include all similar provisions in the compact. In *Pollard v. Hagan*, while it was held that a state could not be hampered or bound, in its admission into the Union, with conditions or compacts that would limit or restrain its municipal power and right, as compared with the other states therein, it was distinctly decided that the clause in the ordinance, as applied to Alabama by the act of congress of March 2, 1819, (3 St. 489,) authorizing the people of that territory to form a constitution, declaring the navigable waters of the future state "common highways," was not such a condition, but a valid law which congress had the power to enact, whether the waters were within a state or territory.

I, therefore, respectfully submit that the clause in the fourth article of the compact in the ordinance of 1787, relating to the navigable waters in the Northwest territory, having been enacted by congress, (1 St. 50,) was a valid commercial regulation as to the navigable waters in said territory or the states afterwards formed therein until repealed by it, and therefore it is still in force in Illinois. But be this as it may, the decision does not touch the question of the validity or force and effect of the act of 1859. For on what possible ground can it be claimed that the admission of Oregon into the Union set aside or superseded an otherwise valid clause in the very act of admission, declaring the navigable waters of the future state "common highways?"

This case, having been heard before the circuit judge, and the decree under review having been made by him, I thought I ought not to decide the matter without consulting him. Accordingly, I submitted this opinion to Judge SAWYER, with copies of the briefs of counsel, and he has authorized me to say that he concurs in it.

There being, then, no error in the original decree, as it appears to this court, the demurrer to the bill of review must be sustained, and the bill dismissed, and it is so ordered.

**DUNDEE MORTGAGE, TRUST INVESTMENT Co. v. SCHOOL-DIST. No. 1,
MULTNOMAH Co., and others.**

(Circuit Court, D. Oregon. March 6, 1884.)

1. MULTIPLICITY OF SUITS.

Equity has jurisdiction to enjoin the collection of a tax levied under an invalid law, when necessary to prevent a multiplicity of suits.

2. STATE STATUTE INVOLVING FEDERAL QUESTION.

In construing or determining the validity of a state statute involving a federal question, the national courts are not bound by the decision of the state court.

3. IMPAIRING THE OBLIGATION OF A CONTRACT.

At the date of the execution of a note and mortgage, the law of the state required the mortgaged premises to be assessed at their full cash value for taxa-

tion, and afterwards an act was passed requiring the note and mortgage to be assessed at its par value for taxation, and exempting so much of the land from taxation; *held* that the latter act did not impair the obligation of the contract between the creditor and the debtor.

4. STATE POWER OF TAXATION.

The state has power, so long as it does not trench upon the constitution of the United States, to tax all persons, property, and business within its jurisdiction or reach; and whether any person, property, or business is so within its jurisdiction is not a federal question, and must be determined by the state for itself.

5. UNIFORM AND EQUAL TAXATION.

An act of the legislature, providing for the taxation of mortgages as land, which, in effect, exempts all such mortgages from such taxation upon land in more than one county, violates section 1 of article 9 of the constitution of the state, which requires that taxation shall be uniform, and imposed according to its value, upon "all property" not specially exempted therefrom, and is therefore void and of no effect; and, *semble*, that such act is also a "special" one for "the assessment and collection of taxes," and therefore in violation of subdivision 10 of section 23 of article 4 of the constitution of the state.

6. DUE PROCESS OF LAW.

The enforcement by the state of a tax levied under a void law is a deprivation of property without due process of law, contrary to section 1 of the fourteenth amendment to the constitution of the United States.

Suit to Enjoin the Collection of a Tax.

William H. Effinger, Charles B. Bellinger, and W. D. Fenton, for plaintiff.

William B. Gilbert, H. Hurley, and Walter W. Thayer, for defendants.

DEADY, J. This is an application for a provisional injunction on the bill filed herein, on December 31, 1883, to restrain the defendants hereinafter named, and others, from selling and disposing of sundry notes and mortgages belonging to the plaintiff, for the non-payment of taxes levied thereon, in the district and counties where the mortgaged premises are situate, under the provisions and by the authority of the act of the legislature of Oregon, entitled "An act to define the terms 'land' and 'real property' for the purposes of taxation, and to provide when the same shall be assessed and taxed," etc., approved October 26, 1882. The defendants—the school district No. 1, and George C. Sears, the sheriff of Multnomah county—were duly served with a subpoena to answer, and an order to show cause why the provisional injunction should not issue; and the defendant E. B. Collard, the sheriff of Yamhill county, appeared and showed cause against the application, without service. None of the other defendants were served with the subpoena or order, or appeared.

From the bill it may be gathered that the plaintiff is a foreign corporation, duly incorporated under the laws of Great Britain, with its "principal office at the burg of Dundee, Scotland." That for some years it has been and now is carrying on in this state, and by the permission thereof, the business of loaning money upon promissory notes secured by mortgage or real property therein, and payable in a certain period of years, with lawful interest, at Dundee,—each of such notes containing, in addition to the ordinary promise to pay, these

words: "This note is given on an actual loan secured by a mortgage, by the terms and conditions of which this note is to be governed." That the money thus loaned is obtained from residents of Great Britain "on bonds or mortgage debentures" that entitle the holders thereof to be paid out of the assets of the plaintiff, including these notes and mortgages. That the plaintiff, as the successor and assignee of sundry similar corporations heretofore organized in Dundee, and engaged in the like business in Oregon, is the "owner and holder" of certain notes and mortgages made and executed to said corporations for money loaned in Oregon, and is also the "owner and holder" of certain other notes and mortgages made and executed to itself for money loaned therein, amounting in the aggregate to two and a half millions of dollars; upon all of which said "bond and debenture holders" have a lien for the money advanced by them to the plaintiff and its said assignors. That the said loans were all made before October 26, 1882, except one in Marion county for the sum of \$19,000, and that they will become due and payable at periods varying from one to five years hence. That the notes and mortgages aforesaid were made and executed within this state, and afterwards transmitted to the "home office, Dundee," where they are kept until the borrower desires to pay the same, when they are returned here for that purpose. That the defendants, the school districts No. 1 and No. 18, and the several counties of which the other defendants are the sheriffs, respectively, have assessed said notes and mortgages, under the act of 1882, aforesaid, for taxation, within the respective districts and counties, so far as the mortgaged premises are therein situate—said district No. 1 having assessed the same within its limits at \$165,510, and levied a tax thereon of \$827.55; the county of Multnomah at \$209,600, and levied a tax thereon of \$3,269.76; and the county of Yamhill at \$——, and levied a tax thereon of \$834.46. And said defendants have demanded payment of the same, and are about "to coerce the payment" thereof, by the sale of the notes and mortgages so assessed. And that said assessment and levy are unlawful, because the act under which they were made, and the defendants are proceeding, is void and of no effect, for the reason that it is contrary to the constitution of the United States, and the state; and that such debts and mortgages are beyond the jurisdiction of the state.

From the affidavit of the defendant George C. Sears, filed at the hearing, it appears that "several" of the notes and mortgages assigned to the plaintiff and assessed for taxation in school-district No. 1 and the county of Multnomah "were made to William Reid, manager," and payable in the state of Oregon; that the corporations of whose notes and mortgages the plaintiff has become the owner by assignment, as aforesaid, during all the time they did business in Oregon had a managing agent residing herein, and duly appointed under the laws of Oregon, concerning foreign corporations doing business here, (Or. Laws, p. 617, §§ 7, 8;) and the plaintiff, during

the period it has done business here, has had a like agent in the state, whose business, in either case, it was and is to receive applications for loans and make the same; that in the course of such business such agents have retained in this state all money received on said loans, whether of principal or interest, and reloaned the same herein; and that a "large proportion" of the mortgages, upon which the collection of the tax is by this suit sought to be enjoined, were made to secure loans of money so received and reloaned within this state.

The act of 1882 provides that a mortgage, "whereby land or real property, situate in no more than one county of this state, is made security for the payment of a debt, together with such debt, shall, for the purpose of assessment and taxation, be deemed and treated as land or real property," (section 1,) and "shall be assessed and taxed to the owner of such security and debt in the county, city, or district in which the land or real property affected by such security is situated;" and "the taxes so assessed and levied on such security and debt shall be a lien thereon, and the debt, together with the security, may be sold for the payment of any taxes due thereon, in the same manner and with like effect that real property or land is sold for the payment of taxes." Section 2. The owner of such mortgage, "for the purpose of assessment and taxation" shall "be deemed to be the person to whom the security was given in the first instance," unless the contrary appears on the record thereof; and "all assignments and transfers of a debt" so secured shall, for the purposes aforesaid, "be null and void," unless the same "is made in writing upon the margin of the record of the security;" and all mortgages "hereafter executed, whereby land situated in more than one county in this state is made security for the payment of a debt, shall be void." Section 3. For the purposes aforesaid, no payment on any debt so secured shall hereafter be considered by the assessor unless indorsed "on the margin of the record of such security;" and "the assessor shall assess such debt and security for the full amount of such debt that appears from the record of such security to be owing," unless in his judgment the property by which such debt is secured is not worth that amount, in which case he shall assess the same "at their real cash value." Section 4. A debt so secured on "property situated in no more than one county in this state, shall, for the purposes of taxation," be considered "as indebtedness within this state," and the person owing the same may deduct the amount from his assessment as such indebtedness." Section 8. No "writing which is the evidence of a debt," wholly or partly so assessed, "shall be taxed for any purpose in this state," but such debt and "the instrument by which it is secured, shall, for the purpose of assessment and taxation," be deemed real property, and "together be assessed and taxed" as therein provided. Section 10.

Sections 5, 6, and 7 of the act relate to the duties of the county clerk in furnishing the assessor with a statement of the unsatisfied mortgages on record in his office, and recording the assignments of such mortgages and of all payments thereon.

The real purpose and intent of this act is not far to seek or hard to find. And, *first*, it is not, as suggested in the brief of counsel for the defendants, to tax the mortgagee's interest in the land to the mortgagee and the remainder to the mortgagor. But the purpose is to tax the "debt" of the mortgagee and "the instrument by which it is secured," and by deducting the amount thereof from the value of the land so far exempt it from taxation. In other words, it is a scheme to tax the debt of the mortgagee, and so far exempt the land of the mortgagor; and not only this, but to tax the debt, not at the residence of the creditor, but the debtor, in the county or district where the mortgaged premises are situate. The debt and mortgage are not the land, and not even a legislative act can make them so; but they are to be deemed and considered such, as a matter of convenience, for the purpose of assessment and taxation, and the collection of the tax.

For many years prior to this act the law was such that a debt was taxed, or supposed to be, at the residence of the creditor, and the debtor was allowed to deduct the amount thereof from his assessment, provided the debt was owing in the state. The result was that the par value of the domestic indebtedness of the country, being deducted from the value of the land, as appraised for taxation, about one-third of its cash value, the value of lands left subject to taxation was very much reduced. In the rural districts, where the principal property is land, and borrowers are more numerous than lenders, the assessment rolls grew very light. The value of the land in a county, as appraised for taxation, was largely swallowed up in its indebtedness, while this was principally owned without its limits, and if it paid taxes at all, did not do so in the county where it was owing and secured, and had taken the place of the land. As an illustration, take the case of a farmer in Linn county. He owns a farm worth, in cash, \$10,000. He borrows from some person or corporation in Portland \$5,000, and gives a mortgage upon his farm to secure the payment of the same. The county assessor, chosen by himself and neighbors for that special purpose, estimates the cash value of the farm, for the purpose of taxation, at not exceeding \$5,000, and, it may be, at only \$3,000. From this false valuation the farmer is allowed to deduct his indebtedness at its par value, and thereby escapes taxation. But the county gets no revenue from \$10,000 worth of land situate within its limits. Getting in debt becomes a recognized mode of escaping taxation. To correct this evil the legislature, instead of retracing the steps which led to it, by taking measures to secure obedience to the law requiring each "parcel of land" to be appraised for the purpose of taxation at its "full cash value,"

(Or. Laws, 754, § 29,) and to prevent the deduction of any indebtedness from such valuation, concluded, in its wisdom, to go further in the doubtful direction it was already traveling. 'And to this end it passed this act to secure the taxation of the indebtedness deducted from the valuation of the land in the county where the land lies, so far, at least, as it was secured thereby. And, to make this right of deduction uniform, it also allows the debtor to deduct his indebtedness from the valuation of his land, if secured thereon, without reference to the residence of the creditor, by declaring that such a debt shall be deemed an "indebtedness within this state," and therefore taxable in place of the land, and in the county where the land is situate.

Counsel for the plaintiff contends that this assessment and taxation of its notes and mortgages are illegal and void for the following reasons: (1) The act of 1882, under which it is made, impairs the obligation of the contract between the plaintiff and its debtors, by which the latter were bound to pay the taxes on the land covered by the mortgage; (2) the debts and mortgages of the plaintiff are in fact and in contemplation of law existing and owned without the limits of the state, as its residence is Dundee, and therefore beyond the jurisdiction of the state either to assess, tax, or sell; (3) this assessment and taxation are contrary to the constitution of the state of Oregon, which declares (article 9, § 1) that the "legislative assembly shall provide by law for *uniform* and *equal* rate of assessment and taxation, and shall prescribe such regulations as shall secure a just valuation for taxation of *all property*, both real and personal, excepting such only for municipal, etc., purposes as may be specially exempted by law," and therefore void, because the act under which it is made arbitrarily and unjustly discriminates between debts and mortgages on land in no more than one county, and those on land on more than one county, and therefore does not provide for a "uniform" assessment of debts secured by mortgage or for "a just valuation for taxation of *all property*," but the contrary; and (4) that the act of 1882 being void, the collection of the tax levied under it would so far deprive the plaintiff of its property without due process of law, contrary to the constitution of the United States. Fourteenth amendment, § 1.

The jurisdiction of the court on the ground of the diverse citizenship of the parties is admitted, and its power to grant the relief sought, on the ground of preventing a multiplicity of suits and irreparable injury, is tacitly conceded. In this respect the case falls within the rule laid down by this court in *Coulson v. City of Portland*, 1 Deady, 494. See, also, Pom. Eq. Jur. §§ 243-275. The validity of the act is questioned in the bill upon other grounds than these, as that it unlawfully discriminates between secured and unsecured debts evidenced by promissory notes, and that it was not passed in conformity with the requirements of article 4, § 19, of the constitution

of the state, concerning the reading of bills during their passage through the legislature. But they were not pressed on the argument.

In *Mumford v. Sewall*, (Daily Oregonian, May 25, 1883,) the supreme court of the state held that the act was duly passed, and that the legislature has the power to authorize and require the taxation of mortgages on real property in Oregon, irrespective of the residence of the owner of the debt thereby secured, and that the act in no way impairs the obligation of the contract between the parties thereto: but whether the state has power to tax such a debt when payable to a non-resident was not decided. The national courts are not bound by the judgment of a state court, sustaining the validity of a state statute, so far as a federal question is involved therein. *Louisville & N. R. Co. v. Palmes*, 3 Sup. Ct. Rep. 193, and cases there cited. Therefore, the question of whether the act of 1882 impairs the obligation of the contract between the plaintiff and the maker of any of these notes and mortgages, is an open one in this court.

It does not distinctly appear from the bill how the alleged obligation of the mortgagor to pay the taxes on the mortgaged premises arose. The first impression is that he directly contracted with the mortgagee to do so, but as no such contract is set out, in either words or substance, the inference is that none was made, and that the alleged liability of the mortgagor to pay such taxes was simply owing to the fact that, by the law as it stood when the loan was made, the land was taxed as the property of the mortgagor, and the mortgage was exempt. But, in any case, the act taxing the debt and mortgage of the plaintiff and exempting a corresponding value in the land from taxation does not impair the obligation of the contract. The state is no party to this contract; and its power of imposing and collecting taxes upon persons, property, and business within its jurisdiction cannot be affected or restrained by it. True, the laws in force when the mortgage is made, defining what constitutes a valid mortgage and prescribing the remedy for its enforcement, are to be regarded as part of the contract; and any essential change in these, is so far invalid as impairing the obligation of the contract. But a law imposing taxes upon the subject of the contract or the property affected by it, or exempting either therefrom, is no part of such contract; and is so far within the power of the state to alter or repeal from time to time as the public good or convenience may require.

It may be admitted that any provision in the mortgage itself or in a contemporary statute, providing who, as between the parties thereto, shall pay the taxes imposed by the state on the mortgaged premises, or the debt or mortgage itself in lieu thereof or otherwise, is beyond the power of the state to alter or modify to the prejudice of either party. To do so would impair the obligation of the contract. But when and to what extent taxes shall be levied is a question for the state to decide. Parties interested in property liable to taxation may contract, as between themselves, on whom the burden of such

taxation shall ultimately fall, but they cannot by such means limit or control the power of the state in placing or apportioning this burden in the first instance, nor in enforcing its payment or collection accordingly.

The liability of the mortgagor to pay taxes on the mortgaged premises at the time of the execution of the mortgage was primarily to the state. It arose out of a law of the state, and not the contract with the plaintiff; and might thereafter be modified or discharged by the authority of the same, without any reference to the agreement or wishes of the parties. As a means of protecting himself against the delinquency of the mortgagor in this respect, the statute in force since 1854 (Or. Laws, p. 770, § 105) expressly provides that the mortgagee may pay any delinquent tax on the mortgaged premises, and add the amount to his mortgage, and enforce the collection of the same as a part thereof. But whether this provision, or an express agreement to the same effect, should be construed to include taxes levied under a subsequent statute on the debt or mortgage itself, or both of them, in place of the land, or so much of its value as being within the equity of the statute or contract, is a judicial question between the parties to the mortgage, and one over which the state has no legislative control. And if it should be determined in the negative it would only add another to the many instances in which statutes and contracts made in contemplation of future events have not been found broad or full enough to comprehend and provide for all the changes and contingencies that may occur in the course of time in human affairs. But it is to be understood that the contract by which the parties to a loan or mortgage may provide between themselves, for the payment of taxes imposed thereon or thereabout, is otherwise lawful when made. Neither is it material in this connection that the holders of the mortgage debentures issued by the plaintiff in Scotland, and upon which it obtained the money loaned on these notes and mortgages, may be inconvenienced or even injured by the enforcement of this tax in the mode prescribed, or that such notes may thereby lose their negotiability. The act is not responsible for the inconveniencies which may result from disobedience to it. The restriction placed upon the negotiability of the notes by the act is only for the purpose of taxation, and can be of no inconvenience to any one except in a case of delinquency, and then the blame must rest on the delinquent. Nor is it material, if true, that the plaintiff may not be able to pay these debenture holders the rate of interest on their money that it expected or agreed to, because of the imposition of this tax. If the power of the state to levy taxes was in any way limited or restrained by the fact that its exercise might hinder or prevent any one from performing his contract with another, it would be useless. If A. rents a mill of B., and afterwards becomes unable to pay the rent on account of a tax which the state imposes on his business, it cannot be admitted for a moment that the act imposing this

otherwise valid tax is void, on the ground that it impairs the obligation of its contract to pay the rent. It may have impaired his ability or means of performing his contract, and so might a fire or flood, but the obligation to perform the contract would be untouched in either case.

But I suspect the truth about this complaint is that, after the payment of this tax in addition to the interest due the debenture holders, the profits accruing to the plaintiff are just so much diminished; but that may happen to any one who loans money in a country where mortgages are taxable or liable to become so. Whether these notes and mortgages are within the jurisdiction of the state, for the purpose of taxation, is a question in this case, but not, as I understand, a federal one. There is no provision in the constitution or laws of the United States that can be invoked to prevent the state from taxing any property on the ground that it is not within its jurisdiction. The power of a state to levy and collect taxes is not directly limited or restrained by the national constitution, except in the case of duties on "imports and exports" and "tonnage." U. S. Const. art. 1, § 10. In a few other cases it is so restrained, incidentally and by implication, as that the obligation of a contract shall not thereby be impaired, or that the powers of the national government, or the agencies by which they are exercised, shall not be hindered or interfered with. *Railroad Tax Case*, 8 Sawy. 250; [S. C. 13 FED. REP. 722.] All other limitations upon this sovereign power must be found either in the constitution of the state or the wisdom and justice of the legislature and people. So long as a state does not intrench on the constitution of the United States, it may tax anything within its reach,—anything it can lay its hands on, and subject to its power. *Kirtland v. Hotchkiss*, 100 U. S. 498. It follows that this court, in deciding this question of the taxability of these subjects by the state, will be governed by the decisions of the supreme court of the state. In *Poppleton v. Yamhill Co.* 8 Or. 341, it was held that notes and mortgages are personal property, and, as such, subject to assessment and taxation. In *Mumford v. Sewall*, *supra*, as we have seen, the court held that a mortgage upon real property in this state is taxable by the state without reference to the domicile of the owner, or the *situs* of the debt or note secured thereby. And this conclusion is accepted by this court as the law of this case. Nor do I wish to be understood as having any doubt about the soundness of the decision.

A mortgage upon real property in this state, whether considered as a conveyance of the same, giving the creditor an interest in or right to the same, or merely a contract giving him a lien thereon for his debt and the power to enforce the payment thereof by the sale of the premises, is a contract affecting real property in the state and dependent for its existence, maintenance, and enforcement upon the laws and tribunals thereof, and may be taxed here as any other interest in, right to, or power over land. And the mere fact that the

instrument has been sent out of the state for the time being, for the purpose of avoiding taxation thereon or otherwise, is immaterial. But the right to tax the mortgage may not give the state any direct power over the debt, when the same is actually held without the limits of the state. But indirectly it does. A sale of the mortgage, although it would not carry with it the debt, would separate them, and leave the latter without any security. A purchaser of the mortgaged premises from the mortgagor, who has or may purchase the mortgage when sold for taxes, would thus unite in himself the interest of both mortgagor and mortgagee, and hold the property discharged from the debt.

But counsel for the defendants claim that these debts are actually within the jurisdiction of the state for the purposes of taxation, on the ground that the plaintiff and its assignors in the transaction of their business here, out of which these notes and mortgages arose, maintained an agent in the state under the foreign corporation act. Or. Laws, p. 617, §§ 7, 8. As to any of the foreign corporations required by that act to appoint an agent to represent it within the state, before doing business here, it is clear to my mind that, as to such business, and for the purposes of taxation, it is a domestic corporation, having a residence within the state. But in the case of *Oregon & Wash. T. & I. Co. v. Rathbun*, 5 Sawy. 32, this court held that a foreign corporation engaged in loaning its own money in this state was not within the purview of the act, as limited by its title, and therefore not required to appoint such agent before doing business here. But admitting that the plaintiff was not required, while doing business in Oregon, to appoint and keep an agent here under the foreign corporation act, nevertheless it appears to be a fact that the business out of which these notes and mortgages arose was done here through an agent, resident in Oregon. The money of the plaintiff was sent here to be loaned by this agent upon applications made and accepted here. And although the notes were made payable to the plaintiff in Dundee, and with the mortgages sent there for safe keeping, they are and have been returned here for payment, and the money received on them reloaned here. It is altogether probable that the otherwise useless ceremony of making these notes payable in Dundee, and sending them there for custody until their maturity, and then returning them here for payment and collection, is a mere shift to avoid taxation thereon in Oregon. In fact, it appears that the money was loaned in Oregon and the notes made here, with the understanding between the parties that, whatever their tenor, they should be paid and payable here. If the plaintiff was actually engaged in loaning money in Dundee, and a resident of Oregon should go or send there and procure a loan from it and give his note therefor, the case would be a different one, although the note was secured by a mortgage on real property in Oregon. But it is plain to be seen that that is not this case, and that the plaintiff could never have done this volume of

business here in that way. Therefore, availing itself of the comity of the state, it comes here, in the person of its authorized agent, with its money, loans and reloans it, and is, so far, I think, a resident here for the purposes of taxation.

The maxim so much relied on by the plaintiffs—that personal property follows the person of the owner—is but a legal fiction, invented for useful purposes, and must yield whenever the purposes of convenience or justice make it necessary to ascertain the fact concerning the *situs* of such property. In cases of attachment and for purposes of taxation it is constantly disregarded, as the following cases will show: *Catlin v. Hull*, 21 Vt. 158; *People v. Com'rs of Taxes*, 23 N. Y. 225; *People v. Home Ins. Co.* 29 Cal. 533; *Green v. Van Buskirk*, 7 Wall. 150. And the case of *State Tax on Foreign-held Bonds*, 15 Wall. 300, cited and also much relied on by counsel for the plaintiff, only decides that a state law which comes between the foreign lender and the local borrower, and compels the latter to pay a portion of the interest due the former on his debt, as taxes to the state, is void because it impairs the obligation of the contract between the parties. And this same ruling could as well have been made on this ground if the parties had both been citizens of the state seeking to impose the tax. The case was before the court on a writ of error to the judgment of the supreme court of the state of Pennsylvania, and this was the only federal question in the case, and therefore the only one determined by it. But on the question of uniformity I confess I am unable to find any ground on which this act can be harmonized with the constitution of the state and upheld as a valid law. It is expressly confined to mortgages on land in only one county, and thereby admits what was conceded on the argument, and what the court may judicially know, that there are mortgages in this state on land in more than one county. Section 1 of article 9 of the constitution of the state, already referred to, not only requires the legislative assembly to “provide by law for *uniform and equal* rate of assessment and taxation,” but also to “prescribe such regulations”—make such laws—“as shall secure a just valuation for taxation of *all property, both real and personal*, excepting such only for municipal, educational, etc., purposes as may be specially excepted by law.” And section 32 of article 1 declares that all taxation shall be *equal and uniform*.”

The rule on this subject prescribed by the constitution is mandatory, and the legislature in exercising the power of taxation must conform its action thereto. But the constitution must have a reasonable and practical construction in this respect. It does not require that a law on this subject shall have mathematical precision or secure in practice absolute equality and uniformity. But it must at least appear to have been enacted with a view to uniformity, and must contain provisions reasonably calculated to secure that end in practice. But when an act not only fails to secure uniform taxation.

but upon its face appears to have been passed with a contrary intent, there can be no question of its invalidity. For instance, no one would claim that an act taxing mortgages in all the counties of the state, excepting Yamhill, or one taxing mortgages in all the counties of the state except those in the Wallamet valley, was intended or calculated to produce "uniform" taxation, or to secure "a just valuation for taxation" of "all property" not exempt therefrom by the constitution.

Now, there is no difference in principle between such an act and the one under consideration, and very little in the circumstances. The latter taxes mortgages on land in no more than one county and exempts those on land in more than one county. The mortgage taxed and the mortgage not taxed, and the property affected by them, are in all essentials the same. The only difference between them is the purely adventitious and immaterial one, that in the one case the land is all in one county, and in the other is in two or more, as in the case of the railway mortgages. Without admitting that there can be any classification of mortgages for taxation, under the constitution of the state, so as to produce a difference in the burden imposed on them or the cost or convenience of discharging it, there is no ground to say that this discrimination between one and two county mortgages is the result of a *bona fide* or other attempt to so classify mortgages for the purpose of taxation. Classification for the purpose of state taxation cannot be arbitrarily made, as by mere reference to the county in which the property is situated. For such purpose a mortgage upon an acre of land in Polk county is not distinguishable from one on an acre of land in Benton county; and a law providing for the assessment and taxation of one and not the other is wanting in the uniformity required by the constitution, and therefore void. This conclusion cannot be made plainer by argument. If the injunctions of the constitution in this respect mean anything, they certainly prohibit this kind of unequal and discriminating legislation on the subject of taxation.

This being a suit between a foreign corporation and citizens of this state, the court has jurisdiction of the controversy on account of the citizenship of the parties, whether a federal question is involved in the controversy or not. The defendants are intending and attempting to sell and dispose of the notes and mortgages of the plaintiff respectively assessed by them for the non-payment of an illegal tax; and this being repeated from year to year until the maturity and payment of the notes, the plaintiff may be compelled to maintain a corresponding number of actions at law to recover the amounts so collected, to prevent and avoid which an injunction will be allowed. Pom. Eq. Jur. §§ 243-275. But the act under which the defendants are proceeding to dispose of the plaintiff's property for taxes, being void, such disposition constitutes a violation of section 1 of the fourteenth amendment to the constitution of the United States, which for-

bids a state "to deprive any person of life, liberty, or property without due process of law," and therefore this court has jurisdiction of the case, as one arising under said constitution, without reference to the citizenship of the parties thereto. If the defendants, acting for and in the name of the state, are allowed to take the plaintiff's property for taxes assessed under a void law, the state would thereby deprive the plaintiff of such property "without due process of law, contrary to the constitution of the United States. *Railroad Tax Case*, 8 Sawy. 251, 287; [S. C. 13 FED. REP. 722.]

The constitution of the state (article 4, § 23, sub. 10) also prohibits the passage of "special or local law * * * for the assessment and collection of taxes for state, county, township or road purposes." In *Manning v. Klippel*, 9 Or. 367, it was held that an act providing for the compensation of the sheriffs and clerks of 14 out of the 23 counties of the state was a "local" law for the assessment and collection of taxes for county purposes, and therefore within this prohibition and void. The terms "special" and "local" are not always convertible, though the former may include the latter. A special act is one that comes short of being general. The latter comprehends the *genus* while the former is confined to the species. In *Holland's Case*, 4 Coke, 76a, cited in Smith, Comm. § 798, it is said, by way of illustration: "Spirituality is *genus*; bishopric, deanery, etc., are *species*;" and the author adds: "Hence, acts which concern the whole spirituality in general are general acts. * * * A statute concerning leases made by bishops is a special act, because it concerns the bishops only, who are but a species of the spirituality. * * *"

An act providing for the assessment of mortgages generally is, so far, a general act. It comprehends the *genus*. But an act providing for the assessment of all mortgages for sums exceeding \$500, or not payable within one year from the date of their execution, is special. It comprehends only a species of mortgages. So an act providing for the assessment of mortgages on wood lands, plow lands, or river lands is special; and, in my judgment, an act that taxes mortgages on land in no more than one county, to the exclusion of those on land in more than one, is in the same category. It does not comprehend the *genus*, mortgages, but only the species, one-county mortgages. Without imputing to the legislature that passed this act any other purpose in making this discrimination between one and two county mortgages, than a desire to avoid the supposed inconvenience of applying it to the latter, it is well to remember that special legislation in the imposition of taxes is sure, if unrestrained, to run into partiality, oppression, and injustice. To prevent this evil this inhibition against special legislation was placed in the constitution. It is not material to the decision of this application nor the case, except as to the loan in Marion county, to ascertain how far, if at all, this act is prospectively valid. It forbids any more two-county mortgages being made, but it cannot, nor does not, attempt to annihilate

or strike out of existence those made before its passage. Admitting that the legislature cannot discriminate between mortgages on the ground of the locality of the property affected by them, it follows that so long as there are any two-county mortgages in existence in the state, an act taxing only one-county mortgages is open to the objection of want of uniformity. In reaching this conclusion concerning the validity of this act, I have not been unmindful of the responsibility of declaring an act of the legislature void. But, as was said by this court under similar circumstances, (*Oregon & Wash. T. & I. Co. v. Rathbun*, 5 Sawy. 38,) "In a plain case like this, it is as much the duty of the court to declare the act of the legislature invalid as to reform or set aside a contract for mistake or fraud. In so doing, it but upholds and obeys the supreme law,—the constitution,—to which both courts and legislatures are bound to conform their conduct."

Let the injunction issue as prayed for; the plaintiff first giving a bond with sufficient surety, to be approved by the master of this court, in a sum equal to the tax in question and 20 per centum thereon, conditioned that the plaintiff will pay all damages which the defendants or either of them may sustain by reason of such injunction, if the same shall be held wrongful, to be ascertained by a reference or otherwise, as this court may direct.

Due process of law, *County of Santa Clara v. Southern Pac. R. Co.* 18 FED. REP. 385, and note, 449; *Railroad Tax Cases*, 13 FED. REP. 722, and note, 783; obligation of contract, *Sawyer v. Parish of Concordia*, 12 FED. REP. 754, and note, 761; state power of taxation and equality and uniformity, *Railroad Tax Cases*, 13 FED. REP. 722, and note, 785; *In re Watson*, 15 FED. REP. 511, and note, 514; *State of Indiana v. Pullman Palace Car Co.* 16 FED. REP. 193, and note, 201; *County of Santa Clara v. Southern Pac. R. Co.* 18 FED. REP. 385, and note, 445; restraining collection of tax, *Second Nat. Bank v. Caldwell*, 13 FED. REP. 429, and note, 434; taxation of national bank shares, *Second Nat. Bank v. Caldwell*, 13 FED. REP. 429, and note, 433; *Exchange Nat. Bank v. Miller*, *infra*, and note.—[ED.]

EXCHANGE NATIONAL BANK v. MILLER, County Treasurer, etc.

(Circuit Court, S. D. Ohio, W. D. February 7, 1884.)

1. TAXATION—NATIONAL BANK SHARES—INEQUALITIES IN VALUATION.

Inequalities in the valuation of property for taxation, under the constitution and laws of a state requiring that all property shall be taxed upon its value by a uniform rule, afford no ground for relief, unless it be made to appear that such inequalities result not merely from error in judgment on the part of the assessing officer, but it must appear also that there was an intentional discrimination. The same rule applies to the valuation of shares in national banks

1 Reported by J. C. Harper, Esq., of the Cincinnati bar.

for taxation, where it appears that they were actually assessed at a greater rate than other moneyed capital in the hands of individual tax-payers of the state. Intentional discrimination may be established by proof of inequalities so gross as to lead the court to the conclusion that they were designed. But the facts do not warrant such conclusion in this case.

2. CORPORATIONS—SHARES ARE PROPERTY DISTINCT FROM THE PROPERTY OF THE CORPORATION.

Shares in the capital stock of corporations in Ohio are not necessarily to be treated or regarded as portions of the capital of the corporation. They are property of the shareholders, distinct and separate from the property of the corporation itself.

3. TAXATION OF NATIONAL BANK SHARES—TRUE MONEY VALUE.

Under the constitution and laws of this state, and also under the law of congress authorizing taxation on shares in national banks, they may be taxed at their true money value.

4. SAME—UNITED STATES BONDS AND OTHER NON-TAXABLE SECURITIES NOT DEDUCTED.

A statutory rule fixing such value, which does not permit a deduction therefrom for the amount of United States bonds or other non-taxable securities held by the bank, is not in conflict with the constitution of Ohio, nor with the law of congress authorizing taxation on such shares.

5. SAME—OHIO—SUCH NON-TAXABLE SECURITIES DEDUCTED FROM RETURNS OF INDIVIDUAL BANKERS, BUT NOT FROM THOSE OF NATIONAL BANKS.

The elimination from the returns made by unincorporated banks and individual bankers to the assessing officers, within the state of Ohio, of all United States bonds and other non-taxable securities held or owned by such bank or banker, is not a deduction nor a discrimination in favor of such bank or banker and against the holder and owner of shares in national banks, although such shares are valued for taxation without such deduction for the non-taxable securities held and owned by the bank.

6. SAME—"OTHER MONEYED CAPITAL" MEANS TAXABLE MONEYED CAPITAL.

"Other moneyed capital," in section 5219, Rev. St., refers to other taxable moneyed capital, and the valuation of shares in national banks for taxation is not, within the meaning of that section, at a greater rate than the assessment of other moneyed capital, unless such other moneyed capital be subject or liable to taxation.

In Chancery.

Perry & Jenney, Stallo, Kittredge & Wilby, and Harrison & Olds, for complainant.

Foraker & Black and O. J. Cosgrove, Co. Sol., for defendant.

Before BAXTER and SAGE, JJ.

SAGE, J. The tax from which the complainant prays to be relieved was assessed on the duplicate of 1882, under the following sections of the Revised Statutes of Ohio:

"Sec. 2765. The cashier of each incorporated bank shall make out and return to the auditor of the county in which it is located, between the first and second Monday of May, annually, a report in duplicate, under oath, exhibiting, in detail, and under appropriate heads, the resources and liabilities of such bank at the close of business on the Wednesday next preceding said second Monday, together with a full statement of the names and residences of the stockholders therein, with the number of shares held by each, and the par value of each share.

"Sec. 2766. Upon receiving such report, the auditor shall fix the total value of the shares of such bank according to their true value in money, and deduct from the aggregate sum so found the value of the real estate included in the statement of resources as the same stands on the duplicate; and when the bank is located in any city of the first or second class, he shall thereupon

make out and transmit to the city board of equalization, otherwise to the county board of equalization, a copy of the report so made by the cashier, together with the valuation of such shares as so fixed by the auditor."

The complainant contests the validity of the tax on the general ground that its shares are assessed at a higher rate than other moneyed capital in the hands of individual citizens, specifying (1) that the shares are valued too high, compared with other property on the tax duplicate; and (2) that the assets of the complainant consist, in part, of United States bonds, not subject to taxation, but included in the valuation made by the auditor and placed on the duplicate.

In support of the first objection the complainant has introduced testimony relating to a meeting of decennial assessors from all parts of the state, held at Columbus in 1880, preparatory to the appraising of real estate, at which meeting, according to the testimony of two witnesses, the conclusion or general understanding was that real estate should be assessed at two-thirds to three-fourths of its value, and that by that rate the assessment would represent the true cash value in money, taking into consideration "that real estate is almost always sold on long terms, and the losses occurring thereby." A third witness testifies that he was present, but that to the best of his recollection no rate was fully agreed upon. One witness states that the meeting was quite large, but how many assessors attended, or how many localities were represented, does not appear, nor does it appear that assessors were guided in their valuations by the action of the meeting, in opposition to their own judgment of the money value of the property by them appraised. There is testimony also that the object of the meeting was to make the assessments of real estate uniform. And whether two-thirds to three-fourths of what is spoken of by witnesses as the value of real estate sold upon payments—part in cash and part on time—would be what is spoken of as its true cash value in money, does not appear. There is testimony tending to show great inequalities in the valuation for taxation of real and personal property, including shares in national banks, but in no instance does a witness testify that any assessor has been governed in making an assessment by any other rule than his judgment of the true money value of the property assessed.

It is contended for the complainant that this testimony brings the case within the rule of *Pelton v. Nat. Bank*, 101 U. S. 143, and *Cummings v. Nat. Bank*, 101 U. S. 153. That is not our view. In *Pelton v. Nat. Bank* it was held that the systematic and intentional valuation of all other moneyed capital by the taxing officers far below its full value, while shares of national banks were assessed at their full value, was a violation of the act of congress which prescribes the rule by which they were to be taxed by the state. In that case the court found that the valuation of national bank shares was intentionally higher than the valuation of other personal property, and

that this discrimination was neither an accident or a mistake, but a principle deliberately adopted in the valuation of all shares in national banks, and applied without exception, and therefore the decree below in favor of the complainant was affirmed. In *Cummings v. Nat. Bank*, the supreme court found that the assessors of real property, the assessors of personal property, and the auditor of Lucas county, Ohio, concurred in establishing a rule of valuation by which real and personal property, except money, was assessed at one-third, and money or invested capital at six-tenths, of its actual value, and that the assessments on shares of incorporated banks, as returned by the state board of equalization for taxation to the auditor of Lucas county, were fully equal to their selling price and to their true value in money, and the decree enjoining the collection of the excessive tax was affirmed.

No such state of facts is shown in the case now before this court. It is true, as shown by the testimony, that, although the shares of the complainant were valued for taxation at but 86.7+ per cent. of their true value in money, they were valued higher than other personal property, but the error or inequality is not shown to arise otherwise than from a mistake in judgment on the part of the assessing officials. It would, perhaps, be more exact to say that the judgment of the assessors, in their official valuation, differs from the judgment of witnesses in their unofficial valuation, as expressed in their testimony. The differences are no greater than frequently arise between witnesses in cases on trial on questions of value. And there is no certain standard by which the court can determine which is correct. Valuations, excepting of money and of standard marketable articles, are, at best, uncertain. The influences which affect salable values are various and often complicated. Much depends upon who is the owner or vendor, as well as upon who is the purchaser. The shrinkage in the value of estates result in many instances largely from the consideration that the salable value imparted by the fact of the ownership of the deceased is gone. A thousand influences, tangible and intangible, so affect the salable value of property, real and personal, in the city and in the country, as to make its true valuation a work of exceeding difficulty, and it is not to be wondered at, nor is it a circumstance of itself warranting an appeal to a court of chancery, that there are great inequalities in valuations for taxation. To correct these the state has provided for appeals to appropriate tribunals, whose duty it is to equalize valuations and the burden of taxation. When these are exhausted all that can be done, practically, is done, excepting in cases of intentional discrimination.

We are of opinion that the rule laid down in *Nat. Bank v. Kimball*, 103 U. S. 732, applies here. There it was held that no case for relief is made by averring that the assessments are unequal and partial, and that some other property is rated for taxable purposes at less than one-half of its cash value, unless it is further averred

that the officers appointed to make assessments combine together and establish a rule or principle of valuation, the necessary result of which is to tax one species of property higher than others, and higher than the average rate. It has been held, and, we think, correctly, that inequalities in valuation may be so great as to authorize the court to conclude that they are the result of intention, but we do not think that the testimony warrants such conclusion in this case.

To the same effect as *Nat. Bank v. Kimball* is *Wagoner v. Loomis*, 37 Ohio St. 571, where it was decided that inequalities in valuations, made under a valid law, of property for taxation, do not constitute grounds for enjoining the tax, in the absence of fraudulent discriminations by the agents and officers making such valuations, and that a petition for such injunction, which shows that the plaintiff's property was valued at only 80 per cent. of its true value in money, while other property in the county was valued at only 40 per cent. of its value, and avers that such valuations were unequal, unjust, and illegal, is insufficient.

2. Is the assessment invalid for the reason that the assets of the complainant consisted in part of United States bonds, not subject to taxation, but included in the valuation made by the auditor, and placed on the duplicate? The legislature, in providing for the taxation of shares in national banks, is subject to two classes of restrictions: *First*, those imposed by congress, and contained in section 5219, Rev. St.; and, *second*, those imposed by the constitution of the state of Ohio. If the act under which the assessment was made exceeds any of these restrictions it is invalid, at least to the extent of the excess. The valuation of shares in national banks, under sections 2765 and 2766, Rev. St. Ohio, quoted above, is fixed by deducting from the resources of the bank, its liabilities, and also the value of the real estate, included in the statement of resources, as the same stands on the duplicate. These are the only deductions.

It is urged on behalf of the complainant, that, by the constitution and statutes of Ohio, taxation is limited to tangible property, subject to ownership, and capable of definite money valuations, and that corporate franchises are not recognized as subjects of taxation. To these propositions, as stated, we agree, and, in our opinion, they are recognized by the legislature of Ohio in providing, by the law already referred to, for the taxation of shares in national banks. Nothing is taken into account, in the valuation of the shares for taxation, but the tangible property of the bank. From the sum of its resources is deducted the sum of its liabilities, and the assessed value of its real estate. The remainder is divided by the total number of shares, and the quotient is the amount which the law fixes as the taxable value of each share.

It is also urged that the taxable property of corporations in Ohio is taxed on valuation, like the property of individuals, and not otherwise, and that shares in any corporation are considered and treated as

"portions" of the taxable property of the corporation, and not otherwise, and are not required to be listed by the owner when the property of the corporation is listed. The constitution of Ohio declares that the property of corporations shall be subject to taxation the same as the property of individuals, (art. 13, § 4,) and the law (Rev. St. Ohio, § 2746) exempts from taxation the shares of the capital stock of any company, the capital stock of which is taxed in the name of such company. If the taxation of the property of the corporation be regarded as indirect taxation of the shares, it is, perhaps, true that the shares are considered and treated as "portions" of the taxable property of the corporation, but the direct and proper view is that the property of the corporation, in the case stated, is taxed, and the shares are exempt. In cases where the property of the corporation is not taxed we do not agree that the shares are considered and treated as "portions" of the taxable property of the corporation.

By section 2736 of the Revised Statutes of Ohio each person listing property is required to include in his statement all investments in bonds, stocks, joint-stock companies, etc., in his possession. Section 2737 provides that such statement shall truly and distinctly set forth the amount of all moneys invested in bonds, stocks, joint-stock companies, etc., and section 2739 provides that investments in bonds, stocks, and joint-stock companies shall be valued at the true value thereof in money. These sections prescribe the standard for the valuation of shares for taxation. It is their true value in money, and not the proportion which they bear to the taxable property of the corporation. If the property of the corporation is taxed, the shares are exempt. But congress does not authorize the property of national banks, excepting their real estate, to be taxed, and it cannot be taxed without authority from congress. It does permit the taxation of shares as the property of their owners or holders. And one of the points decided by the supreme court of Ohio, in *Frazer v. Siebern*, 16 Ohio St. 614, is that shares in national banks liable to taxation in the state of Ohio "are to be understood as the individual property or choses of the stockholders, as contradistinguished from aliquot parts of the capital and property of the bank, and as such may be taxed at their full value, without deduction for the franchise, or for real estate otherwise taxed, or for untaxable bonds owned by the bank." We do not see how language could be more explicit.

In *Bradley v. Bauder*, 36 Ohio St. 28, the question was whether a person residing in Ohio and owning shares of stock in a foreign corporation was required to list the same for taxation, notwithstanding the capital of the corporation was taxed in the state where the corporation was located. The argument was that capital of the corporation was invested in property taxed in the name of the corporation; that the shares only represented proportions of that property; and, therefore, that taxing the shares was, by another mode, taxing the property of the corporation. But Judge BOYNTON, pronouncing the opinion,

said: "This argument, however plausible, has never met with favor from the courts," and the legality of the tax upon the shares, as property, distinct and separate from the property of the corporation, and therefore not "portions" of the same—was affirmed.

In *Wagoner v. Loomis*, *supra*, Judge McILVAINE intimates, on page 580, that the officers of the law violated their sworn duty in placing the national bank shares of the plaintiff in error on the duplicate at their par value, "instead of their true value in money, (as the constitution requires,) which was 125 per cent. of their par value."

In each of these cases there is a clear recognition that the shares are entirely distinct, as taxable property, from the property of the corporation, and in *Frazer v. Siebern*, and in *Wagoner v. Loomis*, that intangible constituents of value—as the franchise—may be included in fixing the true money value of the shares for taxation. But by the law under which the shares of the complainant were valued for taxation everything intangible is excluded. The aggregate tax value of all the shares is equal to the net value of the capital of the bank, less the assessed value of its real estate. The non-taxable bonds owned by the bank are not excluded. How that affects the validity of the assessment is a question which we shall now consider.

Congress authorizes taxation upon the shares in national banks by the states within which they are located, under two restrictions: *First*, "that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individuals within such state;" and, *second*, "that the shares of any national banking association, owned by non-residents of any state, shall be taxed in the city or town where the bank is located, and not elsewhere. The real estate of the bank is also taxable as other real estate. Rev. St. § 5219. By section 2759, Rev. St. Ohio, the county auditor is required to allow to every individual banker, and to every unincorporated bank, in addition to the credits allowed in the valuation for taxation of national bank shares, "the average amount of United States government, and other securities that are exempt from taxation," held by such banker or unincorporated bank. Wherefore, it is argued that the taxation upon the national bank shares is in violation of the first restriction imposed by congress, in that it is "at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens." No complete definition of other "moneyed capital" has been given. It must, however, be held to mean other taxable moneyed capital. Otherwise, the law of congress, permitting taxation of the shares, would defeat itself, for they could not be taxed at a greater rate than individual investments in United States bonds, which are exempt. Unincorporated banks and individual bankers can be taxed only upon their property. The statement they are required to make and return to the auditor shall, the law says, set forth not only their taxable property, but also United States bonds and other non-taxable securities held by them. The auditor is required

to deduct from the statement so made and returned that which the state has no power to tax. The statute creates no exemption. It lays hold upon every item of property which it can reach, and taxes every item which it can tax, allowing only the credits allowed to other individual tax-payers. The auditor, accordingly, in fixing the amount for taxation, deducts from the statement, which the law compels the unincorporated bank and the individual banker to make, the securities which the state could not tax if it would. If it were material to inquire why the law requires that non-taxable securities shall be included in the return, the answer might be suggested by sections 139 and 1522 of the Revised Statutes of Ohio, relating to the statistical duties of the secretary of state and of assessors. Every tax-payer is required, at the time of listing his property, to make to the assessor a verified statement, which shall include, among other things, "the amount of United States bonds owned, the amount of legal tender notes or money exempt from taxation, and the amount of state bonds or certificates." As the unincorporated bank and the individual banker make their returns to the auditor, it is provided that those returns shall contain the items which the assessor, in the discharge of his statistical duties, is required to take from every individual tax-payer.

Unless the taxation on the shares in national banks is indirectly a tax on the property of the bank, there is no discrimination in favor of the individual banker and the unincorporated bank. But in *Van Allen v. The Assessors*, 3 Wall. 573, the supreme court of the United States decided that "the tax on the shares is not a tax on the capital of the bank." They state, as familiar law, that "the corporation is the legal owner of all the property of the bank, real and personal," and that the interest of the shareholder is "a distinct, independent interest or property, held by the shareholder like any other property that may belong to him," and that "it is this interest which the act of congress has left subject to taxation by the states." Chief Justice CHASE, for himself, and Associate Justices WAYNE and SWAYNE, in a dissenting opinion, argued with great power that taxation on shares in national banks, without reference to the amount of their capital invested in bonds of the United States, was "actual, though indirect, taxation of the bonds," but the holding by the majority of the court was affirmed in *People v. Com'rs*, 4 Wall. 244, and has since remained as settled law, so that the dissenting opinion of the chief justice only strengthens the authority of *Van Allen v. The Assessors*. In *People v. Com'rs*, the only question before the court was whether the holder of the bank shares was entitled to deduct from their value a due proportion of the sum which the bank had invested in government bonds. This was decided in the negative. Mr. Justice NELSON, who pronounced the opinion of the court, said that "the meaning and intent of the law-makers was that the rate of the taxation of the shares should be the same, or not greater, than upon the moneyed

capital of the individual citizen which is subject or liable to taxation.¹ Eliminating from the return made by the unincorporated bank or individual banker, every item of property and of moneyed capital exempt from taxation, is not deducting, nor is it discriminating in favor of such bank or banker and against the holder or owner of shares in a national bank. What is such discrimination is clearly shown in *People v. Weaver*, 100 U. S. 539. That case was taken to the supreme court of the United States from the court of appeals of New York. Mr. Justice MILLER, delivering the opinion, said:

"It cannot be disputed,—it is not disputed here,—nor is it denied in the opinion of the state court, that the effect of the state law is to permit a citizen of New York, who has money capital invested otherwise than in banks, to deduct from that capital the sum of all his debts, leaving the remainder alone subject to taxation; while he whose money is invested in shares of bank stocks can make no such deduction. Nor, inasmuch as nearly all the banks in that state, and in all others, are national banks, can it be denied that the owner of such shares who owes debts is subjected to a heavier tax on account of those shares than the owner of moneyed capital otherwise invested who also is in debt, because the latter can diminish the amount of his tax by the amount of his indebtedness, while the former cannot."

In accordance with this view, the judgment of the state court was reversed. It was within the power of the legislature of New York to allow or to disallow a deduction from the listed value of the property of the tax-payer equal to the amount of his indebtedness; and to allow it to one and to refuse it to another was, by intentional discrimination, to make the taxation unequal. But in the case of an unincorporated bank, or of an individual banker in Ohio, the state levies its taxes upon every dollar's worth of property which it has power to tax, at the same rate and by the same method as in the taxation on national bank shares, leaving untouched only the property which it has not power to tax.

It is claimed that upon a proper application of the decision in *Frazer v. Siebern*, *supra*, the assessment must be held illegal. We do not so think. The act of congress then in force, authorizing taxation upon shares in national banks, contained the following restriction not to be found in the present law: "That the tax so imposed under the laws of any state, upon the shares of any of the associations authorized by this act, shall not exceed the rate imposed upon the shares in any of the banks organized under authority of the state where such association is located." The state of Ohio imposed no tax upon shares in the state banks, which were then in existence. On the contrary, by the fifty-ninth section of the act of 1861, then in force, they were expressly exempted. But the state banks themselves were taxed upon their capital, subject to a deduction for the value of their real estate, and of their non-taxable bonds of the United States, while the tax on shares in national banks was upon their nominal or par value without any deduction for real estate, which was taxed separately against the banks as real estate, and

without deduction for United States bonds owned by the banks. The court, recognizing that the equivalent taxation necessary to justify a tax upon shares in national banks might be either upon the shares in the state banks and assessed against the shareholders, or upon the capital of the bank and assessed against the bank itself, provided only that it be equivalent, held that "the tax against the owners of shares in the national banks must not exceed that imposed, in some form, upon the state banks or their stockholders." And, finding that the tax upon the shares in the national banks was in excess of that assessed against the state banks, the court enjoined the collection of the excess.

As we have already found that the limitation in the present act of congress is, in effect, that the taxation on the shares shall not be at a greater rate than is assessed upon other taxable moneyed capital, it follows that the failure to levy a tax against a citizen of the state, whether a banker, a manufacturer, a merchant, or a capitalist, upon property or investments which the state has no power to tax, does not make out a case of discrimination against the owner or holder of shares in a national bank.

Our conclusion is that the bill must be dismissed, and it is so ordered.

POWER OF STATES TO TAX. National banks, as such, being instrumentalities of the government, are not liable to taxation by the states.¹ Such banks derive their authority to do business in the states by virtue of a United States statute, which is supreme law.² Their franchise is not liable to state taxation, nor can the state authorize its municipalities to exact from them license taxes for doing business within their limits.³ A city cannot tax the business of a bank which might be the fiscal agent of the federal government, although it may tax its property and the shares of its stockholders.⁴ Congress may permit states to tax national banks,⁵ and its shares held by individuals,⁶ and this although its capital may be invested in bonds or other securities of the United States;⁷ but the permission of congress is a prerequisite to such authority.⁸ A state can impose only such a tax on national banking corporations as is authorized by the act of congress creating them, and that act only authorizes

¹ McCulloch v. Maryland, 4 Wheat. 316; Osborn v. Bank of U. S. 9 Wheat. 738; Bank of Commerce v. New York, 2 Black, 620; Bank Tax Cases, 2 Wall. 200; Pittsburg v. Nat. Bank, 65 Pa. St. 45; Collins v. Chicago, 4 Biss. 472.

² Carthage v. First Nat. Bank of Carthage, 71 Mo. 509; Van Allen v. Assessors, 3 Wall. 573; Bradley v. People, 4 Wall. 469; Lionberger v. Rouse, 9 Wall. 468; Tappan v. Nat. Bank, 19 Wall. 490; Hepburn v. School Directors, 23 Wall. 480; Second Nat. Bank v. Caldwell, 13 Fed. Rep. 429.

³ Carthage v. First Nat. Bank of Carthage, 71 Mo. 509; Nat Bank v. Mayor, etc. 8 Helsk. 614.

⁴ Johnston v. Macon, 62 Ga. 650; Macon v. First Nat. Bank, 59 Ga. 648; Macon v. Macon Sav. Bank, 60 Ga. 133.

⁵ Van Allen v. Assessors, 3 Wall. 573; 33 N. Y. 161; Frazer v. Seiborn, 16 Ohio St. 614; Mintzer

v. Montgomery Co. 64 Pa. St. 139; Austin v. Boston, 96 Mass. 369; City of Utica v. Churchill, 43 Barb. 550; People v. Com'rs, 4 Wall. 244; Nat. Bank v. Com. 9 Wall. 353; First Nat. Bank v. Douglas Co. 3 Dill. 298, 330; Wright v. Stiltz, 27 Ind. 338; Hubbard v. Sup'rs, 23 Iowa, 130.

⁶ Nat. Bank v. Com'rs, 9 Wall. 353; People v. Bradley, 39 Ill. 130; St. Louis Nat. Bank v. Papin, 4 Dill. 29; Goddard v. Bulow, 1 Nott & McC. 45; Stetson v. Bangor, 66 Me. 274; State v. Haight, 31 N. J. 399; State v. Hart, Id. 431.

⁷ People v. Com'rs, 4 Wall. 269; Wright v. Stiltz, 27 Ind. 238; St. Louis B. & S. Ass'n v. Lightner, 47 Mo. 393. Contra, Whitney v. Madison, 23 Ind. 331.

⁸ People v. Weaver, 100 U. S. 543; McCulloch v. Maryland, 4 Wheat. 316; Osborn v. Bank of U. S. 9 Wheat. 738; Weston v. Charleston, 2 Pet. 449; People v. Assessors, 44 Barb. 148.

a tax on the shares in such banks, and not on its capital stock.¹ States have the power to tax national banks only at a rate, in the manner, and on the particular conditions authorized by congress;² and the requirements of the act must be obeyed in good faith, and the state tax must be construed in connection with the act.³ The permission given by the national banking act to tax national banks, removes any implied exemption that might otherwise exist.⁴

REAL ESTATE. The state may tax the real estate and the shares of national banks.⁵ Under the Revised Statutes the state is left free to exercise the power of taxation over national banks, assessing the same upon the real property of the bank, or upon the shares of its capital stock, at the election of the state, in accordance with the requirements of the state constitution and laws, and only in conformity with the rules applicable to citizens and corporations of the state.⁶ Real estate is taxable by state authority, and the separate shares of its capital stock, as the personal property of the holders of such shares, may be taxed by the state or its municipal corporations, so long as the tax is not at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state.⁷ Real estate owned by a national bank should be assessed as realty in the township where it is situated, and not as a part of the capital stock of the bank.⁸ The banking office and lot lawfully owned and occupied as its place of business by a national bank is not liable to assessment and taxation as real estate *eo nomine* against the bank.⁹

CAPITAL NOT TAXABLE. The capital of a national bank is not taxable by the state.¹⁰ Capital stock as such cannot be assessed. The only way stock can be reached is by assessment of the different shares of stockholders,¹¹ and an assessment on the shares in gross against the bank is not authorized and is illegal.¹² A bank is not liable to taxation on its capital under a statute which requires owners of property to return it for taxation. It does not own the shares held by individuals,¹³ but it is the owner of all the property of the corporation, real and personal,¹⁴ but it is not liable for either state or municipal taxes on the shares of stock not owned by it, but owned by individual stockholders.¹⁵ If the shares of a national bank, when in the hands of a receiver, have any value, they are taxable in the hands of the holders or owners; but the property held by the receiver is exempt to the same extent that it was before his appointment.¹⁶ Such property cannot be subjected to sale for the payment of the demand of a creditor against the claim for the property by a receiver of the bank subsequently appointed.¹⁷ The taxation by a state of the capital stock

¹ Carthage v. First Nat. Bank, 71 Mo. 509; Van Allen v. Assessors, 3 Wall. 573; Bradley v. People, 4 Wall. 459; Lionberger v. Rouse, 9 Wall. 468; Tappan v. Nat. Bank, 19 Wall. 490; Hepburn v. School Directors, 23 Wall. 480.

² Sumter Co. v. Nat. Bank, 62 Ala. 464; Nat. Commercial Bank v. Mobile, Id. 284.

³ First Nat. Bank v. St. Joseph, 46 Mich. 526; S. C. 9 N. W. Rep. 835.

⁴ Union Nat. Bank v. Chicago, 3 Biss. 82.

⁵ Nat. Commercial Bank v. Mobile, 62 Ala. 284; Salt Lake City Bank v. Golding, 2 Utah. 1; Sumter Co. v. Gainesville Bank, 62 Ala. 464; First Nat. Bank v. Douglas Co. 3 Dill. 330.

⁶ Nat. Commercial Bank v. Mobile, 62 Ala. 234.

⁷ Loftin v. Citizens' Nat. Bank, 85 Ind. 341.

⁸ Rice Co. Com'rs v. Citizens' Nat. Bank, 23 Minn. 281.

⁹ Second Nat. Bank v. Caldwell, 13 Fed. Rep. 450; Lackawanna Co. v. First Nat. Bank, 94 Pa.

St. 221; People v. Com'rs of Taxes, 80 N. Y. 673; and cases.

¹⁰ Nat. Commercial Bank v. Mobile, 62 Ala. 235; People v. Com'rs, 4 Wall. 244; Bradley v. People, Id. 459; Salt Lake City Bank v. Golding, 2 Utah. 1; Sumter Co. v. Gainesville Bank, 62 Ala. 464; First Nat. Bank v. Douglas Co. 3 Dill. 330.

¹¹ Collins v. Chicago, 4 Biss. 472.

¹² Nat. Commercial Bank v. Mobile, 62 Ala. 284.

¹³ Waco Bank v. Rogers, 51 Tex. 606; North Ward Bank v. Newark, 40 N. J. Law, 558; Waite v. Dowley, 94 U. S. 527; Sumter Co. v. Gainesville Bank, 62 Ala. 468; Van Allen v. Assessors, 3 Wall. 594.

¹⁴ Van Allen v. Assessors, 3 Wall. 584; Sumter Co. v. Gainesville Bank, 62 Ala. 468.

¹⁵ Waco Bank v. Rogers, 51 Tex. 606.

¹⁶ Rosenblatt v. Johnston, 104 U. S. 463.

¹⁷ Woodward v. Ellsworth, 4 Colo. 593; Nat. Bank v. Colby, 21 Wall. 609.

of a national bank invested in United States securities will be restrained,¹ but injunction will not lie to restrain the collection of a tax illegally assessed by the municipal authorities upon the shares of a national bank in gross, instead of against the individual shareholders, though such municipal corporation be insolvent, as there are ample remedies at law.²

SHARES OF STOCK SUBJECT TO TAXATION. Shares of national bank stock are subject to taxation by the state³ against the shareholders.⁴ They may be taxed at the place where the bank is situated.⁵ They are exceptions to the rule that personal property follows the owner, for they are by law made taxable at the *situs* of the bank.⁶ The state in which the national bank is situated has the exclusive right to derive revenue from the shares of such bank, no matter where the shareholders may be domiciled.⁷ A state may authorize the assessment in the city or town within the same state where the owner resides,⁸ the stockholder having the right to be assessed at his domicile within the state in which the bank is located.⁹ The mode by which the tax shall be assessed and collected, and the place where it shall be laid on resident stockholders, is left to the discretion of the legislature of the state in which the bank is located.¹⁰ Under the general state statutes the stock belonging to an inhabitant of a school-district in a town other than that in which the bank is situated, cannot be taxed for the purpose of defraying the expense of building a school-house in the district.¹¹ Where the legislature declared that the tax on the shares of non-resident stockholders shall be assessed against and paid by the bank, if this were in fact unjust to the resident stockholders the remedy for the injustice would be with the legislature.¹² The fact that a national bank in one state keeps a clerk in another state authorized to receive deposits, does not render the bank taxable to the latter state.¹³ States may tax dividends declared to holders of national bank stock;¹⁴ but the consent of the comptroller of the treasury being necessary for an increase of shares of the stock, new shares issued under a vote of the corporation are not assessable until the certificate of the comptroller of his approval shall be issued.¹⁵

RATE. The only restrictions imposed by the act of congress on the power of the states to tax national bank shares is that it shall not be at a greater rate than is assessed on "other moneyed capital" in the hands of individual citizens of the state, and that shares owned by non-residents shall be taxed in the city or town where the bank is located.¹⁶ "Other moneyed capital" means money capital invested otherwise than in national banks.¹⁷ This restriction only requires that the amount of tax imposed and the system of assessment applied to shares of the stock shall be substantially the same as are

¹ *First Nat. Bank v. Douglas Co.* 3 Dill. 298.

² *Nat. Commercial Bank v. Mobile*, 62 Ala. 294.

³ *Howell v. Cassopolis*, 35 Mich. 471; *Kyle v. Fayetteville*, 75 N. C. 445; *Bule v. Fayetteville*, 79 N. C. 267; *North Ward Nat. Bank v. Newark*, 39 N. J. Law, 380; *Nat. Bank v. Com.* 9 Wall. 263; *Lionberger v. Rouse*, Id. 468; *Austin v. Boston*, 14 Allen, 359.

⁴ *Sumter Co. v. Gainesville Bank*, 62 Ala. 464.
⁵ *First Nat. Bank v. Smith*, 65 Ill. 44; *Bake v. First Nat. Bank*, 67 Ill. 297.

⁶ *Tappan v. Merch. Nat. Bank*, 19 Wall. 490; *Baker v. First Nat. Bank*, 67 Ill. 297; *Prov. Inst. v. Boston*, 101 Mass. 575; *McLaughlin v. Chadwell*, 7 Helsk. 383. See 15 St. at Large, 34.

⁷ *Sumter Co. v. Nat. Bank of Gainesville*, 62 Ala. 469, *Nat. Bank v. Com'rs*, 9 Wall. 355.

⁸ *Austria v. Boston*, 14 Allen, 353.

⁹ *North Ward Nat. Bank v. Newark*, 40 N. J. Law, 558; *North Ward Nat. Bank v. Newark*, 39 N. J. Law, 380; *Howell v. Cassopolis*, 35 Mich. 471; *Kyle v. Fayetteville*, 75 N. C. 445; *Bule v. Same*, 79 N. C. 267.

¹⁰ *North Ward Nat. Bank v. Newark*, 39 N. J. Law, 380.

¹¹ *Little v. Little*, 131 Mass. 367.

¹² *North Ward Nat. Bank v. Newark*, 40 N. J. Law, 562; *State v. Branin*, 38 N. J. Law, 434.

¹³ *Nat. State Bank v. Pierce*, 18 Alb. Law J. 16.

¹⁴ *State v. Collector*, 2 Bailey, 664.

¹⁵ *Charleston v. People's Nat. Bank*, 58 C. 103.

¹⁶ *Lionberger v. Rouse*, 9 Wall. 475; *Pollard v. State*, 65 Ala. 628; *Miller v. Hellbron*, 58 Cal. 133; *North Ward Nat. Bank v. Newark*, 39 N. J. Law, 380; *Ruggles v. Fond du Lac*, 53 Wis. 439.

¹⁷ *Miller v. Hellbron*, 58 Cal. 133; *People v. Weaver*, 100 U. S. 513.

imposed and applied to other moneyed capital.¹ Where different rates of taxation are imposed upon different classes of moneyed capital the rate of taxation on national bank shares should not exceed the rate imposed on shares in state banks.² In the taxation of national bank shares it must appear that the assessors acted under some agreement or rule which necessarily tended to tax such shares at a greater rate than is assessed on other moneyed capital, to render the assessment void.³ If the amount assessed on them is governed by the same percentage on the valuation as that applied to other moneyed capital, the act of congress is satisfied.⁴ Any system of assessment of taxes which exacts from the owner of the shares a larger sum in proportion to their actual value than it does from the owner of other moneyed capital valued in like manner, taxes them at a greater rate within the meaning of the act of congress.⁵

VALUATION. The actual and not the par value is the standard of taxation of national bank shares,⁶ and such valuation is not affected by the fact that a portion of the capital of the bank is invested in United States bonds;⁷ and the surplus fund which a national bank is required to reserve from its net profits is not excluded in the valuation of its shares for taxation.⁸ Under certain limitations, the shares of the national banks are taxable, with exclusive reference to their value, and without regard to the nature of the property held by the bank as a corporation.⁹ They may be lawfully included in the valuation of the personal property of the owners thereof in assessing state taxes.¹⁰ The provision of the act of congress has reference to the entire process of assessment, and includes the valuation of the shares, as well as the rate of percentage charged thereon.¹¹ Shares in national banks may be valued *above* their par value.¹² The actual value of the stock diminished by the proportionate value of the real estate owned by the bank, furnishes the proper sum upon which to assess the tax.¹³ The state cannot evade the restriction contained in the act of congress, by requiring the value of the property to be added to the value of the shares.¹⁴ Where the value of the real estate held by the bank was not deducted, the shares are subjected to double taxation, and the tax was invalid.¹⁵

REDUCTION FROM VALUATION. Where other moneyed corporation was taxed, but a reduction to the whole amount of the owner's indebtedness was to be made before assessment, and no such deduction was allowed to the holders of national bank stock, the tax upon such shares is invalid.¹⁶ Under a statute making taxable all credits in excess of the debts of the person taxed, it is not necessarily in conflict with the act of congress providing that national bank stock shall not be taxed at a greater rate than other moneyed capital, even though the latter are taxed for their full value, without deduct-

¹ Pollard v. State, 65 Ala. 628.

² City Nat. Bank v. Paducah, 2 Flippin, 61.

³ First Nat. Bank v. Farwell, 7 Fed. Rep. 513; S. C. 10 Biss. 270.

⁴ Pelton v. Nat. Bank, 101 U. S. 145; People v. Weaver, 100 U. S. 539.

⁵ Pollard v. State, 65 Ala. 632; Pelton v. Nat. Bank, 101 U. S. 145.

⁶ People v. Com'rs, 94 U. S. 415; S. C. 67 N. Y. 516; Van Allen v. Assessors, 3 Wall. 573; People v. Com'rs of Taxes, 8 Hun, 566.

⁷ Id.

⁸ Stafford Nat. Bank v. Dover, 58 N. H. 316; First Nat. Bank v. Peterborough, 56 N. H. 38; Nat. Bank v. Com'rs, 9 Wall. 353; People v. Com'rs, 67 N. Y. 516; S. C. 94 U. S. 415.

⁹ Evansville Nat. Bank v. Britton, 105 U. S. 325; Van Allen v. Assessors, 3 Wall. 573.

¹⁰ Van Allen v. Assessors, 3 Wall. 573; People v. Com'rs, 4 Wall. 244; Nat. Bank v. Com. 9 Wall. 353; Tappan v. Merch. Nat. Bank, 19 Wall. 491; People v. Com'rs, 94 U. S. 415; Waite v. Dowley, 94 U. S. 627; Adams v. Nashville, 95 U. S. 19; Melver v. Robinson, 53 Ala. 456; Nat. Commercial Bank v. Mobile, 62 Ala. 296.

¹¹ People v. Weaver, 100 U. S. 539.

¹² Pelton v. Nat. Bank, 101 U. S. 143.

¹³ People v. Weaver, 100 U. S. 539; Sup'rs of Albany v. Stanley, 105 U. S. 306; S. C. 12 Fed. Rep. 87. See People v. Dolan, 36 N. Y. 53; Nat. Alb. Exch. Bank v. Hills, 5 Fed. Rep. 261.

¹⁴ Pelton v. Nat. Bank, 101 U. S. 143.

¹⁵ Nat. Bank v. Kimball, 103 U. S. 732.

¹⁶ City Nat. Bank v. Paducah, 2 Flippin, 61.

ing indebtedness.¹ The provisions which authorize the tax-payer to deduct his indebtedness from the amount of money loaned and solvent credits, taxing only the excess, and exempts from taxation of the capital stock of incorporated companies created under any law of the state such portion thereof as may be invested in property, and taxed otherwise as property, and limits municipal taxation upon such corporations, in their operation upon moneyed capital discriminate unfavorably against shareholders in national banks, and are to that extent violative of the act of congress.² Shareholders are not entitled to any allowance for such of the capital and surplus of the bank as may be invested in government bonds;³ as a state statute taxing bank stock must levy the tax on the shares of stockholders, as distinguished from the capital of the bank invested in federal securities.⁴ Congress may subject the shares of national bank stock to state taxation, notwithstanding the capital is invested in national securities.⁵ The shares of stock are property, separate and distinct from the property of the corporation which they represent.⁶

DEDUCTION OF INDEBTEDNESS. Any statute is in conflict with the restrictive clause of the act of congress in so far as it does not permit a stockholder to deduct the amount of his just indebtedness from the assessed value of his stock, while the owners of all other taxable personal property may deduct debts from the value of their property.⁷ When the shareholder has no debts to deduct, the law provides a mode of assessment for him which is not in conflict with the act of congress; the law in that case can be held valid,⁸ and he cannot recover back the tax paid pursuant thereto. If he has debts, the assessment excluding them from computation is voidable, but the assessing officers act within their authority until they are duly notified that he is entitled to deduction of such debts,⁹ and notice of debts must be given to the assessor.¹⁰ If the assessing officer proceeds after such notice and acts in violation of the act of congress, the tax-payer may take the requisite steps to secure the deduction, and when secured the residue of the state statute remains valid.¹¹ Where, under the statute, the stockholder has presented to the proper board of assessors his affidavit showing that his personal property subject to taxation, including such shares, after deducting therefrom his just debts, is of no value, and they refuse, on his demand, to reduce his assessment of the shares, an injunction should be awarded to restrain the collection of the tax.¹² In the absence of evidence that the debt claimed for deduction was not a just one and enforceable against the party taxed, he is entitled to have it deducted, and this, although the transaction creating the debt was a "device to escape assessment and taxation;" so held, in a case where the debt was created in the purchase of non-taxable securities.¹³ Where the assess-

¹First Nat. Bank v. St. Joseph, 46 Mich. 526; S. C. 9 N. W. Rep. 833.

²Pollard v. State, 66 Ala. 623.

³First Nat. Bank v. Farwell, 7 Fed. Rep. 518.

⁴Nat. Bank v. Com'rs, 9 Wall. 353.

⁵McCulloch v. Maryland, 4 Wheat. 316; Weston v. Charleston, 2 Pet. 449; Collector v. Day, 11 Wall. 123; Ward v. Maryland, 12 Wall. 427; Van Allen v. Assessors, 3 Wall. 593.

⁶Kirtland v. Hotchkiss, 42 Conn. 433; Van Allen v. Assessors, 3 Wall. 573; Bradley v. People, 4 Wall. 459; Nat. Bank v. Com'rs, 9 Wall. 353.

⁷Sup'rs of Albany v. Stanley, 105 U. S. 306; Hills v. Nat. Exch. Bank, Id. 319; Evansville Bank v. Britton, Id. 322; S. C. 10 Biss. 503; 12 Fed. Rep. 96; Railroad Tax Cases, 13 Fed. Rep. 737; People v. Weaver, 100 U. S. 539, reversing S. C.; Williams v. Weaver, 75 N. Y. 33; and see Cammings v. Nat. Bank, 101 U. S. 153; Ruggles v. Fond du Lac, 10 N. W. Rep. 566.

⁸Sup'rs of Albany v. Stanley, 12 Fed. Rep. 90; Austin v. Boston, 14 Allen. 357, to the same effect; People v. Bull, 46 N. Y. 57; Gordon v. Cornea, 47 N. Y. 608; Village of Middleton, Ex parte, 32 N. Y. 196.

⁹Sup'rs of Albany v. Stanley, 105 U. S. 306; Hills v. Nat. Exch. Bank, Id. 319; Evansville Bank v. Britton, Id. 322; S. C. 10 Biss. 503; 12 Fed. Rep. 96.

¹⁰Sup'rs of Albany v. Stanley, 105 U. S. 306; S. C. 12 Fed. Rep. 1.

¹¹Sup'rs of Albany v. Stanley, 105 U. S. 306; Hills v. Nat. Exch. Bank, 105 U. S. 319; Evansville Bank v. Britton, 105 U. S. 322; S. C. 10 Biss. 503; 12 Fed. Rep. 96.

¹²Hills v. Nat. Exch. Bank, 105 U. S. 319; Evansville Bank v. Britton, Id. 322; S. C. 10 Biss. 503; 12 Fed. Rep. 96.

¹³People v. Ryan, 89 N. Y. 142.

ment is not void, but only voidable, it must stand good for the assessment in each case which is not shown to be in excess of the just debts of the shareholder that should be deducted.¹

EQUALITY AND UNIFORMITY. The restrictions on the power of the state to tax national bank shares is intended to secure equality of valuation in their assessment, as well as equality in the rate of the tax after the assessment has been made.² The rule that they should not be assessed higher than other moneyed capital is not violated by taxing them without deduction of mortgages, judgments, and other securities for money loaned, although some capital is subject to such exemption from taxation for other than state purposes;³ so exempting from taxation money invested in state bonds, or city bonds, is not an unfriendly discrimination.⁴ The act of congress is not infringed by a state law which provides that all personal property, including money and all debts owing by solvent debtors, and shares in national and state banks, and other corporations, shall be assessed at their true value and taxed at an equal rate, even if it also provides that certain classes of property, including shares in certain classes of corporations, shall be exempt from taxation.⁵ The discrimination must be "with moneyed capital in the hands of individual citizens;" a discrimination between shareholders in corporations, other than banks, is not within the prohibition.⁶ The rule or principle of unequal valuation of different classes of property, adopted by local boards of assessors, is in conflict with the constitution and works injustice to owners of bank shares;⁷ so to tax the shares in a national bank at their full value, while other property is assessed at 30 or 40 per cent. of its value, is unjust and unlawful, and the bank may maintain an action to restrain the collection of such tax;⁸ the court will not restrain the collection where the shares are taxable and no excessive valuation is complained of, although the officers arrived at correct result by an erroneous method.⁹ Although for purposes of taxation the statutes provide for the valuation of all moneyed capital, including shares of national banks, at its true cash value, the systematic and intentional valuation of all other moneyed capital by the taxing officers far below its true value, while the shares are assessed at their true value, is a violation of the act of congress, which prescribes the rule by which they shall be taxed by state authority;¹⁰ and the statute which establishes a mode of assessments by which shares are valued higher in proportion to their real value than other moneyed capital, is in conflict, although no greater percentage is levied than on that of other moneyed capital.¹¹ In such case, on the payment or the tender of the sum which such shares ought to pay, under the rule established by that act, a court of equity will enjoin the state authorities from collecting the remainder;¹² but where they are taxed at the same rate as other property, and the valuation of these shares is at half their actual value, while that of some other property is at less than half its value, a discrimination is not thereby shown.¹³ The validity of a municipal tax on the shares of a national bank is not impaired by the fact that the money paid for such stock may have been taxed for municipal purposes to the same person.¹⁴

DISCRIMINATION. A state law is not violative of the act of congress merely on the ground that it allowed a "partial exemption" of a certain kind of moneyed capital, which was designed to prevent a double burden of taxation,

¹ *Hills v. Nat. Exch. Bank*, 12 Fed. Rep. 95.

² *Albany City Nat. Bank v. Maher*, 6 Fed. Rep. 417.

³ *Gorgas' Appeal*, 79 Pa. St. 149.

⁴ *Pollard v. State*, 65 Ala. 628; *Adams v. Nashville*, 95 U. S. 19.

⁵ *Stratton v. Collins*, 43 N. J. Law, 563.

⁶ *First Nat. Bank v. Waters*, 7 Fed. Rep. 162.

⁷ *Cummings v. Nat. Bank*, 101 U. S. 153.

⁸ *Id.*

⁹ *St. Louis Nat. Bank v. Papin*, 4 Dill. 29.

¹⁰ *Second Nat. Bank v. Caldwell*, 13 Fed. Rep. 432; *Hepburn v. School-dist.* 23 Wall. 430.

¹¹ *People v. Com'rs*, 69 N. Y. 91; *S. C. 8 Hun*, 536.

¹² *St. Louis Nat. Bank v. Papin*, 4 Dill. 29.

¹³ *City Nat. Bank v. Paducah*, 2 Flippin, 61.

¹⁴ *Richmond City v. Scott*, 48 Ind. 568.

both of property and debts secured by it.¹ The fact that two banks by their charters are specially taxed, will not preclude taxation of the shares in the national banks by general law; neither are the shares to be excluded from taxation because some other classes of moneyed capital are exempted from taxation by a law of limited application.² A tax may be levied by an incorporated city on the shares of stock of a national bank at the same rate as on real and personal property within the city, although there is still in existence branches of the state bank, the shares of which are not subject to municipal taxation.³ Where there is no discrimination against such shares and in favor of other moneyed capital in the hands of individual citizens of the state, such taxation is valid.⁴ The act of congress of June 3, 1864, was not intended to curtail the power of the state on the subject of taxation, or to prohibit exemptions of particular kinds of property, but to protect corporations formed under its authority from unfriendly discrimination by the state in the exercise of their taxing powers.⁵ It was the intention of congress to prevent the state, by hostile legislation, from discriminating against national banks, and to place all bank shares, state and national, on a common level.⁶ The system of assessment of bank shares, owing to the fact that the shares of different banks are differently rated, must necessarily be imperfect.⁷ The law does not require absolute accuracy where the shareholders have the same rights as other individuals taxed for moneyed capital; they should look to the statutes of the state for relief.⁸ It is not sufficient, to invalidate the taxation, to show that in the case of a single state bank, the shares of which are subject to a like taxation, that the assessors, either by mistake or intention, have shown favor.⁹

ENFORCEMENT OF PAYMENT. Payment of the tax imposed on bank shares may be enforced.¹⁰ The tax imposed pursuant to statute becomes a lien upon the shares taxed, and such lien continues till the tax is paid.¹¹ It may be made the duty of every national bank to pay for its stockholders the tax legally assessed against their respective shares, whether the stockholders reside in the state or not.¹² The state statute relating to the collection of taxes upon bank shares does not apply to shares belonging to the estates of deceased persons.¹³ A bank may be compelled to disclose the amount of deposits due each depositor, and a state law to that effect is enforceable.¹⁴ Where the statute requires or permits the bank to pay the tax for the shareholder, as trustee it is the proper complainant seeking relief against illegal exaction.¹⁵ A statute requiring the cashier to return to the clerk of each town in the state where shareholders reside, a list of shareholders resident therein, and the amount paid out on each share, is valid.¹⁶

SUIT TO ENJOIN COLLECTION. A shareholder who has made affidavit and demand for deduction of debts owed by him from the valuation of his shares, as required by law, may bring suit to enjoin the collection of such tax.¹⁷ And

¹ Pollard v. State, 65 Ala. 633; Hepburn v. School Directors, 23 Wall 480.

² Lemley v. Com'rs, 86 N. C. 382; Lionberger v. Rouse, 9 Wall. 468; Tappan v. Merch. Nat. Bank, 19 Wall. 490; Providence Ins. Co. v. Boston, 101 Mass. 595.

³ Richmond City v. Scott, 48 Ind. 563.

⁴ Lemley v. Com'rs, 86 N. C. 379.

⁵ Adams v. Nashville, 95 U. S. 19; People v. Com'rs, 4 Wall. 244; Hepburn v. School Directors, 23 Wall. 480.

⁶ Stanley v. Board of Sup'rs, 15 Fed. Rep. 433.

⁷ Id.

⁸ Id.

⁹ Id.

¹⁰ First Nat. Bank v. Douglas Co. 3 Dill. 299.

¹¹ Simmons v. Aldrich, 41 Wis. 241; Van Slyke v. State, 23 Wis. 655; Bagnall v. State, 25 Wis. 112.

¹² Nat. Commercial Bank v. Mobile, 62 Ala. 295; Nat. Bank v. Com'rs, 9 Wall 353; Tappan v. Merch. Nat. Bank, 19 Wall. 491; Waite v. Dowley, 94 U. S. 527; Adams v. Nashville, 95 U. S. 19; Melvers v. Robinson, 53 Ala. 456.

¹³ Revere v. Boston, 123 Mass. 375.

¹⁴ First Nat. Bank v. Hughes, 21 Alb. Law J. 74.

¹⁵ Nat. Bank v. Cummings, 101 U. S. 153; First Nat. Bank v. St. Joseph, 46 Mich. 526.

¹⁶ Waite v. Dowley, 94 U. S. 527.

¹⁷ Hills v. Nat. Alb. Exch. Bank. 12 Fed. Rep. 93.

where it is shown that the affidavit and demand would have been unavailing, they may show, in an action by the bank brought on their behalf, the deductions to which they were entitled.¹ A national bank may, on behalf of its stockholders, maintain a suit to enjoin the collection of a tax which has been unlawfully assessed on the shares by state authorities,² and on the ground of an illegal assessment arising from the failure to deduct from the valuation the debts owned by the stockholders,³ although payable in the first instance by such shareholder, if a multiplicity of suits can be thereby avoided, or injury to its credit or business is anticipated.⁴ Where the statute requires or permits the bank to pay the tax for the shareholder, as trustee, the bank is the proper complainant seeking relief against illegal exaction.⁵ A bill to restrain the collection of the state tax must show a statute discriminating against them, or that they are rated higher in proportion to actual valuation than other moneyed corporations.⁶—[Ed.]

¹Hills v. Nat. Alb. Exch. Bank, 105 U. S. 319; A. C. 12 Fed. Rep. 93; Evansville Nat. Bank v. Britton, 105 U. S. 322. See Sup'rs of Albany v. Stanley, 12 Fed. Rep. 32.

²Hills v. Nat. Alb. Exch. Bank, 105 U. S. 319; S. C. 12 Fed. Rep. 93; Evansville Nat. Bank v. Britton, 105 U. S. 322.

³Nat. Alb. Exch. Bank v. Hills, 5 Fed. Rep. 249; Hills v. Nat. Alb. Exch. Bank, 105 U. S. 319; S. C. 12 Fed. Rep. 93; Cummings v. Nat. Bank,

101 U. S. 153; Pelton v. Nat. Bank, 101 U. S. 143; Evansville Nat. Bank v. Britton, 105 U. S. 322.

⁴City Nat. Bank v. Paducah, 2 Filippin, 61. See Nat. Alb. Exch. Bank v. Hills, 5 Fed. Rep. 249; reversed, 12 Fed. Rep. 93.

⁵Nat. Bank v. Cummings, 101 U. S. 153, affirmed; Evansville Nat. Bank v. Britton, 105 U. S. 322; S. C. 12 Fed. Rep. 93; First Nat. Bank v. St. Joseph, 46 Mich. 526.

⁶German Nat. Bank v. Kimball, 103 U. S. 732; Hills v. Nat. Alb. Exch. Bank, 12 Fed. Rep. 32.

MEMPHIS & L. R. R. Co., as reorganized, v. Dow.¹

(Circuit Court, S. D. New York. February 11, 1884.)

1. ULTRA VIRES—RETENTION OF BENEFITS.

A corporation cannot retain property acquired under a transaction *ultra vires*, and at the same time repudiate its obligations under the same transactions.

2. CORPORATIONS—POWER TO CONTRACT WITH STOCKHOLDERS.

A corporation is not precluded from contracting with its bondholders because they own all the stock.

3. SAME—MORTGAGE OF CORPORATE FRANCHISE.

A corporation lawfully purchasing its franchise has implied authority to mortgage it for the purchase money.

4. SAME—CASE STATED.

A railroad corporation organized in Arkansas issued bonds secured by trust mortgage of its franchises and other property; the mortgage was foreclosed, and a scheme of reorganization adopted, in pursuance of which the company conveyed all its property to the trustees, and the bondholders formed a new corporation, to which the franchises and other property of the old one were conveyed by the trustees. The new corporation, thus composed entirely of the original bondholders, issued its bonds to those bondholders, secured by mortgage of its franchises and other property; and the new bonds were received in lieu of the old. Afterwards portions of the stock passed into other hands. *Held*, that the bonds constituted a valid obligation, notwithstanding the stockholders of the contracting corporation were the contractees, and notwithstanding a provision in the constitution of Arkansas forbidding private corporations to issue stock or bonds except for value actually received.

¹See 7 Sup. Ct. Rep. 482, and 20 Fed. Rep. 260, 768.

In Equity.

Dillon & Swayne, for plaintiff.

Platt & Bowers, for defendant.

WALLACE, J. The complainant's bill is filed against the trustees and holders of the mortgage bonds of the complainant for \$2,600,000, and the mortgage upon its corporate franchises and property for securing the same, executed May 2, 1877, seeking to annul the bonds and mortgage, upon the ground that they were issued and executed by the complainant without corporate power in that behalf.

A brief statement of the facts relating to the creation of the mortgage bonds, their origin, consideration, and purpose, will serve to present the legal questions involved. The complainant, created under a special act of the legislature of Arkansas, is a reorganized corporation which has succeeded to the property and franchises of a former corporation of the same name under the foreclosure of a mortgage of that corporation, and a conveyance under the decree of foreclosure. By the terms of that mortgage, and by the provisions of the decree of foreclosure in conformity therewith, it was provided that if the trustees named in the mortgage should be requested so to do by a majority of the holders of the bonds secured thereby they might purchase the property, and, in that case, no bondholder should have any claim to the premises or the proceeds thereof, except for his *pro rata* share, as represented in a new corporation or company to be formed, by a majority in interest of said bondholders, for the use and benefit of the holders of the mortgage bonds. The trustees purchased at the sale, and thereupon the bondholders proceeded to organize the present corporation. There was due to the holders of the old mortgage bonds \$2,600,000 of principal, and \$1,300,000 of unpaid interest, and the scheme of reorganization contemplated the acceptance by the bondholders of the new mortgage bonds in place of their old ones, and of the capital stock in place of their accrued and unpaid interest. Accordingly, by the terms of the reorganization agreement, the capital stock of the new corporation was fixed at \$1,800,000, divided into 13,000 shares of \$100 each, and was declared to be full paid; and by the same agreement the trustees who had purchased at the foreclosure sale were directed to transfer the property and franchises purchased by them to the new corporation, upon the condition, among others, that the new corporation should execute and deliver to said trustees the new mortgage bonds for \$2,600,000, now sought to be set aside. Thereupon—the new corporation having agreed to accept a conveyance of the property and franchises of the old corporation, pursuant to the terms of the reorganization agreement—the trustees conveyed the same to the new corporation, the deed of conveyance reciting the conditions upon which, as trustees, for the owners of the outstanding mortgage bonds, they were authorized to make such conveyance, and further reciting the acceptance of such conditions by the new corporation. The corporation accepted this conveyance and took

possession under it. Every certificate of shares of stock issued by it contains a recital that the holder takes his stock subject to the mortgage bonds in question. The new mortgage bonds were issued and delivered to the trustees for the holders of the outstanding mortgage bonds, and were distributed by the trustees, *pro rata*, to the holders of those bonds. The capital stock was also apportioned among the holders of these bonds, *pro rata*, and certificates were delivered for the shares to which each bondholder was entitled.

After the reorganized corporation had operated the railroad for several years, and early in the year 1880, the majority of the stock was acquired by Messrs. Margrand, Gould, and Sage, in the interest of the St. Louis, Iron Mountain & Southern Railway Company. The object seems to have been to acquire control of the corporation and subordinate its management to the interests of the Iron Mountain company. The parties who thus acquired control now control the corporation, and, speaking through it, insist that the mortgage bonds, which were the consideration of the transfer of the property to the corporation, are void, and should be set aside. The case, then, is this: The complainant is a corporation which was brought into life by a body of creditors of a pre-existing corporation, who had succeeded to all the property thereof, and who proposed to convey such property to the complainant upon receiving, among other considerations, the mortgage bonds in suit. The complainant assented to this proposition, accepted a conveyance of the property, and executed its mortgage bonds. It asserts now that although it had power to acquire the property it had no lawful power to pay for it in the terms and manner promised. Its contention is founded upon a section of the charter or act of incorporation by which alone it is claimed its power to create a mortgage is conferred, and upon a provision of the constitution of Arkansas which limits the power of corporations of that state in issuing bonds. The section of the charter relied on is section 9, which is as follows:

"The said company may at any time increase its capital to a sum sufficient to complete the said road, and stock it with any thing necessary to give it full operation and effect, either by opening books for new stock, or by selling such new stock, or by borrowing money on the credit of the company, and on the mortgage of its charter and works."

The constitutional provision is contained in article 12, and declares:

"No private corporation shall issue stock or bonds except for money or property actually received, or labor done; and all fictitious increase of stock or indebtedness shall be void."

As the bonds and stock issued by this corporation were issued for property actually received, viz., the said railroad and all the corporate property, it is not obvious how this constitutional provision has any application to the present controversy. It is assumed in the argument of counsel for the complainant, and reiterated several times,

that the complainant received no consideration for the mortgage bonds. Upon what theory this is claimed or can be maintained is not apparent, and, indeed, is incomprehensible. The original corporation had been divested of its property by the foreclosure sale. The newly-organized corporation accepted a reconveyance upon condition of executing the new mortgage bonds to the vendors. Whether the complainant is a new corporation, or whether it is the old corporation, need not be considered, because in either view the mortgage bonds were the consideration of the conveyance.

The proposition which is advanced, that the vendors and the vendees were the same persons, and therefore there could be no contract or sale, is not even technically correct. One of the parties was the corporation; the bondholders, by their trustees, were the other parties. True, the stockholders of the corporation were also the bondholders, but the circumstance that all the stockholders of a corporation are at the same time the several owners of property, which the corporation wishes to buy, does not destroy the power of the parties to contract together. Suppose there were two corporations, each composed of the same stockholders, can it be seriously contended that one corporation could not make a contract with the other? A corporation may contract with its directors; why not with its stockholders? If the complainant ever acquired the property it was by a purchase; if it could purchase, the bondholders could sell, and the mortgage was the consideration of the purchase and sale.

The primary questions, then, are—*First*, whether, upon the purchase of property, the corporation could mortgage what it acquired to secure the purchase money; and, *second*, whether section 9 of the charter has any application to such a transaction. It is to be observed that the complainant does not question its own power to acquire the property conveyed to it. It cannot do this while it holds on to the property and seeks to remove the lien of the mortgage. If it could legitimately purchase, why could it not, like an individual purchaser, mortgage to secure the price? A corporation, in order to attain its legitimate objects, may deal precisely as can an individual who seeks to accomplish the same ends, unless it is prohibited by law to incur obligations as a borrower of money. "Corporations having the power to borrow money may mortgage their property as security. Although it was at one time a question whether express legislative consent was not required in order to authorize a mortgage of any corporate property, as, for example, in *Steiner's Appeal*, 27 Pa. St. 313, yet the rule now is that a general right to borrow money implies the power to mortgage all corporate property except franchises, unless restrained by express prohibition in the act of incorporation, or by some general statute." *Green's Brice's Ultra Vires*, (2d Ed.) 223, 224.

In the late case of *Philadelphia & R. R. Co. v. Stickler*, 21 Amer.

Law Reg. 713, the supreme court of Pennsylvania considered the question, and PAXON, J., delivering the opinion of the court, said:

"So far as the mere borrowing of money is concerned it is not necessary to look into the charter of the company for a grant of express powers. It exists by necessary implication. * * * The reason is plain. Such corporations are organized for the purposes of trade and business, and the borrowing of money and issuing obligations therefor are not only germane to the objects of their organization, but necessary to carry such objects into effect."

In *Platt v. Union Pac. R. Co.* 99 U. S. 48-56, Mr. Justice STRONG, speaking for the court, says:

"Railroad corporations are not usually empowered to hold lands other than those needed for roadways and stations or water privileges. But when they are authorized to acquire and hold lands separate from their roads the authority must include the ordinary incidents of ownership—the right to sell or to mortgage."

The right of mortgaging follows as a necessary incident to the right of managing the business of a corporation, according to the usual methods of business men. The right of a corporation to mortgage its franchises, or the property which is essential to enable it to perform its functions, is generally denied by the authorities. But does the reason upon which this denial rests have any application to a case like the present? The foundation of the doctrine is that such a mortgage tends to defeat the purposes for which the corporation was chartered, and the implied undertaking of those who obtain the charter, to construct and maintain the public work, and exercise the franchises for the public benefit. Some judicial opinion is found to the effect that there is no good reason for denying the right to make such a mortgage without legislative consent, because the transfer of the franchise to new hands through a foreclosure is, in fact, a change no greater than may take place within the original corporation, and the public interests are as safe in such new hands as they were in those of the original corporators. *Shepley v. Atlantic & St. L. R. R. Co.* 55 Me. 395-407; *Kennebec & P. R. Co. v. Portland & K. R. Co.* 59 Me. 9-23; *Miller v. Rutland & W. R. Co.* 36 Vt. 452-492. Here the mortgage was executed to enable the corporation to resume the exercise of its charter powers, and fulfill the purposes for which it was originally created. No precedent has been found denying to a corporation the power to execute a mortgage of everything it acquires by a purchase, when the mortgage is a condition of making the purchase; and there seems to be no reason, in a case like the present, for denying the power when the purchase of the mortgagor includes the franchise and the whole property of the corporation.

Section 9 of the charter is not a restriction upon the implied power of the corporation to incur such obligations as are necessary to enable it to carry on its business. It is a provision which would seem to be intended to enlarge rather than to restrict the power of the cor-

poration in this regard. Its purpose is to authorize an increase of capital to an extent commensurate with the necessities of the corporation in any of the modes usually adopted by corporations for raising money—a provision which was necessary in view of section 4 of the charter, which limited the amount of increase. As a corporation has no implied authority to alter the amount of its capital stock when the charter has definitely prescribed the limit, this permission was necessary. The purchase of property by the corporation for cash or on credit is not an increase of its capital.

There is another ground, however, upon which the decision of the case may rest more satisfactorily. Assuming that the complainant transcended its charter powers in creating the mortgage bonds in question, it cannot be permitted to retain the benefits of its purchase, and at the same time repudiate its liability for the purchase price. The rule is thus stated by a recent commentator:

"The law founded on public policy requires that a contract made by a corporation in excess of its chartered powers be voidable by either party while a rescission can be effected without injustice. But after a contract of this character has been performed by either of the parties the requirements of public policy can best be satisfied by compelling the other party to make compensation for a failure to perform on his side." *Morawetz, Corp.* § 100.

It is to be observed that in the present case there is no express statutory or charter prohibition upon the corporation to purchase the property or mortgage it for the purchase money. At most, its acts were *ultra vires*, because outside the restricted permission of the charter. It is not necessary, therefore, to consider the distinction made by some of the adjudications between the two classes of cases. *Hitchcock v. Galveston*, 96 U. S. 341. The decided weight of modern authority favors the conclusion that neither party to a transaction *ultra vires* will be permitted to allege its invalidity while retaining its fruits. The question has frequently been considered in cases where a corporation, suing to recover upon a contract which has been performed on its side, is met with the defense that the contract was *ultra vires*, or prohibited by the organic law of the corporation. *Whitney Arms Co. v. Barlow*, 63 N. Y. 62; *Oil Creek & A. R. Co. v. Penn. Transp. Co.* 83 Pa. St. 160; *Bly v. Second Nat. Bank*, 79 Pa. St. 453; *Gold Mining Co. v. Nat. Bank*, 96 U. S. 640; *Nat. Bank v. Matthews*, 98 U. S. 621. The latter case is a forcible illustration of the rule generally adopted. There a national banking association was proceeding to enforce a deed of trust given to secure a loan on real estate made by the association in contravention of section 5136, Rev. St., prohibiting by implication such an association from loaning on real estate, and the maker of the trust deed sought to enjoin the proceeding upon that ground. The court, speaking through Mr. Justice SWAYNE, cite with approval *Sedg. St. & Const. Law*, 73, in which the author states that the party who has had the benefit of the agreement will not be permitted to question its validity when the ques-

tion is one of power conferred by a charter. Another class of cases is where the corporation itself attempts to set up its own want of power, in order to defeat an agreement or transaction which is an executed one as to the other party, and from which the corporation has derived all that it was entitled to. Such cases were *Parish v. Wheeler*, 22 N. Y. 494; *Bissell v. M. S. & N. I. R. Co.* Id. 258; *Hays v. Galion Gas Co.* 29 Ohio St. 330-340; *Attleborough Bank v. Rogers*, 125 Mass. 339; *McCluer v. Manchester R. Co.* 13 Gray, 124; *Bradley v. Ballard*, 55 Ill. 418; *Rutland & B. R. Co. v. Proctor*, 29 Vt. 93. In the first of these cases the court say:

"It is now very well settled that a corporation cannot avail itself of the defense of *ultra vires* when the contract has been in good faith fully performed by the other party, and the corporation has had the full benefit of the performance and of the contract. If an action cannot be brought directly upon the agreement, either equity will grant relief or an action in some other form will prevail.

The present case is phenomenal in the audacity of the attempt to induce a court of equity to assist a corporation in repudiating its obligations to its creditors without offering to return the property it acquired by its unauthorized contract with them. The fundamental maxim is that he who seeks equity must do equity. Every stockholder of the corporation when he acquired his stock took it with notice explicitly embodied in his certificate that his interest as a stockholder was subordinate to the rights of the holders of the mortgage bonds. It is now contended that if there is any obligation on the part of the corporation to pay for the property it purchased, it is not to pay what it agreed to, but to pay a less consideration, because the property was not worth the price agreed to be paid. The court will not compel the bondholders to enter upon any such inquiry. They are entitled to set their own value on their own property. When the complainant offers to reconvey the property in consideration of which it created its mortgage bonds it will have taken the first step towards reaching a position which may entitle it to be heard. It may be said, in conclusion, that there would be no difficulty, on well recognized principles, in protecting the bondholders against the destruction of their claims upon the theory of a vendor's lien for the purchase money. The taking of a mortgage by their trustees, so far from evidencing an intention to waive the lien, is conclusive evidence to the contrary.

The bill is dismissed, with costs.

TRUSTEES OF THE CINCINNATI SOUTHERN RAILWAY v. GUENTHER,
Trustee, etc.

(Circuit Court, E. D. Tennessee. February 18, 1884.)

1. AUTHORITY OF TAX COLLECTOR.

A tax collector has no authority to compromise a claim against a tax-payer.

2. TAXATION—UNCONSTITUTIONAL ASSESSMENT—ESTOPPEL.

In Tennessee, when taxes have been assessed and collected under an unconstitutional statute, the municipality receiving them is not estopped by such receipt from disputing the correctness of the valuation and making a reassessment.

3. SAME—ASSESSMENT BY COLLECTOR—RAILROAD PROPERTY.

The statute of Tennessee empowering collectors of taxes to assess property which, by mistake, has escaped assessment in regular course, applies to the property of railroads as well as to that of private individuals.

4. SAME—UNEQUAL VALUATIONS—VALIDITY OF ASSESSMENT.

An exaggerated valuation intentionally put upon a particular class of property renders unconstitutional a tax imposed in accordance therewith; but the tax-payer may be required to pay the amount justly due, without the formality of a new assessment.

5. VALUE OF RAILROAD PROPERTY.

The value of railroad property is to be determined largely by reference to present and prospective profits, and not by the cost of construction alone.

In Equity.

C. D. McGuffy and Thornburgh & Andrews, for complainants.

James Sevier and Luckey & Yoe, for respondent.

KEY, J. Complainants own a railroad extending from Cincinnati, Ohio, to Chattanooga, Tennessee. This line of road passes through Roane county, Tennessee, for the distance of 15 miles and a half. An act of the legislature of Tennessee, passed March 24, 1875, p. 100, provides for a board of railroad tax assessors, who are to assess the taxable value of the railroad property of the state, and how the same is to be apportioned to the different counties through which these roads run. Under this statute the complainants were assessed for and on behalf of the county of Roane the sum of \$1,235.17 for the year 1881, which assessments were paid. At the September term, 1881, of the supreme court of Tennessee, it was decided that the mode of assessment provided by the act of 1875 was unconstitutional. *Chattanooga v. Railroad Co.* 7 Lea, 561. On February 15, 1882, the respondent issued a citation or notice to complainants reciting that the assessments under the act of 1875 were unconstitutional, and that the taxes paid for the years 1880 and 1881 were paid upon an undervaluation, and notifying complainants to appear for the purpose of making a proper assessment. Complainants did not appear, and respondent proceeded to make new assessments, according to which the taxes due the state and Roane county for the year 1880 amounted to \$5,504.79, and for the year 1881, \$5,566.68. Complainants appealed from this assessment to the chairman of the county court of

Roane county, who reduced the assessment somewhat, but not very considerably.

The bill in this case is filed to enjoin the collection of the taxes under the last assessment upon several grounds. It is insisted that the payment of the taxes assessed originally by the board of commissioners was a settlement and compromise in respect to these taxes, because respondent insisted upon their payment, and complainants objected to the validity of at least a portion of the tax. It appears from the receipts executed for the taxes that complainants paid them under protest. As the law provides that taxes illegally assessed may be recovered back by the tax-payer, if paid under protest, these transactions, upon their face, could hardly be regarded as a compromise. But this aside, the respondent, as the trustee and tax collector of Roane county, had no authority to compromise with complainants in this respect. He was bound to collect taxes as assessed. It is further insisted that as the agents of the state had assessed taxes against complainants under the forms and terms of the law of the legislature, and the county of Roane had recognized its action by collecting and appropriating the taxes under the assessments, the county of Roane is estopped from denying the validity of the first valuation, and in consequence the assessments in controversy are void. There is much force in this position, and I am not sure but I might concur in this view of the case if the question were an open one. But we are considering laws,—statutes of the state of Tennessee,—and this court is bound by the decisions of the supreme court of the state in regard to the construction of the statutes thereof, provided no federal or constitutional right is invaded. The supreme court of Tennessee, in the decision already referred to, (*Chattanooga v. Railroad Co.* 7 Lea, 563,) says:

"We may assume in this case that if the position of the plaintiff is correct, that the assessment by the board of assessors for railroads is unconstitutional as to the property owned by the company in the city of Chattanooga, then there has been no assessment at all, and the property may well be assessed for taxation, and the railroad company be compelled to pay the taxes thus assessed."

In that case, as in the one under consideration, the railroad company had paid the taxes for the years 1877, 1878, and 1879, and tendered the sum due for 1880, according to the assessment and valuation made by the state railroad assessors, as provided for by the acts of the legislature of 1875 and 1877, and the court held that the tax as assessed by the board of tax assessors for railroads was unconstitutional,—was void for that reason; so that, according to the paragraph already quoted, "there had been no assessment at all, and the property may be well assessed for taxation, and the railroad company be compelled to pay the taxes thus assessed." The whole scope of this decision is opposed to the idea of the estoppel claimed by complainants.

Complainants say that the assessments for taxes made in 1882 for the taxes of 1880 and 1881 are void for the want of authority in the respondent or the county court to make them. The general tax law of April 7, 1881, p. 251, contains a provision that if it should come to the knowledge of the chairman, or judge or clerk of the county court, the county trustee, sheriff, or tax collector of any county, that any person, company, firm, or corporation had not been assessed as contemplated by the act, or had been assessed on an inadequate amount, it should be the duty of such officer to cite such person, company, firm, or corporation, or their agent or attorney, to appear before him, so that an assessment may be made, and such officer was authorized to make the proper assessment. A similar provision is found in the act of 1873, p. 175. The act of March 12, 1879, p. 93, says "that all collectors of taxes are hereby made assessors to assess all property which, by mistake of law or facts, has not been assessed; and it is hereby made the duty of such collectors in all cases whereby property has not been assessed, but on which taxes ought to be paid by law, to immediately assess the same and proceed to collect the taxes. It is insisted that railroad property was not in the contemplation of the legislature when these acts were passed, and is not embraced in them. That railroads were taxed under other acts, and assessed through different agencies and instrumentalities from those assessing other property, is true. It has not been shown that any special provisions of law have been made for railroads which might have escaped taxation, and the terms of the acts of 1873, 1879, and 1881 are sufficiently general to embrace railroads in their scope and phraseology. When we add to these considerations the authority of the case of *Chattanooga v. Railroad Co.*, *supra*, we conclude that the tax collector was clothed with authority in the premises. The subsequent action of the county court did not invalidate the assessment, for the chairman thereof might have assessed the property as well as the tax collector for the year 1881, and the tax collector and chairman might consult with the members of the county court, or with other persons, as to the valuation of the property. No formalities or methods are prescribed by which he is to be governed in arriving at his conclusions in regard to such assessments as he may make.

It is said by complainants that the taxes for the year 1880 cannot be collected because the respondent was not installed into office until September of that year; that the taxes for that year were assessed in June, according to the terms of the law; and the case of *Otis v. Boyd*, 8 Lea, 679, is relied upon as authority for this position. That case does decide that the tax collector cannot assess and collect taxes upon property which has not been assessed for any year previous to the current year in which he entered upon his office. But it seems to me that the reasoning in that case does not sustain the position of complainants. Under the terms of the law, the tax assessor has no power to assess except in cases in which there has been no as-

assessment, or in which there has been an inadequate one. He is compelled to wait until after the regular assessors have made their reports and returns before he can ascertain whether property has been omitted, or inadequately taxed. If he may wait a week, he may a month, or six months, or more, so that he act thereon during his term. The nature of his duties in this respect leads to this conclusion from the necessity of the case. It may be said, in regard to most of the grounds assumed by complainants in opposition to the payment of these taxes, that it is not denied that the property of complainant is subject to a tax for the benefit of and on behalf of Roane county, and that it is the duty of complainants to pay such tax. It is the invalidity of the tax from the method of its assessment which is relied upon. In such cases all doubts are resolved in favor of the tax. The defense must make its right to resist the collection of the tax clear and manifest before it can have relief.

Complainants insist, however, that though all the foregoing reasons for their relief fail, yet the taxes assessed against them violate the constitution of the state of Tennessee in this: That the tax against complainants is unjust and unequal, and railroad property is valued at a higher rate than property of other character; that this inequality is produced because railroad property, as a class or species, is valued for taxation at a higher rate according to its value than other kinds or species of property in Roane county; that this higher valuation is made and arrived at by establishing a different basis of valuation for railroad property from that used in valuing other kinds of property, and that it is done intentionally, and for the purpose of discriminating against railroads. Mere inequalities in taxation will not vitiate a tax if they be accidental and unintentional. These must occur under any system of assessment, and especially under that in force in this state, in which every civil district and ward has its own assessor. There will of necessity be many instances in which property will be assessed at more than its value, and more, perhaps, in which it will be assessed at less than its value. These errors and discrepancies will not vitiate the tax; they are inevitable. But a different result follows should a standard of valuation be used for one species of property which is different from that used for another, if the end reached necessarily is the taxation of the one species higher than the other. The constitution of Tennessee establishes that "all property shall be taxed according to its value; that value to be ascertained in such manner as the legislature shall direct, so that taxes shall be equal and uniform throughout the state. No one species of property from which a tax may be collected shall be taxed higher than any other species of property of the same value." Article 2, § 28. With something of iteration the principle is emphasized that taxation shall be equal and uniform. If unjust discrimination and difference is made, the tax so imposed may be restrained and its collection pre-

vented. *Pelton v. Nat. Bank*, 101 U. S. 148; *Cummings v. Nat. Bank*, Id. 153; *Chattanooga v. Railroad Co. supra*.

The record in the case under consideration does not show very clearly what particular method of valuation was followed in assessing the value of railroad property, or that of other property, but it does appear that real estate was, as a rule, taxed upon a valuation less than its real value. The respondent in his deposition says, at a rate less by 10 per centum than its real value. But from the other proof in the cause, and from what a court may judicially know of the history of tax assessments in this region of the country, we think that lands in Roane county were taxed at a valuation on the average of one-fourth below their real value. It is quite apparent that the property of complainants was assessed at a valuation much above its real value. It does not distinctly appear what rule was adopted in the valuation of lands, but it is clear that it was not intended to assess them at their real value, but below it; nor were they assessed, as a rule, according to their cost. It is equally clear that it was intended to assess railroad property at its full value, and that in doing so there was fixed upon it an exaggerated and unreasonable valuation. This difference was not accidental. It follows from this intentional inequality that the complainants are entitled to relief, but how far and to what extent is a question of interest. Shall the entire tax be declared illegal and void because of the illegality of the assessment, or shall only the collection of so much of it as may be in excess of a reasonable and proper tax be restrained? As already stated, all presumptions and intendments should be in favor of the tax, in cases of doubt. If the entire tax were declared void, it is probable that under the ruling of the supreme court of the state in the case of *Otis v. Boyd*, 8 Lea, 679, valid assessments could not now be made for the taxes of the years 1880 and 1881. The supreme court of the United States, in the case of *Cummings v. Nat. Bank*, 101 U. S. 153, held that the tax in that case was unconstitutional because the rule of equality in taxation had been disregarded, and that the appropriate mode of relief in such cases is, upon payment of the amount of tax which is equal to that assessed on other property, to enjoin the collection of the illegal excess. The same doctrine is again asserted in *Nat. Bank v. Kimball*, 103 U. S. 733, and in *Sup'rs v. Stanley*, 105 U. S. 305. I conclude, therefore, that so much of the tax as is reasonable and just should be paid by the complainants, and the excess enjoined.

Then, what is a reasonable valuation of complainants' property as compared with that fixed upon other property for taxation? For this litigation should be so conducted that such taxes as are proper may be paid at the earliest moment practicable, and the case should now be finally determined if the record is in such a state of completeness as to allow it. The value of a railroad, especially a new one, is a problem of no easy solution. It is quite evident that the respondent assessed the value of that part of this railroad in Roane county

mainly from the cost of its construction. In his answer he says that "he believes that the *cost* and *value* of the road lying and situate in Roane county was and is above the average of said road. There are several tunnels and bridges in said county, and *cost*, as he is informed, about as follows: Emory river bridge, \$100,000; White's Creek bridge, \$20,000; Kegan's tunnel, \$250,000," etc. To make the cost of a thing, especially a railroad, the measure of its value, or even a chief constituent thereof, is most fallacious. A railroad that costs \$20,000 per mile is worth as much as one that costs \$50,000 per mile, if its business and net earnings be as great or greater. Indeed, it is more valuable, in one sense, as it makes a better return on the investment. The expenses of keeping a road in repair which runs through hills and mountains, and over rivers, are greater, because it requires greater labor to keep its tunnels, bridges, and road-bed in repair, than it does in case of a road over a level country. There must be a greater number of watchmen at the bridges, tunnels, curves, and cuts and fills. The grades are heavier and running expenses more. Sometimes, indeed often, property may cost much and be worth very little, or cost little and be of great worth. Its cost may be looked to as an element entering into its value, but not as its sole or even chief element. The earnings of a railroad, present and prospective, must form a most important ingredient in the estimation of its value. What amount of business has it done, is it doing, and what is it likely to do? What through freights, local freights, etc., does it carry and will it carry? Many things must be considered in arriving at its value. There are 15½ miles of this road in Roane county. One of the engineers under whose supervision it was constructed shows that the cost of this part of the road was about \$40,000 per mile. It has been assessed at that rate for the year 1880, and at \$44,000 for the year 1881. The officers of the road, who predicate their estimate of value solely upon the net earnings of the road for these two years as compared with its cost, fix the value of the same part of the road at about \$16,000 per mile for 1880, and nearly \$20,000 for 1881. We know, as an historical fact, that railroads in this section of the country have never proved a profitable investment to those whose capital built them, even in the localities most favorable for their construction and business. We know that this road runs, for a great part of its way, through a mountainous and rugged country, and was built at a heavy outlay. The country through which it runs is, much of it, wild and undeveloped, and what business may grow up along its line is problematical. Taking all the known and proven facts into consideration, I am of the opinion that about 50 per cent. of the original cost would be a fair valuation for 1880, and that about \$2,000 per mile should be added to it for 1881. I direct, therefore, that a valuation of \$20,000 per mile be assessed for 1880, and \$22,000 per mile for 1881. I think this will be a fair and full assessment upon this property as compared with the rate at

which other property is valued for taxation by the county, and is more likely to be above than below the real value. It is manifest that the rolling stock and other personal property which were assessed for taxes against complainants did not belong to complainants, but to their lessees, and therefore complainants should not be taxed on its account.

The next question raised by complainants is that the act of the general assembly of Tennessee of 1879, p. 282, authorized a county tax of not exceeding 30 cents on the hundred dollars, but that the county court of Roane county, after levying a tax of 30 cents, levied a special tax of 10 cents additional. It is insisted that this special tax of 10 cents is void. This tax was levied, it is said, to repair county buildings. Complainants' position is sustained by the case of *Railroad v. Franklin Co.* 5 Lea, 711, and *Railroad v. Marion Co.* 7 Lea, 664. Special authority must be shown to have been conferred by law on the county court to levy this special tax before it could legally impose it. The repair of the county buildings is an ordinary county purpose, and the limit of taxation for such purposes was 30 cents. A school tax of 25 cents on the hundred dollars was levied for 1880. The foregoing case of *Railroad v. Franklin Co.* decided that a tax of 20 cents on the hundred dollars was the limit of the school tax which the legislature authorized counties to impose for the year 1880. Therefore, to the extent of five cents upon the hundred dollars, the school tax levied by the county of Roane was illegal. The collection of the special tax aforesaid, and of the excess of the school tax herein mentioned, will be enjoined as against complainants. The sums paid by complainants as taxes for the years 1880 and 1881 will be credited on the amounts due from them for the respective years, as ascertained and declared by the decree in this case as herein directed. Interest will be charged upon the balance due from complainants from the date of the filing of the bill in this cause. The costs of the cause will be paid by respondent. No account need be taken, as the amounts due under the decree can be readily arrived at by a simple calculation.

PHILADELPHIA & R. R. CO. v. POLLOCK.¹

(Circuit Court, E. D. Pennsylvania. February 11, 1884.)

INTERNAL REVENUE—SECTION 19, ACT OF FEBRUARY 8, 1875, (18 St. 311.)—NOTES—USE FOR CIRCULATION—PROMISSORY NOTES—WAGES CERTIFICATES.

The nineteenth section of the act of February 8, 1875, (18 St. 311,) providing that "every association, other than national bank associations, and every corporation, * * * shall pay a tax of ten per centum on the amount of their own notes used for circulation and paid out by them," does not apply to certifi-

¹ Reported by Albert B. Guilbert, Esq., of the Philadelphia bar.

cates of indebtedness, bearing interest and payable to bearer on a certain day therein named, issued in denominations of five and ten dollars each, and paid out by a railroad company to its employes for wages, and providing that they would be received by the company at or before maturity for any debts due the company. These notes or certificates, having been issued only to the employes of the company on account of wages, and when paid by the company having been canceled and not reissued, were not "used for circulation," and that they were used afterwards by those to whom they were issued to discharge their debts to others or to purchase subsistence for themselves, does not, affect the character imposed upon them by the company.

Hearing on Bill, Answer, and Proofs.

This was a bill to enjoin Pollock, collector of internal revenue, and his deputy from proceeding to enforce payment of a tax levied under the nineteenth section of the act of congress of February 8, 1875, (18 St. 311,) providing "that every person, firm, association, other than national bank associations, and every corporation, state bank, or state banking association, shall pay a tax of ten per centum on the amount of their own notes *used for circulation* and paid out by them." From the pleading and evidence it appeared that the Philadelphia & Reading Railroad Company issued to its employes for wages in the years 1878 and 1879 certain instruments, in the following form:

"THE PHILADELPHIA & READING RAILROAD COMPANY.

"No. —.

Wages Certificate.

"PHILADELPHIA, December —, 1878.

"The Philadelphia & Reading Railroad Company promises to pay to the bearer hereof the sum of — dollars, on the — day of —, 1879, with interest from date, without defalcation, for value received. This note is issued for wages due by the Philadelphia & Reading Railroad Company, and will be received either before or at its maturity for the amounts due thereon in payment of freight and toll bills of the Philadelphia & Reading Railroad Company, for coal bills of the Philadelphia & Reading Coal & Iron Company, or any other debts due to either of the said companies.

"F. B. GOWEN, President.

"S BRADFORD, Treasurer."

These certificates were printed on tinted paper, embellished with a vignette, and were somewhat narrower and longer in size than national bank notes. For convenience they were made in denominations of five and ten dollars each, and were issued to an amount of about \$4,800,000. They were paid only to the employes of the company for wages, and when returned to the company, before maturity, in payment of freights or tolls, and when paid by the company at maturity, were canceled and not reissued. There was evidence that in many cases these notes had been used, by the persons to whom they had been issued, in payment for goods purchased from store-keepers and dealers, and that wholesale dealers had received them in payment of accounts due by such store-keepers, and that they had been largely dealt in by stock brokers. There was also evidence that they had never been treated as circulation in the localities in which

they were thus used, and that they could not be mistaken for bank notes.

James E. Gowen, for complainants.

The certificates are simply interest-bearing promissory notes, payable at a certain time, issued for existing debts, and were never intended or used as "circulation." The extent of the issue is of no importance. The denominations used were to facilitate the payment of thousands of officers and employes, whose salaries were largely in arrear. They were issued only to employes for actual debts, and when returned to the company before or after maturity were canceled and not reissued. Had the purpose been to use them as circulation they would have been reissued, and in such case a tax could have been claimed only on the average monthly amount in circulation. They were dealt in by brokers and others as any other security, and their credit was fixed by their quotable value at the stock exchange. They resemble warrants issued by municipalities. The distinction between notes issued in payment of existing debts and notes issued for circulation has always been recognized. *Craig v. Missouri*, 4 Pet. 410; *Atty. Gen. v. Ins. Co.* 9 Paige, Ch. 470; *Dively v. City of Cedar Falls*, 27 Iowa, 227; *Mullarky v. Town of Cedar Falls*, 19 Iowa, 24. Obligations which circulate as money are payable on demand. 14 Abb. Pr. 275; *Morse, Banks*, 458. The question, however, is concluded by *U. S. v. Wilson*, 106 U. S. 620, [S. C. 2 Sup. Ct. Rep. 85,] which was a much stronger case for the government than the present. The committee on ways and means of the house of representatives, and the committee on finance of the senate, at Washington, have both reported that these certificates are not taxable as circulation under the act of 1875.

I. K. Valentine, U. S. Dist. Atty., for respondents.

These notes are within the prohibition of the act. *Thomas v. Richmond*, 12 Wall. 353. The name given these notes by the company is not essential. Their nature is to be determined by the instruments themselves, their character and purpose. The agreement to receive them for debts due the company is calculated to facilitate their circulation. In fact they did circulate. It is no answer to say they were not reissued; Bank of England notes are not reissued. These are in all respects current notes used for circulation, and taxable as such. *Webst. Diet.* "Note;" *Morse, Banks*, 438; *Craig v. Missouri*, 4 Pet. 410; *Briscoe v. Bank of Kentucky*, 11 Pet. 257. The law is so settled in Pennsylvania. *Hazleton Coal Co. v. Megargel*, 4 Barr, 324. Also in New York. *Ins. Co. v. Cadwell*, 3 Wend. 302; *Leavitt v. Yates*, 4 Edw. Ch. 134. *U. S. v. Wilson*, *supra*, arose under a different act, and in that case the notes had been issued by the receiver under a decree of a court and were sold by the company.

McKENNAN, J. We are of opinion that this case is ruled by *U. S. v. Wilson*, 106 U. S. 620, [2 Sup. Ct. Rep. 85.] In that case it was sought to subject to taxation certificates of indebtedness issued

by a railroad company, and by a receiver appointed to take charge of it, as notes or obligations, within the meaning of section 3408 of the Revised Statutes, "calculated, or intended to circulate, or to be used as money," and the court held that they were not "circulation" and so not taxable. The tax claimed in this case was imposed under the nineteenth section of the act of congress of February 8, 1875, which provides "that every person, firm, association other than national bank associations, and every corporation, state bank, or state banking association shall pay a tax of ten per centum on the amount of their own notes used for circulation and paid out by them." The notes issued by the complainants here were in the form of promises to pay to bearer a round sum at a future day, with interest, and were upon their face stated to be for wages due by the Philadelphia & Reading Railroad Company, and were receivable before or at maturity in payment of freight and toll bills of the Philadelphia & Reading Railroad Company and for coal bills of the Philadelphia & Reading Coal & Iron Company, or any other debts due to either of said companies. These notes were only issued to the employes of the railroad company on account of wages due them, and when paid by the company were canceled and not reissued. They were not, therefore, "used for circulation" by the company, but only as evidences of the company's indebtedness to its employes for wages. That they were used afterwards by those to whom they were issued to discharge their debts to others, or to purchase subsistence for themselves, is, in our judgment, indecisive in determining the character of these instruments, because that is to be imposed upon them by the company by *using them as circulation*, and paying them out as such. This, as already stated, was not done. What is there, then, to put them in the category of "circulation?" This is claimed to result from the form in which they were issued. But this is fully answered by the supreme court in *U. S. v. Wilson*. In every essential particular the certificates issued there and those in question here are remarkably alike. The former were certificates of indebtedness, good for round sums, payable to bearer at a future day, with interest, and one-fourth of their face value was receivable before maturity for freight and debts due the company, and were paid out again at their face value, with interest. Under these circumstances the supreme court held that it was not satisfied that these certificates "were calculated or intended to circulate or be used as money." Now, in view of this decision, we cannot hold that certificates of similar form, used by the railroad company, not for circulation, but as evidence of wages due to its employes, are within the scope and meaning of the act of congress, and so subject to the tax imposed by it.

The first prayer of the bill must therefore be granted.

BUTLER, J., concurred.

MUSKEGON NAT. BANK v. NORTHWESTERN MUT. LIFE INS. CO.¹*(Circuit Court, S. D. New York. February 9, 1884.)***NEW TRIAL—VERDICT AGAINST EVIDENCE.**

A verdict will not be set aside merely because the court is of the opinion that a contrary verdict should have been rendered, unless it is clearly and palpably against evidence.

Motion for New Trial:

John E. Parsons, for plaintiff.

Edward Salmon, for defendant.

SHIPMAN, J. This is a motion by the defendant for a new trial of an action upon a policy of life insurance, upon the ground that the verdict for the plaintiff was against the weight of the evidence. The defendant relied upon alleged false representations in the application in regard to the insured's habits of temperance and upon a breach of his promissory warranty against intemperance. I am not dissatisfied with the finding of the jury in regard to the alleged false representations in the application. When the application was made, the insured had been confessedly of temperate habits for over nine months, and had thus shown himself capable of self-control. I differ from the jury in regard to his habits after the policy was issued, because I am of opinion from the evidence that his habit of "spreeing," or indulging in occasional debauches, became more confirmed, frequent, and certain until his bondage to intemperance was established; and that the excessive use of liquor impaired his health and shortened his life. The uncontradicted facts that in April, 1881, while he was recovering from a spree, he employed a colored attendant for a fortnight to accompany him everywhere and guard him against the use of liquor, and that, notwithstanding, he occasionally became drunk, are strong proof to my mind that he had reached a point where he was conscious that he was powerless to withstand his periodical thirst for liquor. But, in the intervals between his sprees, it is plain that he was active, prompt, and energetic, and that he did not have the appearance of an intemperate man, and, from the fact that there was no indication of liquor about his person, I think that he did not drink during these intervals. The jury found that the insured was not "habitually intemperate, or so far intemperate as to impair health," apparently from the fact that his excessive use of liquor was occasional, and that he was abstinent during the periods which intervened between his attacks of intemperance. I can see that there was enough evidence in favor of the health and apparent temperance of Comstock, when he was engaged in business, to induce an honest belief that he had not yielded to intemperate habits, and that, therefore, the accounts which were given by persons who had seen him when he was intoxicated were exaggerated. The testimony of Messrs. Barrow, Par-

¹Affirmed. See 7 Sup. Ct. Rep. 1221.

sons, Haines, and Goodsell shows that in their occasional or frequent interviews with Comstock in the business part of the city, and during business hours, they did not perceive that he ever drank liquor, and, I think, it is true that if he had drank without interruption his appearance and breath would have shown it. So that, while I think that the verdict should have been for the defendant, I cannot say that it was so much against the weight of evidence as to demand or justify the granting a new trial.

The jury gave more importance to the testimony for the plaintiff than I thought it deserved. While it was true, it did not seem to me to be convincing. It apparently seemed to the jury to be weighty, but new trials for verdicts against evidence should not be granted merely because the court thinks that a mistake was made. The mistake should be clear and palpable.

The motion is denied.

LAPP and others v. VAN NORMAN and another.

(Circuit Court, D. Minnesota. February 15, 1884.)

1. VOLUNTARY ASSIGNMENT—POSSESSION OF ASSIGNEE—ATTACHMENT.

Property in the possession of an assignee under a voluntary assignment, purporting to be made by the debtor in pursuance of the statute of Minnesota, approved March, 1881, is not *in custodia legis*, so as to exempt it from seizure by a writ of attachment issued out of the circuit court of the United States.

2. SAME—MOTION TO DISSOLVE ATTACHMENT AND TURN OVER PROPERTY TO ASSIGNEE.

A motion to dissolve an attachment and order the property to be turned over to the assignee by the marshal, denied upon the facts stated in the opinion.

The defendants made an assignment to one Bennett, in pursuance of the provisions of section 1 of the insolvency law of the state of Minnesota, approved March 7, 1881. While the debtor's property in store was in the possession of a deputy sheriff of Hennepin county, Minnesota, the United States marshal attempted to take the same by virtue of a writ of attachment issued out of the United States circuit court for this district. The deputy sheriff, after this attempted levy, on demand of the assignee, surrendered the possession of the property to him, which was immediately taken by the marshal, and the assignee ejected from the building. A motion is made by the assignee to intervene in this suit, and to dissolve the writ of attachment issued out of this court.

Merrick & Merrick, for Bennett, assignee.

O'Brien & Wilson, contra.

NELSON, J. It is not necessary to decide on this motion whether the assignment is fraudulent on its face. True, the assignors have expressly reserved an interest to themselves, and authorized the assignee to pay over to them any surplus that may remain, to the ex-

elusion of those creditors who do not file a release and participate in the assets of the estates. It is doubtful whether such a provision is in harmony with the law, but in the view taken by the court this question will not be considered. The affidavits introduced by the assignee at the hearing show that the sheriff of Hennepin county was in possession of and legally controlled the store and stock, when a demand was made by virtue of the assignment and the possession of the property surrendered by the deputy. The United States marshal of this district had attempted to make a levy after the sheriff had taken possession, but he could not rightfully interfere with that officer, and there was no voluntary surrender to him of the property seized. It also fairly appears by the affidavits of Bennett, the assignee, A. B. Van Norman, Peterson, deputy sheriff, and A. N. Merrick, that after the sheriff or his deputy had surrendered the possession on demand of the assignee and released the property, the United States marshal immediately took the same by virtue of a writ of attachment issued out of the circuit court of the United States for the district of Minnesota. It is by virtue of this seizure that the marshal holds the property. On this statement of the facts I shall not decide on this motion who has the better title and right to the possession of the property taken.

Mather v. Nesbit, 13 FED REP. 872, has no application to the facts here. The writ of attachment properly issued in this suit against the debtor, and if the marshal has seized the property which belonged to Bennett, he is certainly liable in an action of trespass for the damages thereby sustained.

It is claimed that the property in the possession of the assignee is in *custodia legis* and not subject to seizure by writ of attachment. I do not agree to this. The statute of Minnesota, March, 1881, did not validate all assignments purporting to be made in pursuance thereof, and forbid a judicial investigation; and while I concede that an attachment would not hold the property to satisfy a judgment against the defendants unless the assignment is fraudulent and void against the plaintiffs, yet under the law the property in the possession of the assignee is not in *custodia legis* so as to exempt it from seizure. This instrument is the source of title in the assignee, and its execution is the voluntary act of the debtors, and not a proceeding instituted by law against them. The object of section 1, as said by the court in Rhode Island, where a similar section is contained in the insolvent law of that state,—“is to take advantage of the displeasure which a debtor naturally feels when his property is attached, or to hold out an inducement to him to make an assignment.” 12 R. I. 460. The defendants have joined issue in the action brought by the plaintiffs, and if the assignee desires to defend he can become a party thereto.

The motion to dissolve the attachment, however, is denied and it is so ordered.

OELBERMAN and others v. MERRITT.¹

(Circuit Court, S. D. New York. February, 1884.)

CUSTOMS DUTIES—APPRaiser NOT ALLOWED TO IMPEACH HIS OWN VALUATION.

A merchant appraiser appointed under section 2930 of the Revised Statutes is a *quasi* judicial officer, and will not be permitted to testify to his own neglect of duty. To permit the awards of the important tribunal, which congress has established to appraise imported merchandise, to be overthrown on the assertion of one of its members made years afterwards, is clearly against public policy. It is putting a premium upon incompetency, inaccuracy, and fraud.

Motion for a New Trial.

D. H. Chamberlain and *Eugene H. Lewis*, for plaintiffs.

Elihu Root, U. S. Atty., and *Samuel B. Clarke*, Asst. U. S. Atty., for defendant.

Before SHIPMAN and COXE, JJ.

COXE, J. On the twenty-ninth day of June, 1879, the plaintiffs imported from Germany 34 cases of silk and cotton velvet, in two invoices, containing 10 and 24 cases respectively. The collector designated two cases from the former and three from the latter invoice, and they were sent to the public store for examination. The appraiser advanced the entered value more than 10 per cent. The plaintiffs, thereupon, gave notice of dissatisfaction under section 2930 of the Revised Statutes. The collector selected a merchant appraiser to be associated with one of the general appraisers for the purpose of instituting a re-examination of the merchandise as provided by law. Before entering upon his duties the merchant appraiser took the following oath:

"I, the undersigned, appointed by the collector of the district of New York to appraise a lot of silk and cotton velvets * * * do hereby solemnly swear, diligently and faithfully to examine and inspect said lot of silk and cotton velvets, and truly to report, to the best of my knowledge and belief, the actual market value, or wholesale price thereof, at the period of the exportation of the same to the United States in the principal markets of the country from which the same was exported into the United States, in conformity with the provisions of the several acts of congress providing for and regulating the appraisement of imported merchandise, so help me God."

Subsequently he made two reports, in which, after having stated that he had examined the velvets with the general appraiser, he certified that the actual market value or wholesale price of the goods was correctly stated in the itemized schedules which followed. The aggregate of his advance over the entered value was 9½ per cent. The general appraiser also made reports advancing the goods 17 3-10 per cent. There being a disagreement, the collector adopted the latter valuation and levied the additional duty and penalty as required by law. The plaintiffs insist that the reappraisal was invalid because the merchant appraiser did not diligently and faithfully inspect the

¹ Reversed. See 8 Sup. Ct. Rep. 151.

goods. The cause was tried at the February Circuit, 1883, and resulted in a verdict for the plaintiffs. The defendant now moves for a new trial. Upon the trial, a former decision by Judge SHIPMAN was relied upon as supporting the proposition that an appraiser might be called to impeach his own award. Although in that case—*Passavant v. The Collector*—the merchant appraiser was permitted to testify, the court did not have before it, or attempt to decide the question now presented for consideration. That question is: Was the merchant appraiser a competent witness to prove his own neglect of duty?

It is true that the counsel for the defendant might have made their objections more definite. We are, however, of the opinion that the exceptions to the admission of evidence and to the refusal of the court to direct a verdict fairly entitle them to present this question here. *Randall v. B. & O. R. Co.* 3 Sup. Ct. Rep. 322; *Gordon v. Butler*, 105 U. S. 553.

Stripped of all disguise the effort, on the part of the plaintiffs, was to induce the merchant appraiser to testify that he had not done what the law required him to do. In this they were partially successful, if they had not been, no question, upon any theory, could have been presented to the jury. In other words the only evidence of which to predicate illegality in the appraisement came from the lips of a man who took an oath that he would act legally, and subsequently certified over his own signature that he had done so. Should this evidence have been received? Appraisers occupy the position of *quasi* judicial officers, they have been aptly described as "legislative referees." *Tappan v. U. S.* 2 Mason, 406; *Harris v. Robinson*, 4 How. 336. The merchant appraiser is presumed to be, and in fact is, the special representative of the importer, and quite naturally, as was demonstrated by the evidence in this case, is somewhat biased against the government. The examination which he is required to make may take place when he is entirely alone, its extent is largely in his discretion. What he says of it and its sufficiency no one can contradict. The government, if he is permitted to testify, is left remediless and wholly at his mercy.

Thus may the solemn and definitive conclusion of the tribunal to which congress has assigned the duty of placing a value upon imported merchandise, be attacked in a collateral proceeding and swept away by the testimony of a negligent, forgetful or dishonest appraiser. The result, too, is infinitely more disastrous than in ordinary actions where verdicts and decisions are set aside and new trials ordered. No better illustration could be furnished than the verdict in this case. The evidence was overwhelming and hardly disputed that the goods were undervalued. The merchant appraiser admitted this, the inference to be drawn from this testimony is, that, being compelled to advance the value, his sole anxiety was to relieve the importer from the penalty; hence his valuation at 9½ per cent. advance. Notwithstanding this, the government loses the penalty not

only, but also the duty, which upon the proof was clearly due. Manifestly the rules of evidence should not be relaxed to produce a result so inequitable. To permit the awards of this important legislative tribunal to be overthrown upon the assertion of one of its members, made years afterwards is, we think, clearly against public policy. To hold otherwise, would be, in effect, to allow the witness to deny his oath and stultify himself by an impeachment of his own finding,—to contradict a record by speculative and fallible testimony, in short it would set a premium upon incompetency, inaccuracy and fraud. We do not intend to intimate that the evidence in the case at bar establishes more than forgetfulness, or perhaps, carelessness on the part of the merchant appraiser. The mischief is in establishing a rule under which ample opportunity is given for a complete reversal of the aphorism—"Corruption wins not more than honesty."

We have been referred to no case and are quite confident none can be found where this precise question has been decided. The weight of authority upon analogous questions, however, having reference to jurors, referees, arbitrators, and commissioners sustains the position here taken. Every objection to them applies with equal or greater force to an appraiser. What are the arguments against the admissibility of this testimony? It permits, it is said, a solemn record to be attacked by parol evidence, and that too in a collateral proceeding, it permits a witness whose memory is clouded and confused by a thousand intervening events to dispute the rectitude of a finding made when all was fresh and clear before him. It promotes litigation. It encourages bribery, trickery and fraud. These are some of the reasons; and which one of them does not apply to an appraiser? If a judicial officer or a juror may not testify to misbehavior on his part; if appraisers or commissioners under state laws cannot be heard to say that they did not sufficiently view or examine the land alleged to be damaged, if an arbitrator cannot impeach his own award, we fail to find any reason, founded upon authority, why the evidence here should stand.

As the conclusion reached upon this branch of the case necessitates a new trial it will not be necessary to consider the other propositions argued. It may be said, however, in view of all the testimony, and particularly that of the government appraiser, refreshed as it was by stenographic notes taken at the time, showing the nature of the examination and the part taken by the merchant appraiser, that the verdict should be set aside as against the weight of evidence; it being established by a great preponderance of testimony that every requirement of law was carefully obeyed

New trial ordered.

SHIPMAN, J., concurs

ELGIN WATCH CO. v. SPAULDING, Collector.

(Circuit Court, N. D. Illinois. January 22, 1884.)

CUSTOMS DUTIES—WATCH ENAMEL.

The substance known as "watch enamel" is dutiable under schedule M of section 2504, as "watch material," at 25 per cent. *ad valorem*, and not under schedule B of the same section, at 40 per cent., as "manufactures of glass, or of which glass shall be a component material." Schedule B was intended to cover only manufactured articles of glass, and not the crude material.

At Law.

Storck & Schumann, for plaintiff.

Gen. Joseph B. Leake, Dist. Atty., for defendant.

BLODGETT, J. The plaintiff, about November 22, 1882, imported an article which was charged by the inspector of customs a duty of 40 per cent. *ad valorem* under the last paragraph of schedule B, § 2504, as "manufactures of glass, or of which glass shall be a component material." The plaintiff paid the duty so imposed under protest, and brings this suit to recover the excess of such duties, contending that the article in question is dutiable as "watch material," under the last paragraph but one of schedule M, § 2504, at 25 per cent. *ad valorem*. The proof in the case shows that the article in question is known to the trade as "watch enamel," and used only, so far as is disclosed by the evidence, for enameling the faces or dials of watches. The proof also shows that the composition of this commodity is a secret; that the component parts of it are not known in this country; that it is used by being pulverized and made into a paste which is spread upon the copper disk which forms the base of the watch dial, and then baked and polished, so as to bring it to a proper surface; and the proof fails to show that it is practically applied to any other use than for enameling watch dials, although it is suggested that it is adapted to use as an enamel for clock faces, and perhaps might be used for scale columns in thermometers and similar instruments, and for other purposes where a white enamel surface is desirable. I come, therefore, to the conclusion that the article in question was imported by the plaintiff solely for use as enamel for watches, and that this is the only purpose for which it is at present imported by importers and used in this country, and the only use known for it to the trade. The appearance of the article would seem to indicate that it is a vitreous material; at least the fracture would indicate that, and it may have in its composition some of the material out of which glass is made; but it seems very palpable to me that it is not a *manufacture of glass*: it is not even crude or raw glass, and I therefore conclude that it comes clearly within the description of "watch material." It is therefore, in my estimation, "watch material," and not a manufacture of glass. It is plain, I think, that the last paragraph of schedule B,

"manufactures of glass, or of which glass is a component material," was intended to designate some manufactured article of glass, in form for use as such, and not crude or raw glass. It must be an article which was fitted and adapted at the time it was imported for some purpose or use, and did not require further manipulation in order to make it dutiable as a manufacture of glass.

Issue is found for the plaintiff.

CHICAGO TIRE & SPRING WORKS CO. v. SPAULDING, Collector.

(Circuit Court, N. D. Illinois. January 22, 1884.)

CUSTOMS DUTIES—TIRE BLOOMS—STEEL PARTLY MANUFACTURED.

Held, that certain steel-tire blooms which had gone through several stages in the process of manufacture, were dutiable at 45 per cent. as "articles of steel partially manufactured," and could not be classified as "steel not otherwise provided for," the duty upon which is only 30 per cent.

At Law.

Storck & Schumann, for plaintiff.

Gen. Joseph B. Leake, Dist. Atty., for defendant.

BLODGETT, J. This is a suit to recover duties claimed by the plaintiffs to have been illegally charged upon certain steel-tire blooms imported by plaintiff. The inspector of customs classed these blooms under the paragraph of schedule E, § 2504, which reads as follows:

"All manufacturers of steel, or of which steel shall be a component part, not otherwise provided for, forty-five per cent. *ad valorem*. But all articles of steel *partially* manufactured, or of which steel shall be a component, not otherwise provided for, shall pay the same rate of duty as if wholly manufactured."

The plaintiffs insist that they should have been classed under another paragraph of schedule E, as "steel in any form, not otherwise provided for, thirty per cent. *ad valorem*." Payment of the duties demanded was made by plaintiff and appeal taken to the secretary of the treasury, who affirmed the action of the customs officer here. The proof shows that the steel-tire blooms in question are produced by first casting a flat round ingot of steel somewhat in the shape of a cheese, or grindstone with no hole through the center. It is then reheated and hammered so as to reduce its thickness, thereby compacting its grain or fiber; a hole is swaged through its center and it is then hammered on the horn or beak of an anvil, thereby expanding its circumference and forming a grain or fiber in the circumferential direction, and when intended for locomotive tires the rudiments of a flange are formed or swaged also upon the outer periphery of the circle. In this form these blooms are ready for rolling, and are im-

ported at this stage of development. On arriving in this country they are reheated and placed in the rolling-machine, where they are rolled or spun into the size and shape adapting them for use for tires for locomotive driving wheels or car wheels, and, after being rolled, the inner and outer surfaces are turned and finished in a lathe. It seems quite plain to me that when imported these blooms had passed through an important stage in the progress of manufacture into steel tires. They were something more than ingots of steel or plain steel blooms or bars. In the first place, the ingots were cast in a peculiar shape, and the work which had been expended on them to bring them from the ingot stage to tire blooms is shown, by the proof, to have been equal to \$10 or \$15 per ton, and it was all work for the specific purpose of making them into steel tires and nothing else. The particular use to which they were to be applied was indicated from the first by the shape in which these steel ingots were cast; the work done not only fitted them for this specific use but it unfitted them, in a degree, for any other use, and hence I conclude that these steel-tire blooms were articles of steel partially manufactured. To use these blooms for any other purpose, it would undoubtedly have been necessary to undo much of the work which had been done upon them. I am therefore of opinion that the duty in this case was rightfully charged.

The case of *Downing v. Robertson*, unreported, in the Southern district of New York, referred to by complainant's attorney on the trial, involved the duties on plain steel blooms where the ingot had been brought into the shape of planks or slabs by hammering or rolling and from which railroad bars or bar steel could readily be rolled, and at the stage where they could be and were readily adaptable to any other use for which steel was needed. This case, therefore, does not seem to me at all in point for the purpose of settling the question in these cases.

The issue must be found in this case for the defendant.

WILSON and others v. SPAULDING, Collector.

(Circuit Court, N. D. Illinois. January 22, 1884)

CUSTOMS DUTIES—TAFFETA GLOVES.

Taffeta gloves containing over 50 per cent. in value of silk and over 25 per cent. of cotton are subject to a duty of 50 per cent. *ad valorem* under the ninth paragraph of schedule 4.

At Law.

Storck & Schumann, for plaintiffs.

Gen. Joseph B. Leake, Dist. Atty., for defendant.

BLDGGETT, J. This is a suit to recover back duties paid by plaintiffs under protest, on three lots of "Taffeta" gloves, imported by the plaintiffs in March and September, 1882, the amount of duties which plaintiffs claim was paid in excess of what was rightly chargeable, being \$129.30 in this particular case. The goods in question were classed by the inspectors as composed of silk and cotton, "silk, chief component of value," and charged with an *ad valorem* duty of 60 per cent., under the seventh paragraph of schedule H, section 2504. The plaintiffs, by the protest, claim that these goods contain 25 per cent. or over in value of cotton, and are only dutiable at 50 per cent. *ad valorem*, under the last clause of schedule H, and the proviso of section 1 of the act of February 8, 1875, "amendatory of the customs and revenue law." By that act it is provided "that from and after the date of the passage of this act, in lieu of the duties heretofore imposed on the importations of the goods, wares, and merchandise hereinafter specified, the following rates of duties shall be exacted, namely: * * * On all goods, wares, and merchandise not otherwise herein provided for, made of silk, or of which silk is the component material of chief value, irrespective of the classification thereof for duty by or under previous laws, or of their commercial designation, sixty per centum *ad valorem*: provided that this act shall not apply to goods, wares, or merchandise which have, as a component material thereof, twenty-five per centum, or over, in value, of cotton, flax, wool, or worsted."

The proof in this case shows without dispute that the gloves in this case are composed of silk and cotton, and contain over 25 per cent. of their value in cotton, but silk is the chief component of value; that is, they contain over 50 per cent. in value of silk. The duty upon them is therefore not specifically fixed by the act of February 8, 1875, as the proviso in this act takes them out of the 60 per cent. class, and the only question is, under what law are they dutiable? Plaintiffs claim them to be dutiable under the ninth paragraph of schedule H, while they were charged with duty under the seventh paragraph of schedule H. The paragraphs in schedule H, upon which the questions arise, read as follows:

"(7) Silk vestings, pongees, shawls, scarfs, mantillas, pelerines, handkerchiefs, veils, laces, shirts, drawers, bonnets, hats, caps, turbans, chemisettes, hose, mitts, aprons, stockings, *gloves*, suspenders, watch chains, webbing, braid, fringes, galloons, tassels, cords, and trimmings, and ready-made clothing, of silk, or of which silk is the component material of chief value, sixty per cent. *ad valorem*."

"(9) Manufactures of silk, or of which silk is the component material of chief value, not otherwise provided for, fifty per centum *ad valorem*."

Since the passage of the act of February 8, 1875, several opinions construing it have been given by the attorney general and secretary of the treasury. These opinions are reported in 15 Op. Atty. Gen. 51, and Decisions of Treasury Department for 1875, page 344, and

Decisions of the Treasury Department for 1876, page 133; and I infer that under the construction of the law given by these rulings the practice of the customs officers has been to charge a duty of 60 per cent. *ad valorem* on this class of goods, on the ground that they are specifically dutiable as "silk gloves, under the seventh paragraph of schedule H. It seems to me, however, that there is at least room for a doubt whether any articles except ready-made clothing, composed partly of silk and partly of cotton, and where silk is the chief component of value, come within the meaning of the seventh paragraph. It reads, "silk vestings, etc." until we reach the words, "and ready-made clothing of silk," and then proceeds, "or of which silk is a component material of chief value." And I think the fair grammatical construction of the sentence limits the application of the words, "or of which silk is a component material of chief value," to "ready-made clothing," and that it was intended that the articles previously mentioned in the paragraph, such as "silk vestings," "gloves," etc., should be wholly of silk in order to subject them to the 60 per cent. *ad valorem* duty.

But whether I am right or not as to the true reading of this seventh paragraph, I think we must certainly assume that congress, by this proviso to the first section of the act of 1875, intended that goods composed of silk and cotton, but which contained 25 per cent. or over of cotton, shall not be dutiable at 60 per cent., else the exception by the proviso means nothing. Why exclude them from the clause of the act immediately preceding this proviso, which makes certain classes of goods dutiable at 60 per cent., and yet by construction put them back into this seventh paragraph, in schedule H, which charges them with 60 per cent. *ad valorem* duty. It is the duty of the court to give effect to all the parts of the law, if it can be consistently done; and, inasmuch as congress did not say by this proviso that these goods containing 25 per cent. or over of cotton should come in free of duty, we must assume that they were still subject to some duty; and the natural clause under which they fall, as they are to pay less than 60 per cent. *ad valorem*, is the last clause of schedule H, which makes them dutiable as "manufactures of silk, or of which silk is the component material of chief value, not otherwise provided for, 50 per cent. *ad valorem*." They certainly respond to this definition, and I therefore conclude that they are dutiable under this ninth clause of schedule H.

This view seems to me to harmonize the legislation, and give effect to all the parts of the act of February 8, 1875, making it consistent with itself and the previous legislation of congress on the subject.

The issue in this case, and the cases that were tried with it, will be found for the plaintiff.

FAIRBANKS and others v. SPAULDING, Collector.

(Circuit Court, N. D. Illinois. January 22, 1884.)

CUSTOMS DUTIES—STEARINE.

Stearine is not to be classed as "tallow," but as a "manufacture of tallow," and as such is subject to a duty of 25 per cent.

At Law.

Storck & Schumann, for plaintiff.

Gen. Joseph B. Leake, Dist. Atty., for defendant.

BLODGETT, J. In February, 1882, the plaintiffs imported two invoices of merchandise, entered as "tallow" and dutiable under schedule M of section 2504 of the Revised Statutes. The article so entered as "tallow" was classed by the inspector as "a manufacture of tallow" under section 2516, and charged a duty at the rate of 20 per cent. *ad valorem*. The plaintiffs paid, under protest, the duty so charged and bring this suit to recover the difference between the amount paid at the rate of 20 per cent. *ad valorem* and what would have been the amount of the duty on this commodity had it been classed as tallow and charged with duty at the rate of 1 per cent. per pound, as provided in schedule M, § 2504. The only question in the case is one of fact, whether the article imported was tallow or a manufacture of tallow, and the preponderance of proof, I think, shows quite satisfactorily that this imported article was stearine, and that stearine is one of the products resulting from the manufacture of tallow. It is a hard substance or residuum, left after extracting or pressing the oil from the tallow, and the proof fully satisfies me that this is stearine—that it had passed through the process of pressing, and was, at the time of its importation, a manufacture of tallow, and not tallow in its natural condition. The plaintiffs' counsel also contends that this article is entitled to come in under the free list provided for in section 2505, as "grease for use as soap stock only;" but there are, as it seems to me, two complete answers to this proposition: *First*, that the protest claimed that the article was "tallow" and dutiable at 1 per cent. per pound, and he is confined to the case made by his protest, under section 2931. *Second*, there is no proof that this article is "grease for soap stock only." The court perhaps might, from common knowledge, say any fatty substance can be used in some way for the manufacture of soap, but I cannot say, and certainly the proof does not aid me in saying, that this stearine is only used for the manufacture of soaps.

There will be a finding, therefore, for the defendant.

LEAHY v. SPAULDING, Collector.

(Circuit Court, N. D. Illinois. January 22, 1884.)

CUSTOMS DUTIES—SILK AND COTTON SHAWLS.

Certain shawls worth 15 shillings and 6 pence, containing one shilling and six pence worth of silk, and the rest cotton, *held*, subject to a duty of 35 per cent. only, as "shawls, cotton chief value," instead of 60 per cent., as "wearing apparel, silk chief value."

At Law.

Storck & Schumann, for plaintiff.

Gen. Joseph B. Leake, Dist. Atty., for defendant.

BLODGETT, J. The only question in this case is whether certain shawls imported by the plaintiff and which were classed as "wearing apparel, silk chief value," and charged with duty at the rate of 60 per cent. *ad valorem*, were improperly so classed and should have been classed as "shawls, cotton chief value," and charged with duty at 35 per cent. *ad valorem*. The proof shows, without dispute, that much the larger component in value of these shawls is cotton. According to the proof the value of these shawls was 15 shillings and 6 pence each, while, if all cotton, they would have only cost 14 shillings each, thus showing that they contained only a very small proportion of silk, and that their value was not increased over 1 shilling and 6 pence by the silk they contain.

The issues will be found for the plaintiff.

KIRK and another v. ELKINS MANUF'G & GAS Co.¹

(Circuit Court, E. D. Pennsylvania. February 13, 1884.)

PATENT FOR INVENTION—INFRINGEMENT.

Patent No. 201,536, for improvement in bronze alloys, not infringed by defendant's metal or alloy, known as "Ajax Metal," in which copper, tin, and arsenic occur in proportions different from the proportions specified in complainant's patent.

Hearing on Bill, Answer, and Proofs.

This was a bill to restrain an infringement of patent No. 201,536, dated March 19, 1878, for improvement in bronze alloys, issued to Edward C. Kirk.

H. T. Fenton, for complainants.

John G. Johnson, for respondents.

¹Reported by Albert B. Guilbert, Esq., of the Philadelphia bar.

MCKENNAN, J. The compound described and claimed in the patent consists of copper, tin, and arsenic, in the proportion of 75 to 90 parts of copper, 10 to 25 parts of tin, and one-fifth of 1 per cent. to 10 per cent. of arsenic to be added to the copper and tin when the latter are at the melting point in the crucible. The patentee was not the first to produce an alloy of copper and tin. The specification shows that castings of these metallic constituents were made before the date of the patent; and, indeed, the patent of Randall, for a metal alloy of copper, tin, and arsenic, is expressly referred to. The patentable novelty of the described alloy consists, then, in the proportions in which the copper and tin are compounded and in the addition thereto, in the process of melting, of the prescribed quantity of arsenic, for the purpose of deoxidizing the metallic oxides always found in ordinary alloys of copper and tin. The only evidence of infringement is furnished by analyses of borings from several samples of Ajax metal manufactured by the respondents. These show it to be composed of copper, tin, zinc, lead, and arsenic; copper within the range of proportion stated in the patent, tin and arsenic generally below the minimum proportion stated in the patent, and lead and zinc in varying proportions, as high as 8 per cent. What differential effect upon the character and properties of the compound results from the reduced proportions of tin and arsenic and the addition of lead and zinc we are uninformed by the evidence; but it is clear that so far as the constituents of the two compounds are concerned they are not the same. But the respondents deny that they have added arsenic to the other metallic components of their alloy, and allege that whatever portion of arsenic it may be found to contain was only in combination with the copper, which they used in its natural state. This is fully sustained by the testimony of their superintendent, who was alone cognizant of the ingredients of their compound. He says he desired to get rid of all the arsenic he possibly could, and hence that no arsenic was artificially introduced; that he used only the copper of commerce, which always contains more or less arsenic; and that he began the use of this in the manufacture of Ajax metal in 1874, and has continued to use it since without material change in proportions.

Considering, therefore, that the alloys manufactured by the complainants and the respondents, respectively, are not constitutively the same, and that the respondents have not used arsenic except as it may have been found in combination with commercial copper, and that their use of this began in 1874, we cannot adjudge them to be infringers, and the bill must therefore be dismissed, with costs.

GOLD & STOCK TEL. Co. v. PEARCE and others.

(Circuit Court, S. D. New York. February 20, 1884.)

PRELIMINARY INJUNCTION—WHEN TO BE GRANTED.

A preliminary injunction will not be granted while another to the same effect is in force in a different suit.

In Equity.

Edward N. Dickerson, Jr., for orator.

Roscoe Conkling and Samuel A. Duncan, for defendants.

WHEELER, J. This cause has been heard on the motion of the orator for a preliminary injunction to restrain infringement of the second claim of the orator's patent. In a prior suit in this court, so lately brought by the orator against these same defendants that the time for an answer and taking of testimony has not yet expired, a preliminary injunction restraining the defendants from infringing this second and the third claims of the patent has, on motion of the orator, been granted, and is still in force. The time for pleading in bar the pendency of the first suit has not arrived. In an affidavit by an expert, filed by the orator on this motion, it is stated that he is familiar with the patent, and made an affidavit on the former motion, and that the apparatus claimed to be an infringement on this motion "is in all material respects, so far as the second claim is concerned, the same apparatus as that enjoined in the previous motion." The defendants object to this mode of procedure by a new bill, and cite *Wheeler v. McCormick*, 8 Blatchf. 267. The orator insists that it is proper to file successive bills for successive infringements, and cited *Higby v. Columbia Rubber Co.* 18 FED. REP. 601. It is also urged in support of the orator's position that the prior suit could not be maintained on an infringement subsequent to the filing of that bill only; while this may be, and that that may fail and this succeed. That is one ground stated by WOODRUFF, C. J., for maintaining the second suit in *Wheeler v. McCormick*, although the principal ground was that the prior suit was in another district and circuit. That reason does not obtain here, however, as this case now stands, for it is adjudged in the prior suit, and that adjudication still stands insisted upon by the orator, that there was an infringement prior to the filing of the former bill sufficient to uphold it to an accounting and final decree. That the accounting in that case would extend to the time of taking, and cover the infringement now aimed at, is not at all questioned. That distinguishes this case from what was said by LOWELL, J., in *Higby v. Columbia Rubber Co.* There the account had been closed, and although the former injunction was in force a new bill would be necessary to full relief for the new infringement. It is also urged that as a proceeding for contempt would be a harsher remedy than a motion for a new injunction, the injunction might be granted on a case on which the

defendants might not be adjudged guilty of contempt of the former one, and especially where the proof would consist of *ex parte* affidavits. But the processes of courts of equity are so flexible and capable of being tempered to the justice and necessities of every case, at all its stages and in all its phases, that the difference between the forms does not seem to be important. As these cases are now situated the modes of proof on proceedings for contempt of the former injunction would or might be precisely the same as upon this motion. The question whether the device sought now to be restrained infringes the second claim is precisely the same as that whether it violates the former injunction. If it is not willful it need not be visited with punishment as such. As the case is presented the question to be decided is precisely the same as that before decided between the same parties, the adjudication of which is in force and covers all that is asked for here. If it were necessary, or more fair, or more desirable, to make the former injunction more specific by being directed at some device which the orators claim to be an infringement and the defendants that it is not, that end can be reached by motion in the pending cause as well as by a new bill. Multiplicity of suits should be avoided when practicable, and this multiplicity may well be avoided here.

Under the circumstances of this case this motion is denied, but without prejudice to any motion or proceeding in the original cause.

GREEN V. BARNEY.

(Circuit Court, D. Massachusetts. February 28, 1884.)

PATENT—LACHES—PENDING LITIGATION.

When the validity of a patent is in litigation, the patentee may, without being guilty of laches, wait until a decision is rendered before bringing suit against infringers.

In Equity.

Allen Webster, for complainant.

B. F. Thurston, for defendant.

LOWELL, J. This suit is brought upon the much-litigated reissued patent, as both counsel have called it, granted to the plaintiff for driven wells, May 9, 1871, No. 4,372. The validity of the patent is not denied. The sum in dispute being small, it is made a question whether the plaintiff should not be remitted to his action at law. The evidence tends to show a technical right to an injunction, and a claim for some profits; and I do not conceive that I have a right, under these circumstances, to dismiss the suit, though, as to the costs, I will hear the parties. The usual license fee for a well for domestic uses is \$10, and for one for supplying water for steam-en-

gines, \$125. The complainant understood the defendant to say, in an interview which they had before suit was brought, that he had paid the complainant's agent the usual fee of \$10 for one domestic well, and had afterwards moved it, as the defendant called it,—that is, had taken up the pipes, and put them down in another place,—which, according to the meaning of a license, as the plaintiff interprets it, requires a second royalty to be paid. The fact is not proved. There was a domestic well which was abandoned in 1873 and a new one driven, but the evidence does not explain when, or by whom, the first well was driven, or whether it had been licensed. The defendant had recently bought the place in 1873, and there is an intimation that the well was already there at that time. He paid the royalty in 1876 for the only domestic well which he now uses, or has used, since 1872; and in the absence of proof to the contrary, the presumption is that he paid all that the agent asked him to pay. Certain it is that he did not move the well after he paid the royalty, but before. In the same year (1873) the defendant made a driven well in the cellar of his workshop, to supply his boiler, and used it for seven months, when he discontinued the use of it, which he has never resumed. It does not appear that he has destroyed it, or taken up the pipes. There is no reason to suppose that he will ever use it again; for the water injured his boiler, and he laid pipes to the adjacent river, which furnishes a purer and better supply. In this state of facts, the plaintiff understood the defendant to be ready and to offer to pay \$10 for the double use of the domestic well; and he charged him with the usual royalty of \$125 for the "well used for engine," and says that he refused to accept anything unless the whole was settled. How near the parties came to an agreement is not proved, nor whether the defendant offered to pay anything for the seven months' use of the larger well. It is plain, however, that the charge of \$125, which is the price of a perpetual license, was excessive, unless it could be shown (which seems highly improbable) that the defendant's profits for the seven months were equal to that sum.

As to the point of laches, so ably argued by the defendant's counsel. This suit was brought in 1879, and the complainant's patent having been and being still severely litigated, he could not be bound to proceed against all supposed infringers, until at least the first decree in his favor, which was made by Judge BENEDICT in 1876, (*Colgate v. Gold & Stock Tel. Co.* 4 Ban. & A. 415;) and between that date and 1879 he had, I do not doubt, a great deal of information to obtain as to the facts of the numerous infringements.

I shall make an interlocutory decree for the plaintiff; but neither refer the case to a master, nor settle the costs, until the parties have had further opportunity to adjust their differences without more expense.

BRAINARD v. EVENING POST ASS'N.

(Circuit Court, D. Connecticut. February 14, 1884.)

PATENT—PREVIOUS STATE OF THE ART—COPY—DISTRIBUTOR.

Letters patent No. 149,092, for an improved galley-holder, designed to facilitate the orderly assortment of compositors' copy, are invalid for want of patentable novelty in the invention.

In Equity.

Chas. Rollin Brainard, for plaintiff.

Wm. Edgar Simonds, for defendant.

SHIPMAN, J. This is a bill in equity for relief against the alleged infringement of letters patent to Charles Rollin Brainard, No. 149,092, dated March 31, 1874, for an improvement in compositors' copy distributors. The plaintiff is the owner of the patent.

The invention is described in the specification as follows:

"My invention * * * consists in a galley-holder provided with a series of compartments and pins or hooks, correspondingly lettered or numbered, as hereinafter more fully set forth, the object being to keep the copy properly assorted, thus greatly facilitating and reducing the expense of proof-reading. * * * It is well known to all practical printers and proof-readers that, as the compositors empty their matter into the different galleys on the stand, the copy is usually deposited into a common receptacle, without regard to the nature of the article or the order of setting. From this receptacle the proof-reader is obliged to hunt up or select the copy corresponding with his proof, frequently causing much confusion and delay when time is very important, especially when the 'takes' are small. In the drawing it is an ordinary galley-stand, or holder, provided with compartments or slips, lettered in regular order from A to M. Disposed in the upper part of the stand are a series of pins or hooks or copy-holders, lettered to correspond with the compartments. * * * When the compositor goes to the 'bank' or 'dump' to empty matter, instead of depositing his copy in a drawer, it is impaled on the pin or hook in the stand corresponding with the slip in which the galley is located. * * *

The claim is for "the copy-distributor described, consisting of the galley-holder, N, provided with compartments for galleys, and pins or hooks for copy, correspondingly lettered, substantially as and for the purpose specified." The important question in the case is that of patentability. To determine this question, a knowledge of the exact relation which the invention bore to the previous state of the art is necessary. The case of *Brainard v. Pulsifer*, 7 FED. REP. 349, was tried before Judge LOWELL upon the patent and a "short stipulation as to the state of the art and the thing which the defendants use." So much of the stipulation as related to the history of the art is as follows:

"It is further stipulated and agreed that, prior to the grant of the complainant's, patent, it was customary to conduct the business of sorting copy in daily newspaper printing offices substantially as follows: 'The copy was

cut in suitable lengths, called, technically, 'takes,' and distributed in order to the compositors in the office. When a compositor had set up his 'take' he deposited the type set up by him on a galley upon the galley-bank, and deposited the copy from which he had set up the type in a drawer, or box, or upon a table or shelf, or other receptacle, for the proof-reader.' "

When proofs were submitted to the proof-reader for correction he was also furnished with the "copy," procured from the receptacle on or in which it had been placed.

Upon this state of facts Judge LOWELL sustained the patent, and it seems to me that there was no reason for a different conclusion.

But it is now clearly shown that the New York *Sun* office, in 1868, and thereafter, and before the date of the patented invention, used the following system: There was placed over the dumping galley a series of lettered hooks, which were lettered to correspond with the letters which, by the custom of the office, were uniformly placed upon the different classes of matter to be put in type. The "takes" or small pieces of copy were marked with their appropriate letter and were numbered in numerical order and were given to the compositors, each of whom placed his matter, when in type, upon a galley in the galley-bank, and marked it with a tag to correspond with the letter and number on his copy, and placed his copy on the hook which contained the appropriate letter. Sometimes, instead of the tags, the galleys were chalked with a letter to indicate where the copy containing the letters was placed.

In the Waterbury *American* office, for the greater part of the time between 1868 and 1872, there was a system of lettered hooks and spindles over the galley-bank, the letters or words indicating the character of the copy to be placed on each hook. Copy was placed upon the respective hooks, was taken therefrom by the compositors, and when set in type was returned to the spindle and the type was placed upon the galleys, which, though not designated, were "understood, as a rule of the office, to correspond respectively with the copy hooks and holders."

It thus appears, especially by the testimony from the *Sun* office, that separate hooks for the reception of copy, correspondingly lettered with the letters placed upon the copy, and designated upon the type when placed in the galley, were used, and thus the delay from having to search through a large pile of copy for the needed slip was avoided.

The improvement of the patentee consisted in having lettered hooks to correspond with lettered galleys. When the art had arrived at lettering a series of hooks to correspond with the letters systematically placed upon the copy, and marked upon the type when placed in the galley, there does not seem to me to have been any invention in permanently lettering the galley to correspond with the lettering upon the hooks. The only advance upon the simple system of the comparatively small Waterbury *American* office was the en-

largement of the system so as to adapt it to the needs of a much larger newspaper, by the use of a greater number of lettered hooks, and the lettering of the galleys instead of their being designated by rule of the office and in the memory of the compositor.

The description of the invention which was given by the patentee upon his cross examination is as follows:

"When the compositor has emptied his type on the galley, he is instructed by my invention, 149,092, to deposit his copy on a receptacle corresponding to the galley where his matter is, or corresponding to the take-mark on his copy and thereby keep the copy for that galley or article distinct and separate from all other copy or matter, for the more immediate convenience of the proof-reader, and without the labor usually entailed on a copy-sorter."

The invention thus described was substantially used in the *Sun* office, and the patented improvement was a convenient modification of, but not a substantial advance upon, the *Sun's* system.

Believing that the invention was not patentable, I have not examined the question of infringement.

The bill is dismissed.

CAHN v. WONG TOWN ON.

(Circuit Court, D. California. February 4, 1884.)

PATENTS—COMBINATION OF SEPARATE DEVICES—SUBCOMBINATION.

The fact that a device, comprising several patentable elements, has been patented as a whole, will not prevent the patentee from afterwards securing a patent for a combination of any number of the elements less than the whole, provided he applies for it before the lesser combination has been two years in public use.

In Equity.

M. A. Wheaton, for complainant

J. L. Boone, contra.

SAWYER, J., (orally.) This action is upon a patent. The patent consists of lapping over two pieces of leather in making the seam of a boot or any other work of the kind, running a line of rivets along, and then a line of stitching on each side of the line of rivets, so as to make a compact, tight seam. The plea sets up that the patentee in this case, on a prior occasion, procured a patent, and that this other and prior patent is for the same thing, with the addition of a piece of India rubber inserted between the two pieces of leather. The strip of India rubber having been inserted, a line of rivets is run along with two lines of stitching, one on each side of the line of rivets, in the same manner as in the second patent. The defendant claims that the second patent is not a new invention; that it is merely a combination of a part of the elements of the first patent, or of the prior invention, and therefore that the second patent is void, as not covering

a new invention. I think, probably, that would be the case if the patentee were a different inventor—if the patentee in the prior patent had been a different person from the patentee in the second, I am inclined to think so. But the prior patentee is the same man, and doubtless if he had made the invention at the time he obtained his first patent, he might have got a patent for the subcombination, omitting one element—the slip of India rubber. And it does not appear in the plea that this second invention has been in public use or on sale for more than two years, whereby it would be abandoned to the public. The inventor failed, therefore, if he is the inventor of both at the same time, to obtain a patent for all he was entitled to. If he was the inventor at that time, he was entitled to patent the second or subcombination of elements, omitting the inserted strip of India rubber, as well as the first combining all the elements. He might, perhaps, have got a reissue covering both, if his invention of the subcombination is sufficiently indicated in the specification of the first patent; but he has chosen to obtain an independent patent for the subcombination. If he invented it at the same time with the other he might undoubtedly have obtained a patent in the first instance. I think if it was patentable with the additional element of the India rubber, the subcombination, without the addition of the India rubber, invented at the same time, would be patentable. Justice FIELD says, in the *Giant Powder Case*,¹ that this is the proper mode of proceeding when there is another invention for which an independent patent might have been obtained, but has been omitted. If he was the inventor of both he was entitled to patent both, the subcombination without the strip of India rubber, as well as the entire combination of the lapping of the leather and the intervention of a piece of India rubber to make the seam tighter, and better still in combination with the line of rivets and line of stitching on each side of it. He being the first person to invent both, I think it was patentable as to both. He doubtless did invent the subcombination as well as the entire combination at the same time. He embraced the subcombination in the last patent without the additional element intervening; and it does not appear that it was on sale for two years before the application for the last patent. I think the plea, then, should be overruled. And it so ordered

¹ 14 FED. REP. 720; 5 FED. REP. 197

GLOUCESTER ISINGLASS & GLUE Co. v. BROOKS and others.

Circuit Court D. Massachusetts. February 13, 1884.)

1. PATENTS—EXTRACTION OF GELATINE FROM FISH-SKINS.

Letters patent No. 167,123, for a process of extracting gelatine from fish-skins, sustained against letters No. 177,764, granted to another person for a like process, and the latter held to be an infringement.

2. SAME—DECISIONS OF THE PATENT-OFFICE.

The decisions of the commissioner of patents, though entitled to great weight upon questions of priority, are not conclusive.

In Equity.

Browne, Holmes & Browne, for complainant.

James E. Maynodier, for defendant.

NELSON, J. The original of the plaintiff's patent was granted to John S. Rogers, August 24, 1875, No. 167,123, for a new and useful process of extracting gelatine or ichthyocolla from salted fish-skins. It was reissued June 1, 1880, No. 9,226, and again reissued July 13, 1880, No. 9,296. The invention has proved of great value commercially, and it has certainly the merit of patentability. It is also new, unless it was anticipated by Isaac Stanwood, to whom a patent was granted for the same process, May 23, 1876, No. 177,764, and reissued May 17, 1881, No. 9,715. The specifications and claims of both the original and reissued patents of Rogers are the same in substance, the difference between them in phraseology being slight and immaterial. In the second reissue he states the process to be this:

"My invention is to utilize such salted skins of fish; and in carrying it out the first portion of it is to desalt the skins, such portion of the process causing the removal of the scales from the skins, it being accomplished by soaking the skins in cool water, and agitating them therein sufficiently to extract the salt from them. The water should be changed repeatedly until the salt may have been separated from the skins, after which they are to be put into fresh water, which should be gradually heated to a boiling temperature, and kept so for three hours, more or less, until the gelatine may have been sufficiently extracted from the skins by the water so heated. Next, the superfluous matter or matters should be removed from the gelatinous solution now procured, and it (the gelatinous solution) should be strained or filtered in order to obtain it in a purified state. Finally, the liquid is to be suitably evaporated by introducing the solution into pans or moulds, or upon slabs, and exposing to the atmosphere until it may be sufficiently condensed for use, whether as an article of food or as a glue for mechanical purposes."

His claim is:

"The process, substantially as described, of obtaining gelatine from salted fish-skins, it consisting in desalting and boiling them, separating from the gelatinous solution so obtained the superfluous matter or matters, and reducing it (the solution) by evaporation to the necessary consistency for use, as set forth."

The evidence shows that in the years 1872 and 1873 an extensive business was carried on in Gloucester, in the preparation of what is

termed dessicated or boneless salt fish. The process of the manufacture consisted in stripping off the skins and removing the bones from the salted fish, and then cutting the flesh into suitable pieces and packing it in boxes for the market. One result was the accumulation of great quantities of the skins, then thought to be of no value for any purpose, which the fish dealers found considerable difficulty in getting rid of. In November, 1873, Rogers first conceived the idea of utilizing this waste substance as material for the manufacture of gelatine or glue, and began his experiments at Gloucester. In the following autumn he had so far succeeded as to be able to place upon the market samples of liquid glue extracted from salted fish-skins. On February 27, 1875, he filed his application for a patent. Stanwood, who was a manufacturer of glue from fish sounds, in Gloucester, begun his experiments in the autumn of 1872, or the following winter, and by soaking and boiling the skins, and then drying the solution, succeeded in obtaining a liquid glue in small quantities. But the glue proving to be of inferior quality, and his customers finding fault with it, he abandoned his attempts and did not resume them until 1876, after Rogers had obtained his patent. The evidence is conflicting on this point, but upon the whole it is satisfactorily proved that everything done by Stanwood prior to the Rogers patent was merely experimental, and that his experiments, such as they were, did not reach the perfected process of Rogers. Experienced as he was in the manufacture of fish glue, he must have appreciated the importance of a new method by which this waste material could be made available as glue stock in his business. The presumption is very strong that if he had actually succeeded in discovering such a method, he would have made more use of the discovery than he is shown to have done.

When Stanwood applied for his reissue patent an interference was declared between his application and Rogers' original patent. The interference was contested by the parties, and the decision of the patent office was in favor of Stanwood. The defendants rely in their answer upon this decision as a final adjudication settling the question of priority in favor of the Stanwood patent. But it is well settled that the decisions of the commissioner of patents though entitled to great weight on questions of priority, are not final, even between those who have been fully heard in the interference. *Union Paper Bag Mach. Co. v. Crane*, 1 Holmes, 429; *Whipple v. Miner*, 23 O. G. 2236; [S. C. 15 FED. REP. 117.]

The process used by the defendants in the manufacture of glue is identical with that of the Rogers patent, and infringes it.

Decree for complainants.

RAYER & LINCOLN SEAMING-MACHINE CO. v. AMERICAN PRINTING CO.

(Circuit Court, D. Massachusetts. February 18, 1884.)

PATENTS—REISSUE—SEWING-MACHINE.

The third claim of original letters patent No. 108,827 was for the combination of an annular plate with the stitching and feeding mechanism of a sewing-machine, for the purpose of guiding the fabric. The first and third claims of the reissue, No. 9,176, were for a wheel to feed as well as guide the fabric. *Held*, that the reissue, being more than a mere reproduction of the original patent, was invalid as against intervening rights.

In Equity.

T. W. Clarke, for complainant.

J. L. S. Roberts, for defendant.

Before LOWELL and NELSON, JJ.

NELSON, J. The plaintiff sues for the infringement of reissue patent No. 9,176, granted to Rayer & Lincoln, assignors by mesne assignments to the plaintiff, April 27, 1880. The original patent, No. 108,827, was dated November 1, 1870. In the original patent the invention is described as "a new and improved sewing-machine attachment." In the specification, the invention is said to consist in certain improvements by which sewing-machines may be adapted to sew the ends of pieces of goods of the same width, one pair after another continuously, and to stitch all kinds of goods where long, continuous seams are required. The invention is described with reference to any sewing-machine of suitable construction and size. D is an annular plate supported in a vertical position by rollers hung in a frame, and so set that its upper edge is behind the presser-foot and needle-bar of the sewing-machine. In front of the plate there is affixed to the frame a shield, covering all but the upper part of the plate. A toothed ring is secured to the back of the plate, and meshes into the teeth of a gear-wheel mounted on an arbor, which derives motion from the driving-shaft of the sewing-machine. Upon the edge of the plate are hung a series of hooks or points, which can be shifted to conform to the width of the fabric. The pieces to be sewed together are hung upon the hooks, and rest upon a shoulder projecting from the plate, and upon the upper edge of the shield. A winged wheel working in front serves to throw the sewed fabric off the hooks. When in operation, the plate is designed to move correspondingly with the feed of the sewing-machine. As the plate revolves with the action of the sewing-machine, the pieces are carried along to and past the sewing devices, and when sewed are thrown off as they arrive at the winged wheel, the process being capable of continuous repetition indefinitely.

The third claim of the original patent is thus stated:

"(8) The combination with stitching and feeding mechanism, substantially such as described, of a continuously revolving annular fabric-guide, D, as and for the purpose set forth."

In the reissue patent the invention is called "an improvement in sewing-machines." In the specification it is described with reference to a Wilcox & Gibbs sewing-machine having the usual rotatable hook-shaft and needle-bar, with needle attached. In describing its advantages the inventors state:

"In sewing-machines containing the usual intermittingly rotated wheel-feed, variations in speed affect, through momentum, the length of stitch, and the power required to run such a feed, and wear of machinery, and the cost of mechanism, are all greater than in this, our plan, wherein the feed is continuous, which always insures an equal length of stitch, and a substantially uniform expenditure of power. With an annular feeding-plate, as described, provided with points or hooks to penetrate and hold the fabric as it is moved along under the needle, we have combined the well-known Wilcox & Gibbs class of machine, the hook or looper of which, as is well-known, rotates continuously in one direction, and may be run at the highest speed."

The first and third claims, to which alone the controversy relates' are as follows:

"(1) The within-described apparatus for sewing together the ends of pieces of fabric for factory use, it consisting essentially of the stitch-forming mechanism shown and described, the rotatable annular feeding-wheel provided with hooks to penetrate, carry, and present the fabric positively to the action of the said stitch-forming mechanism, and means to operate the said feeding-wheel continuously as described.

"(3) The combination, with stitching mechanism substantially such as described, of the continuously revolving annular baster plate or wheel to feed the fabric, and mechanism to continuously revolve the baster-wheel, substantially as described."

The position of the plaintiff is that the third claim of the original patent is substantially reproduced in the first and third claims of the reissue. It is obvious, from the description given in the original specification, that the thing patented was a device to be attached to a sewing-machine having a feeding mechanism of its own, and was designed to carry along the pieces of cloth to be stitched together by a movement to correspond with the movement of the feeding mechanism of the sewing-machine. It is called "a sewing-machine attachment," and its object was to serve as a guide and support to the pieces of cloth as they were carried along by the sewing-machine. It is apparent that the first and third claims of the reissue, taken in connection with the specification, cover a combination different from this. The combination, with the stitching and feeding mechanism of a sewing-machine, of the annular plate, D, to guide the fabric as it is carried along by the feeding mechanism of the sewing-machine, which was in substance the original claim, has been expanded into a combination with the stitching mechanism alone of a sewing-machine, of a feeding-wheel to feed as well as to guide the fabric, working independently of, and in substitution for, the feeding mechanism of the sewing-machine. A new function has been added to the plate, D. It is no longer a mere attachment to a complete sewing-machine, and a guide and support to the cloth as it is moved along in the ma-

chine. It has become itself a feeding apparatus for a sewing-machine,—a thing quite different from the original invention. Under the rule established by the recent decisions of the supreme court, the plaintiff's reissue patent was taken out too late, and must be held to be invalid.

Bill dismissed, with costs.

THE MANHASSET.

(District Court, E. D. Virginia. February 24, 1884.)

1. ADMIRALTY PRACTICE—LIBEL—AMENDMENT.

In a case in admiralty where the *res* is the same, and the tort and the contract for which damages are claimed are the same, and where the original libel sets out matter enough by which to amend, a libel may be amended as to parties by changing the character in which the libellant sues, and dismissing as to the parties who have no right to sue.

2. SAME—ACTION FOR DEATH CAUSED BY NEGLIGENCE—CONTRIBUTORY NEGLIGENCE.

Where, in a libel for damages for the killing of a husband and father, the ferry steamer inflicting the injury was in fault, but the deceased had violated rules of the managers, forbidding passengers to step over guard-chains and passing off to the wharf before the boat was drawn up and made fast at the landing, in doing which deceased received fatal injuries, but in doing so only did what men and boys habitually and constantly did on the ferry, without restraint or remonstrance from the management, *held*, that this was not such contributory negligence on the part of deceased as to exonerate the claimants from responsibility in damages, the managers of the ferry having, by neglecting to enforce their rules, held out to passengers that there was no practical danger in violating them, and thereby put the deceased off his guard as to the danger attending the practice, which was habitually permitted.

In Admiralty, in a Libel for Damages.

After the decision rendered in this case on the question of jurisdiction, on the fifth of January, 1884, (18 FED. REP. 918,) the libellant moved for leave to dismiss the original libel as to herself, as administratrix of William H. Black, and to file an amended libel in her individual character as widow of Black, and in her character as guardian of the two minor children of the deceased. This motion was granted, on the ground that the *res* was the same, the *tort* and contract on which the claim for damages was leased was the same, and that the original libel contained all the facts as to parties that were necessary to amend by.

William H. Black, whose widow, Frances Black, brings this libel, was a colored man, 64 years old, who had irregular employment at \$2.50 a day in the carpenter-shop of the United States navy-yard, at Gosport, opposite Norfolk, and lived on the Norfolk side of Elizabeth river, some distance westward of Norfolk, where he had a farm of about 120 acres of land. Returning from the navy-yard, after fail-

ing to get work, on the morning of March 18, 1881, the weather being somewhat rainy, Black got upon the ferry-boat Manhassett to cross over to Norfolk. He was engaged in earnest conversation, on the passage, with George Mason, a colored deck-hand, on the subject of politics. The weight of testimony is that Black, on the approach of the boat to the Norfolk landing, had got outside the chains which are stretched as a guard in front of the gangways to prevent the egress of passengers and teams until the boat can be secured. It was also stated in evidence that he was, while standing beyond the chains, before the boat had touched the landing, still conversing with Mason, the deck-hand, who also had stepped beyond the chains. The weight of evidence is that the chains were all still up when Black was at the front edge of the boat, conversing and ready to step off. When the boat had got within 18 inches of the float, or dock, to which it was to be fastened, Mason stepped off to hook the boat's chain to a windlass, and to draw the boat up fast to the landing. As Mason stepped off for this purpose, Black also stepped off; in doing which, Black's foot slipped, and he fell forward, with his body partly upon the float. Mason and another man seized hold of Black as he fell, but were unable to draw him upon the float before the other foot was caught and crushed by the boat, which was coming slowly with a side motion to the float. Medical aid was immediately brought to Black, but his injury terminated fatally on the morning of the twenty-fifth of March, just one week after the accident happened.

At that time three chains were used as guards, in front of this boat, to prevent the premature egress of passengers and teams. One small chain stretched across the gangway of the white passengers, on the right-hand side of the boat, one end of which was fastened to the side of the boat, and the other hooked to a post on the left of that gangway. A large chain stretched across the team gangway, in the middle of the boat. A small chain, quite long, stretched across the colored people's gangway on the left of the boat, and also across the team gangway in the middle, to the post on the right of the team gangway, and hooked to the same post on which the small chain across the white people's gangway was hooked. This long chain was fastened to the left side of the boat. The weight of evidence, as before said, is that all of these chains were still up, and none of them had been lowered, when Black was standing in front of them, conversing with Mason, and ready to step off to the float. It was not Mason's duty to let down the chains at the time of the landing of the boat; and he did not do so on the occasion of this accident. It was the duty of the white deck-hand, Montague, to let the chains down; and Montague swears, I think with truth, that he had not let them down before the accident happened to Black. Mason's place of duty, on this occasion, was on the left side of the boat, forward of the colored people's gangway. Montague's place of duty was on the right

side of the team gangway at the post to which one end of each of the three chains that have been described was hooked.

It is proved that it was the habit of men and apprentice boys to pass off the boat before it had reached and had been made fast to the dock, and that not unfrequently the chains were lowered by passengers before the deck-hands in charge were at liberty to do so, under the rules and regulations prescribed to them by the managers of the ferry. It is not shown that the authorities of the ferry did more than give very proper orders for the safety of passengers, in respect to keeping the gangways closed. It is not shown that they did anything effectual towards preventing the premature egress of passengers during those critical moments while the boat is approaching the dock, or took any practically effective measures for preventing the habitual violation of their wise rules and regulations in this respect. On the occasion on which Black received his injury several other persons are proved to have passed over the chains and stepped to the float before the boat had landed and been made fast. It is proved that the principal ferries of the north have adopted, and have been using for several years, a patented set of gates, called "the Frazee Patent Safety Gates," designed for preventing passengers from incurring the hazard of injury by passing from ferry-boats before they have been made fast.

W. H. & J. J. Burroughs, for libellant.

J. F. Crocker and Sharp & Hughes, for claimant.

HUGHES, J. I think the foregoing statement of the facts of this case embodies all that is material to its decision. There is no doubt that the managers of the ferry-boats made good and wise rules for securing the safe transportation of passengers. These rules forbade all persons to leave their boats until the guard-chains before the several gangways were lowered; and rigidly forbade the deck-hands from lowering the chains before the boats were drawn close to the dock and made fast. That part of the evidence reflects the highest credit upon the management. The residue of the evidence, however, is less satisfactory. It shows that men and apprentice boys habitually violated the rules of the ferry. It shows that this class of passengers frequently themselves let down the chains which stretched in front of the passenger gangways, without waiting for the deck-hands to do so; and that they did this frequently, and when not doing it, habitually got over the chains and leaped off the boats before they were drawn up and made fast to the dock. It shows that this was all done without check or hinderance from the management of the ferries. Now it is but little short of mockery to say that rules, the best and wisest conceivable for the safety of human life are made by common carriers, and at the same time to admit that they allow these rules to be continually and habitually violated. The impatience of passengers to precipitate themselves pell-mell off of ferry-boats is a matter of constant observation; and the managers of well-regulated ferries else-

where, in view of this notorious and apparently uncontrollable propensity, acknowledge their obligation to provide against the dangers attending it by adopting contrivances which physically prevent this unreasoning press of passengers for egress, and effectually insure against the dangers incurred. I will not say that the ferry-boats which ply across Norfolk harbor are under legal obligation (as one or two other classes of common carriers are) to provide the latest and most approved contrivances that have been invented, for insuring the safety of their passengers; but I am bound to say that it is their duty to do more than adopt wise, cautionary rules for the purpose,—it is their duty to take effectual measures for enforcing, from all passengers, a certain and absolute obedience to those rules.

The obligations of the carriers of passengers on this subject are laid down by the courts in very stringent terms. Federal courts take the law from the supreme court of the United States; and that tribunal, in a late case, (*Penn. Co. v. Roy*, 102 U. S. 455, 456,) reviewing previous cases, declared that when carriers undertake to convey persons by the powerful and dangerous agency of steam, public policy requires that they shall be held to the greatest possible care and diligence; that the personal safety of passengers should not be left to the sport of chance or the negligence of careless agents; that although a carrier does not warrant the safety of passengers at all events, yet his undertaking and liability as to passengers go to the extent that he or his agents shall possess competent skill, and, as far as human care and foresight can go, he will transport them safely; and that he is responsible for all injuries received by passengers, which might have been avoided by the exercise on his part of extraordinary vigilance, aided by the highest skill.

These propositions may be regarded as the settled and accepted law of the subject in this country, and they are the law of this case. The obligations of the authorities who controlled the Manhasset are determined by them, and they show that there was fault on the part of this ferry-boat; and therefore, if the accident which happened to Black, a grown and sane man, had happened to a child or other person unpossessed of ordinary discretion, the liability of the Manhasset would have been indisputable. But Black was a man of responsible age and discretion; and the law, tender as it is of the safety of passengers on steam vehicles, yet lays down the counter-principle that every man is bound, no matter in what he may be engaged, to use ordinary care for his own protection, and no man is bound to use more; so that if a man of discretion is negligent in taking care of himself, and *contributes* by that negligence to bring upon himself the accident by which he suffers, he, in general, relieves the carrier from the obligation of compensating him in damages.

The application of these counter doctrines of the rigid responsibility of carriers to passengers, and of the *contributory negligence* of the person injured, is one of the most difficult tasks that devolve upon

courts, and is especially difficult in the present case. The question here is, whether Black, by stepping over the guard-chains of the ferry-boat and then attempting to leap from the boat to the float before she was made fast, "contributed" to the accident to such a degree as, under all the circumstances of the occasion, to exonerate the boat from responsibility. That the boat was in *fault* has already been stated; that Black was more or less reckless in his conduct is equally true; and the question of law is whether his conduct was of such a character as to relieve the boat of *responsibility* for the accident in damages. Now, if Black had not been a customary passenger on that ferry, or if, of those who habitually made that passage, he was the only person, or one of a few persons, who took the hazard of passing the chains and leaping the chasm before the boat was made fast, then the case would be free from much of its difficulty. It would resemble in principle the case of *Railroad Co. v. Jones*, 95 U. S. 439. But Black had passed the ferry often enough to know what its authorities habitually allowed in respect to this matter. He was familiar with the fact that passengers habitually overstepped the chains and strided the chasm without hinderance or rebuke from them. The managers thus gave out to the public, as if it was their opinion, that the practice was practically safe and unattended with danger. Printed rules there may have been; chains were in fact stretched formally before the eyes of passengers; but passengers were seen and notoriously known to disregard them by the half dozen or dozen on every trip. The question, therefore, resolves itself into this: was Black not thrown off his guard? Was it not held out to him habitually by the managers, that, practically, there was no danger? Was anything presented to arrest his attention and to warn him of the fate which overtook him? I think the evidence in the case leaves room for but one answer to this, the crucial question of this case.

The case turns upon this question, because it is a principle of the law of contributory negligence that a carrier is not necessarily excused because the injured person knew that *some* danger existed through the carrier's neglect, and voluntarily incurred the danger. *Clayards v. Dethick*, 12 Q. B. 439. Where, for instance, a traveler crossed a bridge which he knew to be *somewhat* unsafe, but which its managers had not closed, nor warned the people not to pass, and the traveler's horse fell through and was killed, it was held that he was not in fault, and damages were recovered. *Humphreys v. Armstrong Co.* 56 Pa. St. 204. So it was held that the plaintiff might recover where a passenger train was moving very slowly by, but did not stop at a depot where it should have stopped, and a passenger was injured by leaping off, notwithstanding the usual warning that passengers must not get off the train while in motion, the slow gait of the train seeming to invite the passenger to get off. *Filer v. N. Y. Cent. R. Co.* 49 N. Y. 47. These cases sufficiently illustrate the principle of the law of contributory negligence, that though the

passenger must do what a prudent person should do to avoid accident in any particular circumstance, in which he may stand, yet if he has reason to infer from the conduct and policy of the carrier that no practical danger would attend an act, though there might be some risk, and if he is thereby thrown off his guard respecting it, the carrier is liable.

I do not feel called upon to review the myriad of cases on this subject which fill the reports of the courts, or to dwell upon the confusing and confounding niceties of distinction which are drawn by the text-writers in digesting these cases. Suffice it to say that I am of opinion, though it has been arrived at with diffidence and some doubt, that the Manhassett is liable in this action.

I will now allude to a question of jurisdiction which was raised at bar, to the effect that the *tort* in this case was not maritime, and not within the cognizance of admiralty; inasmuch as Black, when he fell upon the float, just as he received the injury to his foot, was, as a matter of fact, on land, and not on the boat; it being certain that if he had already got upon the float, and was standing upon it, the *tort* would not have been maritime. See *The Plymouth*, 3 Wall. 20, and *The Mary Stewart*, 5 Hughes, 312.¹ This view of the case is defeated by the consideration that the *tort* was inflicted by the boat while Black was in the act of leaving her, and before he had completed the act of landing. But even if this were not so, it is only with respect to *torts* that maritime locality is essential to the admiralty jurisdiction. In respect to *contracts* the rule does not hold; if the contract is maritime in its character, the locality where it is made is immaterial. In this case there was not only the *tort* of inflicting an injury resulting in death, but a *contract* to carry the passenger and to land him safely at Norfolk. The damages he received will be of the double character of a satisfaction for the breach of contract and for the *tort*. But I insist that it was the boat which inflicted the injury, and that the injury was inflicted upon a part of the body of the deceased man which had not yet landed, and which was injured by reason of its being still on the water. I know that this distinction would seem over-nicely drawn, but questions of law very often depend upon nice distinctions, and when they do it is necessary to draw them.

Assuming, on the whole case, that the libellant is entitled to recover damages, the final question is what these should be. The amount depends upon the question, how much of his earnings could the deceased have bestowed upon the libellants as their sustenance if he had lived? He owned a farm; and that, of course, is still left to them. Beyond this the evidence gives us but little to build an estimate upon. His precarious employment and wages at the navy-yard afford no certain basis for a calculation. Driven to conjecture, my

¹8. C. 10 FED. REP. 137.

estimate must be very moderate; the more moderate, as this man had entered the period of old age, and could not, in the course of nature, be supposed to have continued long to spare from his own support a surplus for the sustenance of those dependent on him. It is the custom and the duty of the young to support the aged when they have entered the period of old age. At the age of 64 the tables of vitality show that Black's expectation of life was seven years and a half. If we assume that he could during this period of old age have spared an average of \$75 a year to the use of the libelants, then we should arrive at an award of \$562.50 as the damages to be allowed in this case. I will give a decree for that amount, and for the costs of this suit.

BAKER SALVAGE Co. v. THE EXCELSIOR.

(*District Court, E. D. Virginia.* February 20, 1884.)

SALVAGE SERVICE—AWARD.

A large passenger and freight steamer, worth \$150,000, having a cargo worth \$10,000, was run into by a tug, which stove a hole in her hull, some six by eight feet in size, causing her to fill with water, and she was beached on Hampton bar, in Hampton Roads. Salvors were telegraphed for, to Norfolk, who came with wrecking steamers, schooner, steam-tugs, pumps, and diving and wrecking apparatus. A diver went down, and, with plank and canvass, battened the hole. Pumps were then set to work, which emptied the hull of the water. The cargo was all got off without loss or damage. The steamer was floated, and towed 12 miles into port at Norfolk. All further injury to the steamer or her machinery was prevented. It was in December, and a severe storm from the eastward could have wrecked the steamer. None occurred, and the work of the salvors was accomplished within 48 hours. *Held*, that the service was a salvage service, and that the reward should bear some relation to the value of the property saved. Six thousand dollars decreed.

In Admiralty. Libel for salvage.

The passenger and freight steamer *Excelsior*, belonging to the Potomac Steam-boat Company, claimants in this suit,—Theodore E. Baldwin, master,—left her wharf in Norfolk at 5 p. m. on the fourth of December, 1882, on her regular trip to Washington City. She was valued at \$150,000. She had a cargo worth \$10,000, and the usual number of passengers, and her regular crew, on board. After passing Sewell's point, and in making for the wharf at Fortress Monroe, she came in collision with the United States naval tug *Fortune*, which drove a hole into her hull, on the starboard bow, some eight by ten feet in dimensions. Capt. Baldwin immediately made for Hampton bar, and at about 6:15 p. m. beached her about midway of that bar, about four miles from Sewell's point, a mile from the Soldiers' Home, and a mile and a half from Old Point Comfort wharf. She went upon, and lay nearly at right angles with the bar; her bow in six feet, and her stern in ten or eleven feet, water. She had filled

with water, and laid easily on the bottom. The sea came over the main deck, aft, at high tide; but did not cover the deck amid-ships or forward. Her cargo was amid-ships, and was not reached by the water. She was in a place on the bar, and in a position on the bottom, that rendered her reasonably safe from further injury, except in the event of rough weather from the eastward. In consequence of the width of her guards, which spread out from about three feet at the ends of the steamer to ten or twelve feet at the wheel-houses, the waves of a rough sea would beat under the guards, and endanger the deck and the joiner work, and cabins above it, by lifting and breaking them up, and carrying them away, thereby bringing the cargo and the lives of those on board in peril.

It may be stated here that a board of naval officers, appointed afterwards for the purpose of inquiring into the collision, found that the *Fortune* was in fault; and the United States government has since compensated the claimants in damages from the accident to the amount of \$18,350.86. From this computation of damages the amount due the libelants for salvage in this case was reserved, (to be determined by this court,) as also a bill of \$470.70, rendered by the libelants, for services rendered the *Excelsior* during and after the salvage service was rendered. The board of naval officers, which has been mentioned, found that the direct damage to the *Excelsior*, done by the *Fortune*, was \$11,795.

After beaching his vessel, Capt. Baldwin went off to Old Point Comfort, and from thence sent the following telegrams to the Baker Wrecking Company, Norfolk:

"FORT MONROE, VA., Dec. 4, 1882.

"Send assistance, with steam-pumps, to *Excelsior*, on Hampton bar. Get here by low water.
BALDWIN."

This telegram reached the telegraph office in Norfolk at 8 p. m. on that night. Capt. Stoddard answered it from Berkeley,¹ but the answer is not in the evidence. Capt. Baldwin's second telegram was as follows:

"DEC. 4, 1882.

"Delay guaranteed.

"Bring on steamer *Resolute* a diver, with appliances.

"T. E. BALDWIN."

This telegram reached the telegraph office at Norfolk at 9:15 p. m. Capt. Stoddard, superintendent of the Baker Salvage Company, left Berkeley shortly after 10 that night, on the wrecking steamer *Resolute*, with the wrecking schooner *Scud* in tow, with a diver and diving apparatus, with a portable steam-pump and appliances, and with other wrecking apparatus on board. Not knowing the position

¹The east and south branches of Elizabeth river meet, and form Norfolk harbor; Norfolk being on the north, Portsmouth on the south, and Berkeley in the fork of the two rivers.

on the bar where the Excelsior was, Capt. Stoddard went directly to Old Point wharf, reaching there at midnight, and finding it high tide at that point. Aiming to reach the Excelsior at low tide, as requested by Capt. Baldwin, Capt. Stoddard remained at the wharf until the approach of morning, and then left for the Excelsior, which he reached at daybreak. On meeting Capt. Baldwin, conversation immediately occurred between the two as to the terms on which Capt. Stoddard was to proceed with the work for which he had been summoned. Capt. Baldwin's statement, reduced after the conversation to writing, but never shown to Capt. Stoddard, was as follows:

"It was agreed that there was to be no salvage. The said Baker Salvage Company agreed to raise and float the steamer Excelsior and tow her to Norfolk, Va.; the work to be done as quickly as possible, the bills to be rendered, and, in the event of the said Baker Salvage Company and the Potomac Steam-boat Company not agreeing as to the amount charged for services rendered, then the question was to be settled by arbitration."

Capt. Stoddard, while positively denying any stipulation that there should be "no salvage," substantially admits that there was an understanding as to arbitration in the event of a disputed bill for services. The Excelsior lay about midway of Hampton bar, on its south side, about fifty to a hundred yards from the channel. As before said, she was full of water and submerged to her main deck, the water at high tide rising over the main deck aft. The hole that had been driven into her by the Fortune extended from her hurricane deck far down under the water. Most of her cargo was amid-ships, free from the water. Capt. Stoddard put the wrecking schooner Scud along-side, with a view to taking off the cargo. The diving apparatus was put on board the steamer, and the diver sent down to make examination into the extent of the wound which the steamer had received. Meanwhile Capt. Stoddard went back with the Resolute to Old Point wharf, where he employed a number of laborers to aid in handling the cargo, and procured a quantity of plank lumber with which to batten up the hole in the hull of the Excelsior. Returning with these laborers and this lumber to the steamer, the cargo was put in course of being transferred on the Scud to Old Point wharf, and the diver and his gang employed themselves in battening the hole in the hull. The removal of the cargo was successfully effected without any loss or damage by the latter part of the afternoon of the 5th; the officers and crew of the Excelsior rendering assistance in the work, and the two wrecking vessels making two or three trips each to the wharf. The diver and his assistants could not complete their task that day, and had to suspend work at nightfall till morning. At night a breeze set in from the eastward, producing a rather rough sea, and creating apprehensions in the minds of the officers of the two steamers. At Capt. Baldwin's request, the Resolute was put on the starboard (windward) side of the Excelsior and made fast to her, with fenders placed to prevent injury to the guards and sides of the

vessels. While the sea continued rough, it was a laborious task to keep these fenders in place, and to replace such of them as would be crushed between the two steamers. This task and that of keeping the vessels lashed together, subjected the seamen engaged to more or less danger of limb and life. The Resolute also was in more danger, lashed to the sunken steamer, in the event of a storm, than if she had been at anchor out in the harbor. The object of having the Resolute close at hand was to be in readiness to save life in the event of a storm. Fortunately, however, instead of the breeze increasing on the night of the 5th, it ceased about 1 o'clock, and the weather continued good from that time until the enterprise was finally completed.

The portable steam-pump of the Baker Company had been set up on the Excelsior in the afternoon of the 5th. On the next morning the diver and his gang resumed their work, and were assisted in putting canvass over the planking by the action of the portable pump, which had been made ready for use the afternoon before. The stationary pump on the Resolute was, on that morning, put in connection with the operations on the Excelsior in such manner as to be ready to render effectual assistance. About 12 m. on the 6th the driver completed his task of stopping the hole in the hull with plank, and covering it with canvass, and both pumps were set to work at their full capacity. The wrecking steam-tug Olive Baker had been before that time ordered to the assistance of Capt. Stoddard, and had a tow-line attached to the Excelsior. By about 2 p. m. the pumps had done their work so effectually that the steamer went 'afloat in tow of the Olive Baker. She was soon afterwards got under way, and, with the further assistance of the wrecking steamer Victoria J. Peed, belonging to the Baker Company, and their tug Olive Branch, was towed to her wharf at Norfolk; the pumps being worked during the voyage by the Resolute. The latter steamer lay by her at her wharf at Norfolk, on the night of the 6th, doing such pumping as occasion required. During the voyage from Hampton bar to Norfolk there was, of course, no other covering upon the hole in the Excelsior's hull but of inch pine plank, overlaid with canvass, which was liable to be punctured by encounter with logs or other hard substances in the channel. This danger rendered it necessary to provide every precaution against such an accident, by which she might be sunk to the bottom of the channel. During the period of this service the libelants' tug Nettie was employed in errands between Berkeley and Old Point, under the direction of Capt. Stoddard. Before the Excelsior left Norfolk to go to Baltimore for repairs, certain necessary work was put upon and done for her by the libelants, to the value of \$470.70, as assessed by the board of naval officers before mentioned. These are the subjects of a second libel. The libelants are a corporation chartered expressly as a wrecking and salvage company, and expensively and elaborately equipped with wrecking steamers, tugs, life-boats, steam-pumps, donkey-engines, heavy and light anchors, chains,

cables, falls, diving apparatus, and skilled wreckers and divers, and are capable of rendering prompt and effectual salvage service, at short notice, on the Atlantic and Gulf coasts, and in the West Indies.

Ellis & Kerr, for libelants.

White & Garrett, for claimants.

Edmund Waddill, U. S. Atty., and *Sharp & Hughes*, for the United States.

HUGHES, J. Obviously, the service rendered by these libelants to the *Excelsior* was a meritorious salvage service. They were telegraphed for as salvors. They left Norfolk and went to the *Excelsior* for the purpose of rendering salvage service. If their agent, Capt. Stoddard, had assented to the protestation of Capt. Baldwin that this was not to be a salvage service, he would not have altered the fact, or destroyed the rights of his employes as salvors, or changed the character of the service already entered upon. It is not the policy of the law maritime, when a vessel is in peril and has invoked the services of salvors, and these have gone to her for the purpose of rendering salvage assistance, to listen to stories of sharp bargains, driven at the instant, in the endeavor to change the character and lower the grade of the service about to be rendered. The law of the subject is laid down by the United States supreme court in the case of *The Camanche*, 8 Wall. 477, in which the answer alleged that the services were rendered under an agreement for a fixed sum, and were therefore not salvage services. The court said: "An agreement of the kind suggested is no defense to a meritorious claim for salvage, unless it is set up in the answer with an averment of tender or payment." In the present case there was no fixed sum agreed upon, and, of course, none tendered. There was an agreement that the compensation should be left to arbitration, in the event of a future disagreement as to the amount to be paid. As to such agreements, the supreme court of the United States, in *The Camanche Case*, said that "nothing short of a contract to pay a given sum for the services to be rendered, or a binding engagement to pay at all events, whether successful or unsuccessful in the enterprise, will operate as a bar to a meritorious claim for salvage." This, therefore, was a salvage service, and it is an attribute of such a service that it entitles the salvor not merely to the ordinary compensation for work and labor performed, materials furnished, and money laid out and expended,—which are allowed and are computed at the usual rates commanded in the market by such services,—but to a *reward* in addition, given on the principle of encouraging daring and enterprising men to be in readiness, and to be prompt and adventurous, in giving aid to ships in distress, and rescuing lives and property in peril of the sea. The reward is gauged according to the peril in which the persons or property rescued may be; and if the thing saved be property, according, in some degree, to its value.

In one respect this was a highly meritorious salvage service; for all the cargo was saved, without any loss or damage whatever, and the ship herself was saved without damage of any sort to her beyond what she had received in the collision which sunk her. This being indisputably so, the only further point of inquiry is as to the danger in which the Excelsior and her cargo were, from which they were taken by the salvors; and as to the hazard encountered by the salvors, and their vessels and material, in the course of the service which they rendered. That a large and expensively furnished bay and river steamer, with first-class boilers, engines, and machinery in her hold, lying full of water on the bottom, at a place where a heavy sea could easily effect her destruction, was in very great *possible* danger, is quite clear. This danger of possible *destruction* on a December night, though not certain, was imminent, and depended entirely on the caprice of the winds. The danger of greater or less *injury* to her machinery, her hull, her joiner-work, and cabins, and her decks, from lying in the water submerged, with a hole in her sides of 50 superficial feet, was certain and absolute. She could not be removed from the position in which she was until the hole in her hull was closed, and made water-tight. This needed to be speedily and effectually done; it needed the services of one who was not only an experienced diver, but a workman of skill; and of the greater skill from the work having to be done under water. Not only was such a diver with such experience absolutely requisite, but after he had accomplished his task, and to some extent while it was in progress, steam-pumps of exceptional size, power, and efficiency were necessary to empty the ship of the water with which she was full, and to empty it expeditiously, without mishap or delay. And, after the vessel was thus—by the work of the diver and of the pumps—made ready to be floated, it was of the highest importance that towing appliances and vessels should be in readiness to take the ship promptly into port, thoroughly guarded from the peradventure of accident to her frail and weakened hull at every step. All this was accomplished in a thoroughly skillful and successful manner by the salvors.

The complainants have not shown that there were other skilled persons, with ample outfit of divers, steamers, and wrecking vessels and apparatus, at hand, by whose instrumentality this ship and her cargo could have been rescued from the danger they were in, speedily enough to have prevented the irreparable damages that would have resulted from her lying long in the water. That fact could not have been proved; and this court has had such an iteration of evidence in such a large number of cases to the same effect, that it is now at liberty to assume, until the contrary is shown, that the Baker Salvage Company is the only fully equipped wrecking company available at all times for the most arduous and difficult salvage work, that is to be found anywhere south of the Delaware capes on the Atlantic seaboard. I think the danger of *injury* which the Excelsior was in

was very great; and she was certainly in danger of possible *destruction* from a rough sea, if one had set in, which, by thumping up under her very wide guards, might have lifted and ripped up her main deck, and broken up and wrecked all that was above it. Possible danger, which chanced not to have actually occurred, to a vessel in danger, may always be considered as interpreting the spirit with which the salvors worked, and illustrating the merit of their conduct; but is seldom made, of itself, the ground of materially increasing their reward. As to the danger in which the *Resolute* and her crew were during the rough part of the night of the fifth of December, I do not think it was actually great. That there was ground for apprehending danger is proved by Capt. Baldwin having requested that the *Resolute* should lie close along-side of him; and that the *Resolute* was by Capt. Stoddard willingly subjected to the risk of taking that position, shows that the salvors were ready and prompt to encounter the risks incident to salvage service. On the whole, I think this was a meritorious salvage service, deserving high commendation for the spirit, skill, and success with which it was rendered; but not of high grade when considered with reference to the risks and dangers incident to it; yet of sufficient merit in both respects to justify a graduation of the reward in some degree by the value of the property saved.

Except for the stress laid by claimants' counsel upon the matter, it would hardly be worth while to indicate the marked distinction between this case and the case of the same steamer *Excelsior*, when, in December, 1881, she was by accident run on Hampton bar, not far from where she was beached by Capt. Baldwin. For the first case see 5 Hughes, 416. There is in fact no similarity between the two cases, except that the vessel was the same and the bar on which she was grounded the same. In the former case, the *Excelsior* was merely aground, though so fast aground, by reason of her bottom being exceptionally broad and flat, that she could not be pulled off by tugs, and resort had to be made to wrecking anchors and cables. It is true that the services of a wrecker were called for, and the apparatus of wreckers employed. By the use of these means, and by taking advantage of the tides, which were waited for, the steamer was floated, and then proceeded on her voyage. She had been merely delayed. I believe none of her cargo was removed. On the authority of abundant precedent, I held that the case was one of salvage, but of salvage of a very low grade. It was more than a case of tugging and towing. It was a case for the use of wrecking anchors and cables, and for wrecking services. On this ground alone, I allowed, in addition to compensation by the rule of *quantum meruit*, a reward of \$350. It was not a case for the reward to be made to bear any relation to the value of the property saved, which then was \$180,000.

In contrasting the present case with that, it is unnecessary to advert further than already done to the circumstances under which the

present libelants found the Excelsior in Hampton roads,—sunk to her main deck on the bottom; full of water; with a hole in her hull, graphically described by one of the witnesses as “big enough for a street car to pass through;” with \$10,000 worth of cargo on board nearly reached by water, on the main deck; with this deck and all above it liable to be lifted off and broken up by a heavy sea from the eastward; and with injuries inflicted by collision upon her hull to an extent then painfully and apprehensively unknown, but since discovered to be more than \$10,000 could repair. The only elements of safety in the condition of the Excelsior were that she was squarely bottomed on one of the bars which skirt Hampton roads, and that she was within 12 miles of Norfolk, on the border of one of the safest anchorages and most capacious roadsteads for shipping in the world. The success with which she was saved, with all her cargo, was due to two causes, viz.: *First*, to the accident that no heavy wind or sea arose during the 42 December hours when she lay on the bottom; and, *second*, to the consummate skill with which the salvors performed their work. Though the former accident, that of good weather, may go to the diminution of the salvage reward, the latter should not. It is the characteristic of these salvors that, whenever success is possible, they perform their work with such facility and perfect success as to produce the impression on those who are benefited that their labors have not been difficult enough to deserve a liberal compensation. Such an objection is faulty both in its logic and justice, and I cannot accede to it.

As to what claimants’ counsel say of “harbor service,” Hampton roads is rather an inland sea than a harbor. It is an anchorage and roadstead, into which sea-going vessels put for safety by hundreds, without a thought of going into port. It is surrounded by headlands, flats, and bars, and there are but two wharves on its entire boundary, and these run out far from land in reaching the channel.

The services rendered by the libelants to the Excelsior in this case were of the same character, though not as tedious, laborious, or difficult, as those which were rendered within the harbor of San Francisco in the case of *The Camanche*, 8 Wall. 448, where the award was one-third of the value of the property saved, where only a part of the property at risk was saved, and where the service was what counsel calls “harbor service.” The work there was divers’ work, and that of powerful lifting machinery. It was done in the harbor, and in perfect safety, except as to the accidents ordinarily incident to diving and the handling of machinery. Yet in that case, where there was no sea danger, nor much danger of any sort, the award was, as before stated, one-third of the value of that portion of the sunken property which was saved—\$25,000 for \$75,000.

The case of *The Blackwall*, 10 Wall. 1, was also a notable case of harbor service, in which for a half-hour’s work with city fire-engines on board of a harbor tug, a fire on a ship was put out, and \$10,000 awarded for saving property worth \$100,000.

Salvage services are rewarded in proportion to the danger attending them, to the peril from which the property was rescued, and to the energy, promptitude, skill, and success with which the salvage is affected. When of the requisite grade in these respects, the amount awarded is fixed with some reference to the values saved. In this case I will give a decree for $3\frac{1}{2}$ per cent. of those values, or \$5,600. In the second libel filed I will give a decree for the amount claimed, or \$470.70.

The libelants claimed in argument 10 per cent. of the value of the property recovered, or \$16,000; but as a compromise, to avoid the necessity of suing, reduced the amount of the bill presented to \$10,000. I do not, in view of all the circumstances of the case, feel justified in awarding a larger amount than \$6,000, as above stated.

BLOWERS v. ONE WIRE ROPE CABLE.

(District Court, S. D. New York. January 18, 1884.)

1. SHIPPING—FREIGHT, LIEN FOR.

A barge has presumptively a lien for her freight upon the goods laden on board, which is not waived by any provisions of the contract of hire not absolutely incompatible with the enforcement of the lien at the time of delivery.

2. SAME—CONTRACT TO TAKE ON BOARD WIRE CABLE.

A contract to take on board wire cable in New York to be laid in the Erie canal, freight, the hire of the barge, at a *per diem* rate, to be paid as soon as the cable is laid, is not incompatible with such a lien, and with proceedings to enforce it at once in default of payment as agreed.

3. SAME—PRIVATE ARRANGEMENT BETWEEN MANUFACTURER AND OWNER.

Where wire cable was laden on board a barge by the manufacturer, pursuant to an agreement between the shipper and the owner of the barge, of which the manufacturer was chargeable with knowledge, *held*, that the barge had a lien upon the cable for her freight pursuant to the contract, and that such lien was not affected by the private arrangement between the manufacturer and shipper, not known to the libellant, that the cable should be paid for on delivery, nor by the fact that the manufacturers, upon completing the lading of the cable, kept the shore end fast upon their premises, so as not to permit the departure of the barge with the cable abroad. *Held, also*, that the cable, as between the manufacturers and the libellant, must be regarded as laden on account of the libellant's contract, and as the goods of the shipper, and that the manufacturers were estopped from denying this, as respects the libellant, although, as between the manufacturers and the shipper, the title may not have passed.

4. SAME—LIEN ARISES, WHEN.

A maritime lien for freight arises from the time the goods are laden on board.

5. SAME—LIEN AS AGAINST MANUFACTURER.

As the barge under her contract with the shipper would, as against him, be entitled to a lien on the goods during the time the vessel was detained by reason of his not fulfilling his contract with the libellant, *held*, that the lien existed to the same extent as against the manufacturers, who, for their own benefit, had held the vessel fast by the shore end of the cable until they removed the cable under the stipulation given in this suit.

The libel in this case was filed by the owner of the barge E. M. Greenman, to recover freight under an agreement for the transportation of some 15 miles of wire rope cable from the city of New York, to be laid in the Erie canal. The charter was executed on September 10, 1880, between the New York Steam Cable Company and the libelant, whereby the latter agreed "to furnish the canal-boat E. M. Greenman, of Buffalo, for the purpose of taking on board and laying in the Erie canal a quantity of cable of the parties of the second part, the boat to be maintained in good condition and sufficiently manned, at \$5 per day from the time of commencing to load until reaching the Erie canal at West Troy, after which \$6.50 per day, until fully unloaded;" and the cable company thereby agreed "to pay the sum above mentioned upon performance of the agreement." At the time the charter was signed the cable company had agreed with the Wire Rope Manufacturing Company, by verbal contract, for the manufacture at its factory, near the wharf at One Hundred and Fiftieth street, Harlem, of the cable in question, to be delivered along-side the wharf, on board of a boat to be sent by the cable company, as the cable was manufactured; and upon delivery to be paid for by the cable company, one-half in cash and the other half in stock of that company. The manufacturing company also agreed, as part of the contract, to pay to the cable company one-half of the expense of the boat during the time it lay at the wharf taking the cable aboard.

The president of the cable company, after this agreement, procured the libelant's boat to be sent to the wharf under the above charter, where it arrived on the thirteenth of September, 1880. The cable was manufactured and put on board by the manufacturing company, at the rate of about a mile a day, and the lading completed on the third of October, 1880. The cable lay in a single coil extending the whole length of the barge, fore and aft, but running ashore into the manufacturing company's factory and there connected with the machinery, but was not cut off or let loose so that the barge could depart. The manufacturers thereupon demanded pay for the cable according to the terms of the contract with the cable company, but not obtaining the cash payment agreed on, continued to hold the shore end of the cable fastened to their premises. Numerous interviews took place between the agents of the two companies and the libelant, having reference to the payment of their respective demands. The cable company, during the three or four months following, paid the libelant, as his boat lay at the wharf, some 10 payments, amounting altogether to not quite \$200, and the agent of the manufacturing company, at the request of the president of the cable company, paid the libelant the sum of \$52.50, on account of its one-half part of the expenses of the boat while lying at the wharf and receiving the cable on board, pursuant to the agreement between the two companies. The cable company became insolvent, and went into the hands of a receiver, who declined to interfere in the matter.

In the spring and summer of 1881, the barge remaining all the time at the wharf, and the shore end of the cable still fastened in the manufactory, the libelant or his attorney, in several interviews and letters, required payment of the amount due the boat under the agreement, and that she be released by the removal of the cable, and threatened to remove it himself if this was not done. The vice president and superintendent of the manufacturing company always objected to this, and throughout this long period encouraged the libelant in the expectation that all difficulties would be settled through the action of the cable company or its president, Mr. Foote, and frequently forbade removal of the wire from the barge. On the nineteenth of July, 1881, the present libel was filed against the cable for the libelant's claim. The manufacturing company appeared as claimants, and thereupon removed it from the barge, and, in their defense to the action, claimed that under the charter no lien attached; and, *second*, that there was no such delivery of the cable on board as subjected it to any claim of the libelant.

J. A. Hyland, for libelant.

Scudder & Carter and *Geo. A. Black*, for respondents.

Brown, J. It is claimed that no lien could attach under the charter in this case, because the provision that the freight was not to be due until the vessel had performed her contract, that is, until the cable had been laid in the Erie canal, shows that no lien on the cable was contemplated, and that none could have been enforced by action if the freight or hire of the barge had not been paid according to contract as soon as the cable had been laid. It is undoubtedly true that where the express stipulations as to payment of freight are incompatible with a claim upon the cargo, the lien will be deemed waived. *Ruggles v. Bucknor*, 1 Paine, 363; *Raymond v. Tyson*, 17 How. 53, 61. But in this case payment was due upon performance as in the ordinary cases of the transportation of goods on freight; nor do I perceive anything in the fact that the cable was laid in the canal incompatible with the right of the libelant immediately to proceed to libel the cable, as it lay, by a suit *in rem*, and to attach and seize it through the marshal, as in other cases, if the charterer had failed to pay the contract price upon the delivery being complete. I understand, the law, as generally administered, to be that the lien of the vessel upon the goods, and of the goods upon the vessel, attaches from the moment the goods are laden on board, and not from the time only when the ship breaks ground. *The Bird of Paradise*, 5 Wall. 545, 562, 563; *Bulkley v. Naumkeag, etc., Co.* 24 How. 386, 393; *The Yankee Blade*, 19 How. 82; 1 Pars. Shipp. & Adm. 174, and notes; *The Hermitage*, 4 Blatchf. 474; *The Eddy*, 5 Wall. 481, 494. This objection, therefore, cannot be sustained.

The situation of the barge, with 15 miles of cable on board, but made fast at the shore end upon the manufacturer's premises, is doubtless a peculiar one. The manufacturing company did not in-

tend to make a complete delivery in favor of the cable company, except on receipt of the cash payment agreed on, and it is claimed that they were, therefore, in possession of the cable while it was on the barge through the control they exercised over it by holding fast to the shore end. The manufacturers, however, are clearly chargeable with notice of the relations of the libellant to the cable company. In loading the cable on board they could not have supposed that the barge belonged to the cable company. They knew that it came under some contract with the libellant, by which he was to have pay for the use of it, for they agreed to pay one-half of the expenses of the vessel while she was receiving the wire, and they subsequently made a payment on this account. So far as the libellant was concerned, therefore, they must be held to be chargeable with knowledge of the contract between him and the cable company, and that in the ordinary course of business the libellant would have a lien for the hire of the boat upon all cable put aboard. They must be held, therefore, to have laden the cable on board the libellant's boat pursuant to his contract with the cable company. The libellant, in receiving it on board, received it in execution of his contract with the cable company, and the manufacturers in putting it aboard did so on account of the cable company, at least so far as respects the libellant's rights. The libellant had no knowledge of the terms of the contract between the two companies, and there were no circumstances putting him upon inquiry. He had no right to refuse to receive the wire on board when tendered by the manufacturers; on the contrary, he was bound to receive the cable on board, precisely as he did accept it; and in thus accepting it and permitting it to be laden on board, he received it evidently under, and in part execution of, the contract of affreightment; and the manufacturers are clearly chargeable with notice of these facts. It is clear, therefore, as it seems to me, that the libellant could not be bound to receive the wire on board under his contract without at the same time acquiring that lien on the cable which by the maritime law attaches to goods from the moment they are laden on board. Had the manufacturers desired to put the cable on board under such qualifications and restrictions as would prevent the ordinary lien of the vessel from attaching, they were bound to give the libellant express notice of this intention and condition on loading; and the libellant might in that case have lawfully refused to receive the cable on board under such qualifications. As the manufacturers did not do this they must be held, as respects the libellant, to be estopped from denying that they loaded the goods on board the barge as the goods of the cable company, and to have voluntarily subjected the cable to the lien of the vessel thereon, without regard to their own private relations to the cable company as respects their right to payment on delivery. *Faith v. East Ind. Co.* 4 Barn. & Ald. 680. The same principle of estoppel as regards the lien of material-men upon vessels or their equipment, without regard to the actual title, has been applied in the

case of *The May Queen*, 1 Spr. 588; *The St. Jago de Cuba*, 9 Wheat. 409, 418; and *The Sarah Starr*, 1 Spr. 453.

As respects the cable company, it is manifest that the delivery of the cable was not complete, and was not intended by the manufacturers to be complete, until they should obtain the cash payment agreed upon; but this, so far as the libelant was concerned, was a secret arrangement between the two companies, of which the libelant had no knowledge; and the intention of the manufacturers to hold on to the shore end of the cable, instead of cutting it loose, when the whole amount was put on board, was in no way communicated to the libelant until the cable had all been loaded. The manufacturers being then unable to obtain their pay, refused to cut the shore end of the cable so as to allow the vessel to depart and perform her contract, and in their endeavor by subsequent negotiations with the cable company and the receiver to procure their pay, they kept the vessel in that condition, and would neither remove the cable nor suffer it to depart.

The manufacturers, it is true, were not, as respects the cable company, bound to deliver the cable or suffer the vessel to depart without being paid according to their contract. The cable company in omitting to pay for the cable as their contract provided, so as to permit the departure of the vessel, in effect obstructed and prevented the further performance by the vessel of her contract after the cable had been taken aboard, though the vessel was ready to proceed and complete her contract. The vessel is entitled, therefore, to compensation according to the contract price prior to reaching West Troy. The manufacturers have no equity to contest this, for the reason that, having put the wire on board with substantial knowledge or notice of the libelant's rights, they could not afterwards, upon failure to get their pay as expected, rightfully keep the vessel tied to the wharf for their own benefit, in the hope of speedy payment for the cable put on board.

By the charter the libelant was to have five dollars a day for the vessel until she arrived at Troy. She has been prevented from the full performance of her contract, after having taken the cable aboard, through the default of the charterer; and, by this default, with the concurrent acts of the claimants, the vessel was detained until the cable was removed from on board, under the bond given by the claimants on August 23, 1881, after this libel was filed, in all 343 days, making \$1,715. The increased price of the barge after reaching the Erie canal is presumably on account of the increased expense subsequently attaching. The time during which she was detained at the wharf was far more than sufficient for the laying of the cable, so that full compensation for her contract will be given by an allowance of the stipulated price of five dollars per day for the time during which she had the cable on board, amounting to \$1,715, from which, deducting \$240.50 already paid, a balance remains due of \$1,474.50. Where a lien on the cargo for freight exists, it extends also as against the

freighter, by the maritime law, though otherwise at common law, to demurrage and damages for the unreasonable detention of the vessel, though not expressly agreed upon. *The Hermitage*, 4 Blatchf. 474; *The Hyperion's Cargo*, 2 Low. 93; *Sprague v. West*, Abb. Adm. 548. But in the present case, compensation for the vessel, while lying at the wharf with the cable on board, is not in the nature of damage for detention, but is a part of the express contract of the charter to pay for the vessel at the rate of five dollars per day until arrival at Troy.

The libellant is therefore entitled to a decree for \$1,474.50, with interest from August 23, 1881, with costs.

THE ROCKAWAY, etc.

THE SURVIVOR, etc.

(District Court, S. D. New York. January 15, 1884)

1. COLLISION—ANCHORED VESSEL—PRESUMPTION.

Where a steamer in motion collides with a vessel properly anchored, the presumption of fault is upon the former.

2. SAME—RINGING BELL—SNOW.

There being no positive rule nor settled usage for a vessel at anchor to ring a bell in thick snow, *held*, such vessel is not in fault for not ringing a bell during a thick squall of snow of a few minutes' duration only.

3. SAME—CASE STATED.

Where the ferry-boat R., running from Hunter's Point to Seventh street, New York, her usual course being near where the bark S. was anchored off Nineteenth street, was overtaken after leaving Hunter's Point by a sudden squall of thick snow, and on passing Twenty-third street was embarrassed by one of the ferry-boats of the Twenty-third street line crossing her bows, compelling her to stop and back, and while so doing, and being headed well towards the New York shore, she drifted down with a strong tide and ran afoul of the S. at anchor, the position of the latter being previously well known to the R., *held*, that the ferry-boat was in fault for not keeping further away from the known situation of the S.; *held also*, that under the circumstances it was not probable that the ringing of a bell would have been of any service to the R. in avoiding the collision, and that the R. accordingly was alone answerable.

In Admiralty.

Shipman, Barlow, Larocque & Choate, for ferry company.

Jas. K. Hill, Wing & Shoudy, for the Survivor.

BROWN, J. These cross-libels were filed to recover damages arising out of a collision, which took place in the East river, off Eighteenth street, a little after 7 o'clock in the evening of Sunday, December 26, 1880, between the brigantine Survivor and the ferry-boat Rockaway. The brig was a new vessel of 193 tons register, belonging at Windsor, Nova Scotia. She arrived at New York, loaded with potatoes, on the afternoon previous, by way of Long Island sound and the East river, and, after being taken through Hell Gate by the pilot in charge, was

left by him on the usual anchorage ground, known as the Poor House flats off Nineteenth street, about 450 yards from the New York shore. The brig Louisa Coipel was anchored just above and a little nearer the shore. The place of anchorage was at first disputed, but is fixed with approximate accuracy by the pilot who anchored the Louisa Coipel, who states that she was anchored when he got in range of the west ship-house, at the navy-yard, as it opened along the line of the New York shore. This fixes the position of the brigantine at about 450 yards from the New York shore.

On Sunday, the day of the collision, the wind was strong from the north-east, with occasional spits of snow. At about 5 p.m. both vessels threw out a second anchor, apprehending a stormy night, and paid out 20 additional fathoms of chain. This would have brought the brigantine between Eighteenth and Nineteenth streets. The Rockaway, with her companion-boat, the Long Beach, was running from the ferry at the foot of Seventh street, New York, to Hunter's Point. Off Tenth street there is a reef of rocks near the middle of the river. The usual course of the ferry-boats is to run between this reef and the New York shore until off Seventeenth street, and then make somewhat across the river for Hunter's Point. When the weather is thick the boats go near the docks as far as Seventeenth street and then steer by compass across for Hunter's Point, and return in the same manner. At Seventeenth street the New York shore makes a sudden and deep bend to the westward, forming a sort of bay with the flats above referred to. The harbor regulations forbid vessels to anchor within 300 yards of the shore. While the Survivor was thus at anchor, the tide being strong ebb, the Rockaway, on one of her trips down the river from Hunter's Point, ran afoul of the brigantine, causing damage to both vessels. The ferry-boat at the time was headed more or less for the New York shore; was under slow headway through the water, and drifting down with the strong ebb-tide. As she did so, the jib-boom of the Survivor ran through the second window from the front of the forward cabin of the Rockaway, on her port-side, and that side of the ferry-boat was carried away as far back as the wheel-house. The boats became entangled; the Rockaway swung round with her head up river and upon the east or starboard-side of the Survivor, and was fast afoul from half an hour to an hour, when she was finally extricated through the aid of the Long Beach, which was approaching and very near at the time of the collision.

The witnesses on behalf of the ferry-boat testify that when the Rockaway left her slip at Hunter's Point the lights at Thirtieth street could be seen, but that a few moments afterwards, when she got out into the river, a thick squall of snow set in, which hid the lights on both shores, as well as the lights of the vessels at anchor, so that no light could be seen except at a very short distance; and that this snow squall and this condition of the weather continued until the collision. The pilot testifies that as he approached the crossing of

the Twenty-third street ferry from New York to Greenpoint, he blew signal whistles for this ferry, and received in reply two whistles from the ferry-boat Martha, of that line, which he recognized, indicating that she would cross his bow; that he immediately reversed his engine; that the Martha passed his bow very near to him; that he could only see her white light when she was close to him; that after she had passed, and while he was still drifting and backing, he ran afoul of the Survivor in the manner before described, not being able to see her anchor light, which was set in her fore-stay, until close upon her. This testimony in regard to the state of the weather is substantiated by three other pilots, namely, the pilot of the Long Beach, and the pilots of the Martha and Greenpoint, of the Twenty-third street line. They all testify that on this trip lights could not be seen any considerable distance, so as to be of service in avoiding vessels, and that they sounded their fog-whistle, as customary in thick weather. The witnesses on behalf of the Survivor, including some who were disinterested, state in general terms that the weather was not thick; that there was no snow to obstruct lights; that the lights on both shores were visible, and the lights of vessels visible at a good distance off. Such a conflict of evidence in regard to the weather is extremely embarrassing. But, upon a careful consideration of the testimony, and notwithstanding the able argument of counsel on the part of the company, I am not satisfied that the ferry-boat has absolved herself from the sole responsibility for this collision.

1. The brig was at anchor in a proper place, where she had a right to be, and with her light properly set. The pilot of the ferry-boat knew her precise position, and was bound to keep out of her way. The burden of proof in such cases is upon the vessel under way to show by a clear preponderance of proof that the collision occurred without fault on her part, or through some fault of the other vessel. *The Batavier*, 2 Wm. Rob. 407; *The John Adams*, 1 Cliff. 404, 413; *The City of New York*, 8 Blatchf. 194.

2. Even if the weather were as thick as the witnesses on the part of the Rockaway state, the latter must, nevertheless, be held in fault, because her pilot well knew where the Survivor lay at anchor, and was bound to give her a good offing, there being nothing in the way of his doing so. Moreover, a statute of this state requires steam-boats navigating the East river to keep in the middle of it; and this statute was held by NELSON, J., in the case of *The E. C. Scranton*, 3 Blatchf. 50, to be binding upon the Williamsburgh ferry-boats. The Rockaway in deviating from this rule did so at her own peril. The course of the Rockaway on this trip, by compass, as stated by the pilot, shows that no effort was made to keep in the middle of the river or to go much to the eastward of the Survivor. As respects her duty to keep away, the case is very similar to the case of *The D. S. Gregory*, 6 Blatchf. 528, in which NELSON, J., says:

"It was the duty of the D. S. Gregory [in a thick fog] to take every reasonable precaution in her power to avoid the Talisman. In this, I think, she failed. She knew that the Talisman was anchored in her track the afternoon or evening before; and, as the Talisman did not change her position down to the time of the collision, and the ferry-boat was passing her every trip she was making, the ferry-boat is chargeable with notice of her position, and should have been so navigated as to avoid her."

That case presented more difficulties from the surrounding shipping than the present, and, nevertheless, the ferry-boat alone was held liable.

3. It is urged that the Survivor was in fault in not ringing a bell when the weather was so thick with snow that lights could not be seen. There was not then, and is not now, any express rule or regulation in force in this country requiring a vessel at anchor to ring a bell in snowy weather. The rule provides for cases of fog only. The new international rules of navigation provide for snow as in cases of fog; but these rules have not yet been adopted by congress. There was no proof of any usage or custom of the port for vessels at anchor to ring a bell in snowy weather. See *The Bay State*, 1 Abb. Adm. 235, 241, note.

Without considering what may be the obligations of a vessel in this respect when anchored in the region where ferry-boats are in the known habit of passing, I have come to the conclusion that under the peculiar circumstances of this case there is not such satisfactory evidence or preponderance of proof on the part of the ferry-boat in regard to the condition of the weather for such a length of time as would justify me in holding the Survivor chargeable with negligence in not ringing a bell. The case is not one of the omission of a reasonable precaution to avoid the danger of a particular collision after that danger has become visible. The fault charged is that the Survivor did not commence to ring a bell when the weather, as is alleged, became thick, as a general measure of precaution, to enable ferry-boats and any other vessels to keep away from her. But the time during which this thick snow could have existed was extremely short; certainly not more than five or six minutes. No bells were rung anywhere else, either upon other vessels, or upon the ferry slips, which are in the habit of using bells in thick weather to guide boats coming in. Some suspicion necessarily attaches also to the claim that so thick weather should come on so suddenly, continue until the collision, and disappear a minute or two afterwards; and the proof to sustain it ought to be clear and satisfactory. Although four pilots of ferry-boats do testify to this, there are numerous circumstances in connection with the other direct evidence, which, contrary to my first impressions, have led me to hesitate, and at length to conclude, after much review, that the weather was not so thick for any such appreciable time as could constitute negligence in the brig for not ringing a bell. There must be some reasonable period allowed for observation, directions, and the execution of orders for such signals. A vessel at anchor, and

in a proper place, is not, I think, to be charged with extreme vigilance or watchfulness against collision with other vessels, nor held to be always prepared for the instantaneous sounding of a bell. Less vigilance is required of a vessel at anchor. *The Lady Franklin*, 2 Low. 220. The general absence of such ringing of bells as would be looked for if the weather was very thick is entitled to considerable weight, I think, as evidence that whatever thickness of weather existed was for so brief a period as not to have given occasion for bells to be rung, in the exercise of ordinary prudence. In the several years that have elapsed since the collision it is not impossible, also, that the thickness of the weather may have become somewhat exaggerated in the recollection of the witnesses on the part of the ferry-boat; and some important differences in their testimony and other circumstances of proved mistake have on the whole satisfied me that, as the main fault was very clearly on the part of the ferry-boat, there is not sufficiently satisfactory evidence of negligence to make the Survivor also legally responsible for the collision. If, moreover, the weather was as thick as alleged, it is not evident, and scarcely appears probable, that, considering the heading, the backing, and the drifting of the Rockaway after the embarrassment caused her by the Martha's crossing her bows, she would have received aid from a bell if rung from the Survivor. Her pilot had not lost his bearings; he knew the position of the Survivor and Louisa Coipel, and must have known his own position very approximately from the Martha's course. He does not claim to have been misled by the absence of the bell, and I doubt that the bell, if rung, would have made any difference in the result. *McCreedy v. Goldsmith*, 18 How. 89, 92.

In the case of *Slocomb* a reference may be taken to compute the damages to the Survivor, if the parties do not agree, and the cross-libel must be dismissed, with costs.

THE ECHO, etc.

(District Court, S. D. New York. January 21, 1884.)

1. COLLISION—NEGLIGENCE—BURDEN OF PROOF—CUSTOM.

Where a boat properly moored receives damage from another colliding with her, the latter is presumptively liable for the damages, and the burden of proof is upon her to clear herself from fault.

2. SAME—LINE ACROSS CHANNEL.

The temporary use of a line or warp stretched across a narrow stream in the mooring and handling of vessels is not necessarily unlawful.

3. SAME—CUSTOM.

Where a tug-boat coming down Newtown creek discovered such a line ahead of her, and upon backing to avoid it, ran into the libellant's boat, *held*, that the burden of proof was upon the tug-boat to show that the line was used improperly, or that any proper signals were omitted; *held, also*, that in view of the

local usage the tug-boat should have been more cautious in her approach, and kept further away from the libellant's boat, and was therefore chargeable with the damage.

Collision.

Beebe, Wilcox & Hobbs, for libellant.

Edwin G. Davis, for claimant.

BROWN, J. On December 21, 1880, the libellant's canal-boat Van Vleet, laden with coal, was lying at the Long Island railroad dock, in Newtown creek, a short distance above the bridge, moored outside of two other canal-boats. At dusk, about 5 p. m. of that day, the weather being clear, the steam-tug Echo was coming down the creek on a course which would carry her about 25 feet outside of the Van Vleet. When she had come within about 30 feet of the stern of the Van Vleet her pilot saw a line stretched across the creek a short distance below the canal-boat, running from a schooner on one side to the opposite shore, and ranging about 10 or 12 feet above the water. The pilot immediately stopped and reversed his propeller to avoid running into the line. In doing so, the Echo not being entirely manageable in backing, swung her bows towards the canal boat and inflicted a blow, causing some damage, for which this libel was filed. The owner of the Echo subsequently agreed to pay for certain repairs, but the terms of the agreement being afterwards a subject of dispute, no settlement was effected.

The canal-boat being moored at a proper place, and no fault chargeable against her, she is presumptively entitled to the damages inflicted by another boat colliding with her. *New York, etc., v. Rumball*, 21 How. 385; *The Bridgeport*, 7 Blatchf. 361; *Pierce v. Lang*, 1 Low. 65; *The Lincoln*, Id. 46; *The John Adams*, 1 Cliff. 404, 413; *The City of New York*, 8 Blatchf. 194; *The Rockaway*, ante, 449. On the part of the Echo, it is urged that she ought not to be held liable, on the ground that the stretching of a line across the creek, a thoroughfare for vessels, was the real wrong which caused the collision; that there was no previous notice given of the existence of the line, available to the Echo; that it was seen as soon as it could be perceived; and that there was no subsequent fault in the handling of the tug. If the evidence sustained this view a different question might be presented; but it is a familiar fact, and it was proved on the trial, that the use of lines stretched across the creek was a usual and customary thing for the purpose of handling and moving vessels of a considerable size which go above the bridge, and that the temporary use of such lines is necessary for that purpose, in that narrow channel-way. 1 Pars. Shipp. & Adm. 547. It cannot be assumed, therefore, that this line was wrongfully across the stream at the moment when the pilot of the Echo discovered it, and no evidence was given showing the omission of any customary signals. The burden of proof to show that the line was wrongfully there was upon the Echo. Nothing was proved, however, beyond the bare fact of the

line being there, and, under the custom proved, that is not presumptively unlawful. The custom of stretching lines across the stream for this purpose imposes the duty upon tugs navigating that part of the creek to observe carefully, and to regulate their speed and distance from other craft with reference to such a contingency. There was plenty of room for the tug to have gone further from the canal-boat. The pilot of the *Echo* had not been accustomed to navigate in Newtown creek, and the accident in question, doubtless, arose from his want of familiarity with the usage of stretching lines across the creek. This does not exempt the *Echo* from responsibility, and the defense in this respect cannot be sustained. Nor upon the evidence of the pilot himself can I sustain the claim that the blow was a light one, or such only as may rightfully occur in the ordinary rubbing of boats passing along-side each other. *The Chas. R. Stone*, 9 Ben. 182. It was plainly a considerable blow, and did not arise in the course of the ordinary, usual, and prudent handling of such boats.

I see no reason in this case to doubt the fairness of the bill presented for the repairs, detention, and expenses of the vessel. These are proved to amount to \$97, which, with interest to this date, makes \$115, for which the libelant is entitled to a decree, with costs.

THE SWAN.

(*District Court, S. D. New York. February 1, 1884.*)

1. SHIPPING—OBSTRUCTION TO NAVIGATION—ROPE ACROSS CHANNEL—DAMAGE—PROXIMATE CAUSE.

A rope stretched across the archway of a bridge and over the principal channel of a navigable river, and remaining 24 hours, is an unlawful obstruction of navigation.

2. SAME—WHEN JUSTIFIABLE.

Wherever such rope or warp may be used, it is justifiable only for a temporary purpose, those who use it making provision for loosening it to allow vessels to pass, and giving timely notice of its existence.

3. SAME—CASE STATED.

Where a rope was stretched across the west archway of High bridge, for the purpose of keeping a canal-boat a few feet distant from the abutment of the bridge where there were sunken spiles, and the boat might have been breasted off equally well by the use of planks upon the wharf, and the passenger steamer *S.*, after landing within 150 feet of the abutment, proceeded with the flood-tide through the main channel, no notice being given of the rope which was under the water in the middle, and visible only where the ends came from beneath the surface, and those on the boat being unable to loosen it at once, and in the strong tide it being dangerous for the *S.* to remain in contact with the rope, *held*, that the use of the line in this case was unnecessary and was an unlawful obstruction; that the cutting of the rope by those on the steamer was lawful; and that the steamer was not liable for any damage subsequently sustained by the canal-boat. *Held, also*, upon the facts, that the damage to the canal-boat from settling upon the spiles arose after a considerable interval, during which the boat might have been breasted off from the spiles; that the cutting of the line was not the proximate cause of the injury; and that on these grounds also the libel should be dismissed.

This action was brought to recover damages for injuries to the canal-boat C. B. Simon, on the fifteenth day of July, 1881, on the west side of the Harlem river, at High bridge, caused through a line by which she was fastened having been cut by those in charge of the steam-launch Swan. The Simon had arrived at High bridge the day previous, loaded with coal, and moored on the west side of the river, along-side of the bulk-head which extends northerly from the westerly abutment along the shore, and which is on a line flush with the inner side of the abutment. The canal-boat lay with her bows to the northward and her stern projected part way through the western archway of the bridge. Beneath the water and near the bottom were the remains of a crib extending around the abutment two or three feet from its base, the outer margin of which consists of spiles which had been cut off a foot or two above the bottom. To prevent boats moored along the bulk-head and the abutment from settling down upon these spiles at low water, they were usually fended off so as to be outside of the line of these sunken spiles. This was sometimes done by means of planking passing from the wharf to the boat, and sometimes by a line run from the end of the boat at the abutment and stretched across the western archway and fastened to a spike driven into the second abutment of the bridge not far from the surface of the water at high tide. The stern of the Simon was kept off by a line fastened in the manner last described. The Swan was a small steamer plying in the summer season between Harlem bridge and High bridge for the carriage of passengers. Her usual landing place at High bridge, upon the west side, was at a float, known as Riley's float, upon the western edge of the channel directly below, and about 150 feet southerly from the western abutment of the bridge. Her usual landing on the east shore was about the same distance above the bridge. The principal channel is under the western arch of the bridge, which is of about 70 feet span. The middle arch, though usually having about six feet of water at low tide, was much less used for passage. Around the second abutment there were loose stones extending some distance to the southward which interfered somewhat with the approach to the middle arch, and rendered a cross-ways approach to it dangerous; and under the eastern arch the water was too shoal for navigation. The ordinary course of the Swan upon her trips, both in going and coming, was through the western arch, not only by reason of the deeper water there, but especially, also, because upon the flood tide, after landing at Riley's float, the Swan could not in the short space between that and the bridge get far enough out into the river to make the middle passage without danger of running upon the rocks by the second abutment, except at great inconvenience and by special appliances which she did have aboard for first shoving her bows or her stern out into the river. After making her landing at Riley's float, upon her first trip on the fifteenth of July, the Swan proceeded in the manner usual at flood tide through the western arch-

way, and when close to it observed for the first time the line stretched across it, which in the middle was beneath the water and was visible only where the two ends came out above the surface. Shouts were given from the Swan to loosen the line, and some effort was made by the wife of the libellant on board of the boat to unfasten it there, but it was so secured that it could not be readily loosened, and the Swan having run afoul of it, and the captain apprehending danger both to the boat and passengers in the strong flood tide, after a few minutes ordered it cut, which was done. The canal-boat afterwards got upon the sunken spiles, which in the ebb tide made holes in her bottom, causing the injury for which this libel was filed.

J. A. Hyland, for libellant.

Edwin G. Davis, for claimant.

BROWN, J. There can be no doubt that the archway across which the line was stretched was the principal channel for navigation in the Harlem river, under High bridge. The landing at Riley's float has been in use for many years. The course from that landing, through the middle archway, upon a flood tide, would be attended by such obvious inconvenience and dangers as cannot rightfully be imposed upon persons entitled to navigate the river in the ordinary course of navigation. The line stretched across the western archway was, therefore, in my judgment, plainly an unreasonable obstruction to the navigation of the river, which could only be lawfully put there very temporarily, or at seasons when the channel was not in use for ordinary navigation. While such lines or warps may doubtless be used temporarily for mooring and handling vessels in rivers or harbors, they cannot be lawfully continued so as to form a permanent obstruction to navigation. Those who make use of them must be prepared to give seasonable notice of them to approaching vessels to avoid danger, and make seasonable provision for their passage.

In *Potter v. Pettis*, 2 R. I. 487, the court say:

"The plaintiffs had a right to extend their warp across the entire channel of the river, if there were no vessels passing, but on the approach of another vessel it was their duty to take notice of such approach, and to lower their warp so as to give ample space in the ordinary traveled part of the channel for her to pass, and to give timely notice of the space so left."

In *McCord v. The Tiber*, 6 Biss. 410, the court say:

"The respondent had no right to obstruct the channel with a line across it in that manner. * * * If it was for the safety of the boat to make a line fast to the shore, or to use a line attached to the shore as a necessary assistance in getting off the bar, she should have taken care to get it out of the way of all passing vessels, either by dropping it, so that they could pass over it safely, or by casting off one end. The obstruction not being removed so as to let this raft pass over or under it in safety, was manifestly illegal."

See 1 Pars. Adm. 547; *The Vancouver*, 2 Sawy. 381.

In this case no attempt was made to give seasonable notice to the Swan of the existence of this line across the archway before she left Riley's float, or afterwards, until she was close upon it. Such a

line was not easily distinguishable, and the pilot of the Swan is not, so far as I can see, chargeable with any negligence in not perceiving it in time to avoid it. Those on the Simon could not loosen the line, though requested to do so. The Swan could not safely remain any length of time in contact with the line, and the only alternative was to cut it, as was done, which, under such circumstances, as I must hold, the captain had a legal right to do. There was no actual necessity for the use of this line by the Simon at all. The boat might have been breasted off by the use of planks, and that, as the laborer Dunn stated, has been latterly the more usual method. The line had been thus used by the Simon for 24 hours, forming a plainly illegal obstruction of the channel.

While, therefore, upon the ground above stated, I should be constrained to hold that any loss occasioned by the line's being cut was through the libelant's own fault, and not through any legal fault in the Swan, upon the other facts of the case, also, the weight of evidence seems to show that the damage to the boat was not the proximate result of cutting the line. It was high water that day at Governor's Island at about 10 minutes before 12, and it could not have been high water at High bridge until between 2 and 3. The libel states that the line was cut at about 11 o'clock, and the libelant so testified. The answer does not state the hour, but says that the flood tide was then about three-quarters full, which would place the time between 11 and 12. These statements in the pleadings, with other direct evidence in accord with them, should be held controlling, notwithstanding some contrary evidence which was given on the part of the libelant. While the tide, therefore, was rising rapidly, it was impossible that the injuries complained of could have arisen immediately after the line was cut. The discharge of coal continued until 3 o'clock, and until nearly that time the tide was rising; after that it fell, and the settling of the boat upon the spiles with the falling tide must have taken place at or after that time. During the interval there was abundant time for the libelant to take all necessary means to shove his boat off and out of the way of the sunken spiles. The libelant himself says the effort to get the boat off was soon after the line was cut,—from five to fifteen minutes afterwards. But the libel is so full of gross errors in its statement of facts as to detract much from the credit to be given to the libelant's case, and I cannot accept as true the statement of some of the libelant's witnesses, that when the line was cut the boat immediately got upon the spiles and could not be removed.

On both grounds, therefore, the libel should be dismissed, with costs.

THE OLUF.

(Circuit Court, E. D. Louisiana. December, 1883.)

1. CHARTER-PARTY—DEMURRAGE.

The words "providing for demurrage for every day, day by day," in a charter-party, are to be construed as running days, and not working days, and all days are to be counted, including rainy days, Sundays, and other holidays.

Lindsay v. Cusimano, 12 FED. REP. 503, 504, followed.

2. SAME.

The words "weather permitting," in the charter-party in this case, apply to the time to be taken for unloading, and not to the time of the detention of the vessel by the default of consignees.

Admiralty Appeal.

E. H. Farrar, for libelants.

W. S. Benedict, for respondents.

PARDEE, J. Libel for demurrage under charter-party, containing this clause on the subject:

"It is agreed that the lay days for loading and discharging shall be as follows, (if not sooner dispatched:) commencing from the time the vessel is ready to receive or discharge cargo; cargo to be delivered to the vessel in quantity of not less than 15,000 feet per day, and to discharge as fast as the vessel can deliver to company's lighters, weather permitting. And that for each and every day's detention, by default of said party of the second part, or agent, twenty-five dollars per day, day by day, shall be paid by said party of the second part, or agent, to the said party of the first part, or agent."

The evidence shows that the cargo could have been discharged in 10 working days had ordinary dispatch been used. And this was expressly agreed to by the agent of consignees. It is also shown and agreed that the lay days commenced September 26th, and expired October 27th, from which time the bark was detained by default of the respondents. The only question remaining is whether, under the contract, demurrage was to be paid for running days or only for working days. It seems to me that the contract is perfectly plain: "And that for each and every day's detention, * * * twenty-five dollars per day, day by day, shall be paid." The vessel should have been discharged October 27th.

As this court had occasion to say in another case:

"All delays after that date were the result of the negligence of the respondent, and whether it 'rained or shined,' was Sunday or week-day, he should pay demurrage for every day thereafter, until the ship was discharged." *Lindsay v. Cusimano*, 12 FED. REP. 504.

It seems that after the expiration of the lay days, and while demurrage was running, the storms were so violent at intervals that the bark was compelled to go to sea for safety, and this no less than six times; and one time the bark was kept outside some 10 days. It

¹Reported by Joseph P. Hornor, Esq., of the New Orleans bar.

does not appear that much of the time the bark was outside for safety could or would have been utilized for discharging; but the respondents urge that these days should, at least, be deducted from the delay for which demurrage is allowed. This claim, though plausible at first glance, cannot be allowed under the contract. The words "weather permitting" apply to the time to be taken for unloading, and not to the detention of the bark by the default of consignees. If the bark had been discharged with dispatch when the stormy season came on, she could have sailed for smoother seas and safer ports. The risks and losses she was compelled to meet to secure her safety will be hardly compensated by the allowance she will get as demurrage during that stormy season.

A decree will be entered in favor of libelant for \$2,650, being demurrage for 106 days at \$25 per day, with interest from December 24, 1881, with credit of \$550 deposit, with interest from November 24, 1882, and for costs of both courts.

THE CITY OF LINCOLN.

(Circuit Court, E. D. Louisiana. December, 1883.)

1. APPEAL—BOND—PARTIES.

Where the appeal was taken and bond given before the decree below was made final by the signature of the judge, and where all parties against whom the decree below was rendered have not appealed nor severed, and where the motion and order for appeal were not taken against any of the numerous libelants by name, and where no bond was given in favor of any other than one of the libelants, and the judgment below in his favor was only for \$40, not sufficient to give jurisdiction to this court, the appeal will be dismissed.

2. SAME—AMENDMENT OF PROCESS.

On appeal from district to circuit court defective process cannot be cured by amendment.

On Motion to Dismiss Appeal in Admiralty.

Richard De Gray, for libelants and appellees.

Emmet D. Craig, for claimants and appellants.

PARDEE, J. The appeal bond in this case is irregular and defective, (1) because the appeal was taken and bond given before the decree below was made final by the signature of the judge; (2) because all parties against whom the decree below was rendered have not appealed, nor have they severed; (3) because the motion and order for appeal were not taken against any of the numerous libelants by name; (4) because no bond was given in favor of any other libelant and appellee than Daniel Kelly, and the judgment below in his favor was only \$40, not an amount sufficient to give appellate jurisdiction.

¹ Reported by Joseph P. Hornor, Esq., of the New Orleans bar.

It may be said that the first three grounds are not sufficient to enable the court to say that there is no appeal. There may be no rule of the district court (although the custom is invariable) requiring decrees to be signed by the judge; but see *Betts*, Adm. 98. The steam-ship company may be the only real party interested in the decree below, to be determined by examining the record. No motion for appeal may be necessary where notice is given and a proper bond given.

The fourth and last ground, however, is too serious to be explained away. I take it that the bond in the case is the real and only appeal process which in this case, at least, brings the case to this court. The decree below was in favor of some 20 odd libelants by names, for various sums. The appeal bond is in favor of Daniel Kelly and intervening libelants, without naming any one. The rule is well settled that such appeal process is defective. It must name all the persons which the appeal is intended to bring before the court; otherwise there can be no decree for or against them. See *Smith v. Clark*, 12 How. 21; *Deneale v. Stump* 8 Pet. 526; *Holliday v. Batson*, 4 How. 645.

Suggestion has been made that the court can grant leave for appellant to amend, but I do not know of any authority for the court to make such order where the effect would be to bring new parties before the court. There is no sufficient bond in this case to bring the parties here for the court to act upon them for any purpose.

The appeal will be dismissed.

THE CITY OF BATON ROUGE.¹

(*Circuit Court, E. D. Louisiana.* December, 1883.)

JURISDICTION—ADMIRALTY.

An unexecuted contract of affreightment gives no lien in admiralty.

The Pacific, 1 Blatchf. 569, distinguished

Admiralty Appeal.

Henry C. Miller and Walter S. Finney, for libellant.

Charles B. Singleton and Richard H. Browne, for claimants.

PARDEE, J. Libel *in rem* to recover damages for the breach of a contract made between libellant and the master of the steam-boat City of Baton Rouge, to convey certain molasses from libellant's plantation, in the parish of Iberville, to St. Louis, "it being agreed that said molasses would be taken on board for conveyance to St. Louis on or about January 25, 1883, the said steam-boat being on her down

¹ Reported by Joseph P. Hornor, Esq., of the New Orleans bar.

trip from St. Louis when said contract was made, and it being intended by said contract that said molasses would be taken on board said steam-boat on her return and up trip to St. Louis." The breach alleged is "but neither on said appointed day nor at any time did the said master call for, take on board, or convey said molasses as he had agreed to, but in all respects he failed to keep and carry into effect said contract." The case has been heard on an exception to the jurisdiction, and the question is whether an unexecuted contract of affreightment gives a lien. This question is well settled in the negative. *The Freeman v. Buckingham*, 18 How. 188; *Vandewater v. Mills*, 19 How. 82; and see *The Lady Franklin*, 8 Wall. 329; *The Keokuk*, 9 Wall. 517; *The Prince Leopold*, 9 Fed. Rep. 333.

The learned proctor who brings the libel in this case relies entirely, to maintain the jurisdiction, on *The Pacific*, 1 Blatchf. 569. In regard to that case, it should be noticed that the maritime contract for passage had been so far entered upon that the passage money had been paid, and one demand of the libel was for the return of the money. It is very probable that in just such a case jurisdiction would be maintained now. In our case no freight has been paid, no goods delivered, nor the maritime contract in any sense entered upon by the ship. The whole case is that the master contracted for the ship that on the return trip the molasses should be shipped. There is no case that I am aware of that gives a maritime lien for entire breach of such a contract.

The exception will be maintained, and the libel dismissed, with costs in both courts.

THE IMOGENE M. TERRY.

(District Court, D. New Jersey. February 2, 1884)

1. ADMIRALTY—MARITIME LIEN—CAPTAIN OF VESSEL.

The rule of law that the captain of a vessel has no lien upon it for his wages is not applicable to a person who, though calling himself captain, neither contracts directly with the owners, nor has charge of freights and moneys, but is, except in name, an ordinary seaman.

2. SAME—PLEADINGS—AMENDMENTS.

It is in the discretion of a court of admiralty to allow amendments in the pleadings even with respect to matters of substance, by a party who shows merits.

In Admiralty. Libel *in rem*.

Bedle, Muirheid & McGee, for libelants.

E. A. Ransom, for respondent.

NIXON, J. In the above libel the libelant, with some self-complacency, describes himself as master of the sloop *Imogene M. Terry*. But courts of admiralty deal with things, and not with words. If the proofs show that he is in fact an ordinary seaman, under the control of the master, his calling himself the captain ought not to hinder him from invoking the seaman's remedy for the collection of his wages. It is well settled in the admiralty that the captain has no libel *in rem* upon the vessel for his wages. *The Orleans v. Phœbus*, 11 Pet. 175. Two reasons are ordinarily assigned for this: (1) Because the freights of the ship pass through his hands, on which he has a lien for payment; (2) because his contract for hire is with the owners, and he is supposed to bargain with reference to their personal responsibility, and not with an intention to look elsewhere for satisfaction. *The Grand Turk*, 1 Paine, 73. The evidence shows that both these reasons failed in the present case. *Cessante ratione legis, cessat ipsa lex*. The libelant was not hired by the owners, but by the master of the *Frank C. Barker*. He earned no freights, and no money passed through his hands from the earnings of the vessel. When the crew of the *Barker* was made up by Capt. Raynor, he was employed with other fishermen, and at the same rate of compensation, to-wit, \$25 per month, and three cents for every thousand fish caught. To carry on the fishing operations, some of the men were placed on board the *Barker* to aid in taking the fish, and others on two tenders, by which the fish were transported from the vessel to the respondent's manufactory on the shore. The libelant had charge of the tender *Imogene M. Terry*, but was as much subject to the orders and the control of Capt. Raynor as if he had remained on board the *Barker*. The same attempt was made to charge him with the cost of his grub, over three dollars per week, that was sought to be imposed on the other men. There was also a refusal to pay anything to him on account of the bonus for fish caught, although the fact that Capt. Raynor went with a num-

ber of the crew to the owners on July 1st to receive payment on account of the dues for fish then taken, and the additional fact that he suggested that the number should be estimated, for convenience, at 500,000, show quite clearly that he did not understand when the men were hired that they would be expected to wait until the end of the season before any payment on account should be made.

The proctor of the libelant, at the hearing, asked leave to amend the libel, in order to have the allegations harmonize with the proofs. In admiralty practice there is not much limit to the discretion of the court in this respect. In section 483 of Benedict's American Admiralty, it is said that "on proper cause shown omissions and deficiencies in pleadings may be supplied, and errors and mistakes in practice, in matters of substance as well as in form, may be corrected at any stage of the proceedings, for the furtherance of justice. Where merits clearly appear on the records, it is the settled practice in admiralty not to dismiss the libel, but to allow the party to assert his rights in a new allegation. The whole subject rests entirely with the discretion of the court, as well in relation to the relief to be granted as to the terms on which it shall be granted. Amendments may be made on application to the court at any time, as well after as before decree, and at any time before the final decree new counts or articles may be added, and new and supplemental allegations may be filed."

The libel may be amended as proposed, and a decree entered in favor of the libelant. If necessary, a reference will be ordered to ascertain the amount of monthly wages and bonus due to the libelant to the date of the order given by the captain upon the owners for the payment of the sum due.

POLLOK and others v. LOUCHHEIM and others.

(Circuit Court, N. D. Illinois. November 21, 1883.)

JURISDICTION OF CIRCUIT COURT—RIGHT OF REMOVAL—SEPARATE CONTROVERSY.

One of several attaching creditors joined the others as defendants in a suit to set aside certain judgments obtained against the debtor by confession. *Held*, that they were necessary parties to the controversy between the plaintiff and his debtor; and that, as they were citizens of the same state with the debtor, the cause could not be removed to the United States court.

In Equity.

Flower, Remy & Gregory, for complainants.

Mr. Shehan and L. Schissler, for defendants.

DRUMMOND, J. On the twenty-seventh day of September last Louchheim was a merchant, engaged in business in Galena, in this state, and about that time three several judgments were rendered by confession in the circuit court of Jo Daviess county against him, in favor of different parties, amounting altogether to a little more than \$15,000, upon which executions issued and were levied by the sheriff upon a stock of goods in his possession. Shortly after this had taken place various creditors of Louchheim, including these plaintiffs, sued out attachments from the same court, which were also levied upon the same property by the sheriff, and thereupon the plaintiffs filed a bill in the same court against Louchheim, the sheriff, and the various creditors who had sued out the attachments. The bill alleged an indebtedness to them on the part of Louchheim, for which their attachment had issued, and declared that the judgments confessed by Louchheim were in whole or in part fraudulent as against the plaintiffs, and asked that a receiver should be appointed and the property sold, and the proceeds distributed in accordance with the equities of the parties. The plaintiffs in the bill were and are citizens of Wisconsin, the defendants are all citizens of Illinois except two, who are alleged to be citizens of New York. The bill was filed on the sixteenth of October, and an injunction issued in conformity with a prayer to that effect contained in the bill. On the twenty-fifth of October last the plaintiffs made application, under the act of 1875, for the removal of the case from the circuit court of Jo Daviess county to this court, which application, it is admitted, was refused by the court, and the plaintiffs now ask leave of this court to file a transcript and docket the case, on the ground that it was properly removable from the state court.

The principal objection made to this application is that the attaching creditors, who have been made defendants, are only nominal defendants, but are really plaintiffs, when they come to be arranged according to the principle laid down by the supreme court in *The Removal Cases*, 100 U. S. 457, on opposite sides of what is the real controversy in this case, without regard to the position they occupy in

v.19,no.7—30

the pleading as plaintiffs or defendants; and it is insisted that when so arranged the interests of the attaching creditors and of the plaintiffs in this bill are identical, and that, as some of them are citizens of the same state as the plaintiffs in the suits, upon which judgments by confession were entered, but who are defendants to this bill, consequently this court has no jurisdiction of the case. It is manifest, if this court takes jurisdiction of the suit, all the attachment suits brought by the various parties against Louchheim must necessarily come into this court for adjudication if the purpose of the bill is to be accomplished. The bill is not filed simply to remove the obstacles in the way of the prosecution of the attachment suits and the collection of judgments, which may be obtained therein, caused by the other judgments heretofore mentioned, rendered upon confession, but to take possession and dispose of all the property covered by the various executions and attachments already referred to. It is important, therefore, to ascertain whether this position of the defendants is well taken. The only allegation in the pleadings bearing upon this part of the case, and which is contained in the bill, is "that as to whether the respective sums for which said attachments issued are actually owing by the said Abram J. Louchheim to the above-mentioned firms, or as to whether the same, or any part thereof is now past due, your orators have no information, and make them defendants hereto for the purpose of determining such facts and of ascertaining whether or not they have liens prior to or equal with the lien of the attachment issued in favor of your orator, and for the purpose of determining and settling in this suit their respective rights and interests;" and in the prayer for relief, the bill requests "that the attachment creditors hereinbefore named, and each of them, be required to establish and show what, if anything, is due to them upon their claims against the said Abram J. Louchheim, and the nature and extent of their respective liens, if any they have." It is manifest, therefore, that in order to accomplish the object of the bill it was indispensable that the attachment creditors should be made parties; and the real question is whether, as the record now stands, they are really plaintiffs or defendants. It may be assumed from the allegations of the bill, if the judgments entered by confession are held to be valid, there will be little or nothing left for the attaching creditors, including the plaintiffs to this bill. It is not stated that the bill is filed as well for the benefit of the plaintiffs named therein as of the other attaching creditors, nor is it stated that any application was made to the latter to join these plaintiffs in the prosecution of the present bill; and so far as it now appears, if the plaintiffs shall prove the allegations of their bill and get rid in whole or in part of the judgments entered by confession, the result would operate for the benefit of the attaching creditors as well as of the plaintiffs to the bill, unless some special equity should be obtained by the plaintiffs, from the fact that they alone of the creditors have proceeded in chan-

cery for the purpose of removing the claims made under the judgments rendered by confession. It will be observed that the bill does not really make any controversy between these plaintiffs and the attaching creditors. It does not deny that the debts on which the attachments were issued were *bona fide* and properly enforceable at law. The bill simply alleges that the plaintiffs had no information as to whether the debts are owing or past due, and states that they are made parties for the purpose of ascertaining these facts; neither does it allege any priority of lien on the part of the plaintiffs over the attaching creditors, but says one of the objects of making them parties is to ascertain whether their liens are prior or equal to that of the plaintiffs. I think the case would have appeared much stronger in favor of the jurisdiction of this court if it had been stated that application had been made to these attaching creditors and they had declined to take part in these equitable proceedings instituted by the plaintiffs. It may be that they will insist, as for aught that I can see they may have the right to do, that they shall be made parties with the plaintiffs in the prosecution of this bill in equity, sharing with them in the labor and expense of the litigation. They would then be co-plaintiffs, and some of them would be citizens of Illinois, and therefore, citizens of the same state as some of the defendants.

As has been already stated, the allegations of the bill seem to require the settlement of any controversies which may exist between the attaching creditors and Louchheim. It desires the court to determine the amount of the debts, whether due, and the nature of the lien against the property. The substantial result of this is to decide all controversies between the attaching creditors and the principal debtor. There are here, therefore, nine suits at law between plaintiffs, all of whom, except the plaintiffs in this bill, are citizens of Illinois, against a defendant who is also a citizen of Illinois. The plaintiffs in this bill allege that they do not know what are the facts as to these claims; but the parties to those attachment suits do know, and have the right to insist, that they should be ascertained, if controverted, by a jury, because they are suits at law; and can the plaintiffs in this case deprive them of that right by filing this bill? As the case now stands, therefore, I cannot say that it clearly appears that the right of removal exists, but as the litigation has only just commenced, and this cause is not ready for trial, it may be that before the plaintiffs shall have lost the right to remove the case its *status* may change so as to present the question in a different phase.

On the record *now* there seems to be no substantial controversy between the plaintiffs and the attaching creditors, and for aught that appears the latter may have been made parties simply for the purpose of giving jurisdiction to this court, as it seems clear that if the plaintiffs shall obtain a decree upon their bill it will inure as well to the benefit of the attaching creditors as to the plaintiffs.

It should be stated that the frame of the bill and the question of

removal are to be applied to the first clause of the second section of the act of 1875, and not to the second clause, where there is a controversy existing between some of the parties, citizens of different states, which can be fully determined, as between them, irrespective of other parties and other controversies in the case.

FLAGLER ENGRAVING MACHINE Co. v. FLAGLER and others. (Two Cases.)

(Circuit Court, D. Massachusetts. February 21, 1884.)

1. JOINT STOCK COMPANY—FRAUD OF DIRECTORS—BY WHOM SUIT TO BE BROUGHT.
Where the organizers of a joint stock company put in as a part of the capital stock certain patent rights, and by fraudulent puffing induced others to purchase the stock at factitious rates, *held*, that whether the purchasers could set aside the sales or not, they were not entitled to gain control of the company and pursue their remedy against the fraudulent directors in the corporate name.
2. MASTER'S FINDING AFFIRMED.

In Equity.

Ball, Storey & Tower, for complainant.

N. B. Bryant and J. M. Baker, for defendants.

LOWELL, J. These suits in equity come up upon the report of Mr. Merwin, as special master. Both are brought by the Flagler Engraving Machine Company, a corporation established under the laws of Connecticut, but having its business in Boston, against the same defendants. In the second, and more important, case, the company complain that the defendants, Flagler, Bartlett, and Chaffee, in January, 1880, conspired together to form, and did form, the plaintiff corporation, with a capital of \$300,000, divided into 3,000 shares of the par value of \$100 each, and put into the company as its capital stock certain rights and interests under letters patent of the United States, numbered 174,715, and 191,821, of inconsiderable value, very much less than \$300,000; that of the 3,000 shares, Flagler received 1,425, and each of the other defendants 663; that the defendants were duly elected directors of the company, and that Flagler was elected president, Bartlett secretary, and Chaffee treasurer; that afterwards the defendants voted to authorize Flagler, as president, to convey to A. S. Sullivan, of New York, as trustee for a corporation called the New York & London Metal, Wood & Stone Working Company, all the patent rights and interests of the complainants, and that they were conveyed accordingly, so that the complainants cannot tender the respondents a reconveyance of those rights and interests; that the complainants are not bound by the fraudulent acts of the defendants, and are unwilling to accept the patent rights in payment for the shares of capital stock issued to the

defendants, and demand the par value of the shares in money, less the value, if any, of the patent rights.

The case has been argued upon several issues besides that raised by the bill, which is that the defendants are bound to pay the par value of their shares in money. The facts, as found by the master, are that Flagler owned an exclusive license for the United States to use the inventions of one Atchison, described in the patents referred to, for working on metals. He likewise owned foreign patents for the same inventions in Great Britain, Canada, France, Germany, Italy, and Belgium, and the right to obtain patents in all other foreign countries. One Benyon, of Boston, and a corporation in Chicago, owned, respectively, the exclusive rights for the United States to use the invention in working wood and stone. The value of the right for wood working is estimated, by the person best informed upon the subject, at about \$20,000; the right to work upon metals and upon stone are of some value, but the master cannot estimate the former, and the evidence gives none of the latter; but they are, probably, together, of less value than \$20,000. In January, 1880, Flagler gave the other defendants to understand that the machine would do much more important and complicated work than it could really perform. He showed them a watch which he said was engraved by the machine, but which was, in truth, made by hand. The machine would only do frost work, or "matting," which was, comparatively speaking, of little value to the trade. One firm had paid a royalty of about \$275 a year to the inventor, Atchison, for three years, for the use of one machine, but the fashion had changed, and they had not renewed their contract after 1878. The master finds that the defendants Bartlett and Chaffee were deceived by Flagler, and honestly believed that the patent right might be made to earn a fair income on \$300,000. The three defendants organized a corporation under the laws of Connecticut, and put the patent rights in as the capital. They gave 250 shares to the company itself, as "treasury stock," and kept the remainder, as alleged in the bill. The master finds that the law of Connecticut, at that time, permitted property to be used as the capital of a corporation. The defendants, acting for the company, employed a broker to sell the treasury stock, and published advertisements in which the value of the patent was set forth in the most glowing terms; and some positively false and fraudulent statements were made in these advertisements, with the assent of all the defendants. By these means a great demand for the shares was created, and they were all sold in a few days. It is plain, I think, and I do not understand it to be questioned, that every person concerned understood that the patent was the capital, and that the nominal value of \$300,000 was merely arbitrary. Indeed, the advertisements represent it as much too small a valuation. No one says that he understood \$300,000 had been paid for the property. The sales were made upon the representations of what the machine would accomplish, and of

the demand for machines by jewelers and others; and the prices at which the shares were taken varied from \$100 to \$300, and even more, in which the nominal capital of the company was simply the point of departure. The money received for these 250 shares was put into the treasury of the company. The defendants, as directors of the company, passed a vote in February, while the sales of treasury stock were going on, to sell 300 shares more, and pay the proceeds to Flagler for his rights in foreign countries. About 195 shares were sold, and from this source the defendants received the only money which came to them at any time. These shares were contributed by the defendants, and the proceeds were divided among them in proportion to their several holdings of shares. The money passed through the hands of the treasurer of the company. The defendants gave the shares to the company and took back the proceeds at the same time, but left with the company, or subject to its order, the patents and patent rights for foreign countries. The occasion for passing a vote to authorize the sales of shares appears to have been that there was some agreement not to sell shares without the consent of the company. The defendants then gave the company the foreign interests in exchange for a permission to sell some of their own shares.

From this statement of facts it appears that certain persons were probably induced to buy stock by false and fraudulent representations; and for this wrong I do not doubt that there is a remedy. But I cannot see how the company itself can work out the remedy. There was no contract that the defendants should pay for their shares in money, and no such contract can be set up by estoppel, because no one ever supposed that they had made any such; nor is it true, nor did any one suppose, that they warranted the property to be worth its nominal estimated value. The actual fraud was not in fixing the capital stock at a certain sum, but in puffing the property afterwards; and the persons who suffered were those who were induced to buy shares in the market. The shares were not subscribed for at par, but bought. The purchasers, some or all of them, may have a right to set aside the sales, and to recover their money of the company or the defendants, or both, but they are necessary parties to the suit or suits, and they cannot, by obtaining control of the company, set up an artificial case and recover through the company what is really their own loss, from which the company itself was enriched. This is the view which the master takes of the case, and I concur in it.

In the other suit, the company assuming that it was legally organized and is to continue its corporate existence, asks an account from the defendants, its former officers, of the money paid into the treasury for the 250 shares of "treasury stock." The master finds that this sum was \$32,130. The plaintiffs insist that it was a larger sum; but I cannot find that the master has made a mistake in this respect. When the present managers obtained control of the com-

pany, the money turned over to them was between \$5,000 and \$6,000. The remainder had been paid out. The principal items of payment are connected with the New York company. The defendants, encouraged by their extraordinary success in selling shares in Boston, determined to set up a company in New York, and, in addition to the patent rights which they already owned, to procure a transfer to the New York company of the right to use the patented invention in working wood and stone, which were owned by other persons. The several parties were to take the stock in the New York company in certain proportions. A company was organized under the law of Connecticut, and established in New York, and rooms were fitted up there in which the machine was exhibited in its operation upon wood and stone. Few buyers of stock were found, and the enterprise has not proved successful. The plaintiff company advanced to the New York company the money necessary to fit up the rooms and do the other things supposed to be necessary for the successful launching of the new corporation. The master finds that this is a debt against the New York company, and that the loan was justifiable. This decision I understand to rest upon the assumption, which is necessary in this case, that the plaintiff corporation is not to be dissolved, but has an existence as a company engaged in dealing with certain patent rights. From this point of view, the master considers that the company had reason to expect a return and repayment of the money expended in aid of the New York company. I affirm this finding. I note that all, or nearly all, the shareholders appear to have known of this enterprise, and that no one objected to it.

I disallow, as against the treasurer, Mr. Chaffee, and the defendant Flagler, a sum negligently paid by the former to the latter, for machines already once paid for, \$750. I disallow one-half of the charges for advertising, because a considerable part of the sales were for the benefit of the defendants, as I have shown. I disallow one-half of the \$500 paid to Mandell, because I think so much of it was paid for a certificate of value which was exaggerated, and only the other half for work done. In other respects, the report of the master is confirmed.

HAZARD, Commissioner, v. DURANT and others.

SAME v. SAME.

(Circuit Court, D. Massachusetts. February 15, 1884.)

1. EQUITY PLEADING—RELEVANCY OF AVERMENTS.

A stockholder of the Credit Mobilier brought suit in behalf of himself and others against Thomas C. Durant and others, trustees, to enforce the trust, and set forth in his bill a decree formerly rendered in a different court declaring

certain shares nominally held by Durant to be in fact the property of the stockholders of the Credit Mobilier and appointing the plaintiff in the present case receiver of all moneys due from Durant to the stockholders. *Held*, that the averment of the plaintiff's appointment as receiver was relevant as tending to show the disposition to be made in the final decree of the moneys for which the defendants may be held accountable.

2. **SURVIVAL OF LIABILITY FOR BREACH OF TRUST—JOINDER OF DEEENDANTS.**

The personal representatives of a deceased trustee are liable to the extent of their assets for breaches of trust committed in his life-time; and in case of a joint breach of trust the representatives of a deceased trustee may be joined with the survivors as defendants.

3. **ABSENCE OF PARTIES BEYOND THE JURISDICTION OF THE COURT—WHEN RELIEF WILL BE GRANTED.**

When effectual relief can be given against the parties actually appearing, the courts of the United States will not dismiss a bill because of the absence of other parties whose appearance would be required if they were within the jurisdiction of the court.

4. **SAME—JOINT BREACH OF TRUST.**

Such relief can be given against one of several trustees jointly implicated in a breach of trust, since their liability is several as well as joint.

5. **POWERS OF RECEIVER LIMITED TO THE JURISDICTION WHERE APPOINTED.**

A receiver appointed in one jurisdiction to take charge of a fund cannot sue in another in his own name, though expressly authorized by the decree to maintain actions in his own name.

In Equity.

Elias Merwin, for complainant.

S. Bartlett and R. D. Smith, for defendants.

Before LOWELL and NELSON, JJ.

NELSON, J. These suits, arising out of the same transactions, and between the same parties, may conveniently be considered together. In the first case, the plaintiff brings his bill "as he is commissioner under the decree of the supreme court of Rhode Island, in a suit in equity pending in said court, wherein the said Rowland Hazard and others are complainants and Thomas C. Durant and others are defendants," and "in behalf of himself and all others who were stockholders in the Credit Mobilier of America, on the fifteenth day of July, 1867."

The allegations of the bill, filed December 7, 1882, are in substance as follows: On the sixteenth of August, 1867, a contract was made between the Union Pacific Railroad Company and Oakes Ames, whereby Ames undertook to build and equip certain portions of the railroad and telegraph lines of the company, in which agreement were set forth the terms upon which the building and equipment were to be undertaken, the extent and character of the work to be done, and the times and amounts of payment to be made by the company for its performance. On the fifteenth of October, 1867, an agreement in writing was made between Oakes Ames, party of the first part, Thomas C. Durant and six other persons, named as trustees, parties of the second part, and the Credit Mobilier of America, party of the third part, by which the construction contract between Ames and the Union Pacific Railroad Company was assigned to the trustees, parties of the second part, upon the trusts and conditions that the trustees should

perform all the terms and conditions of the construction contract which were to have been performed by Ames, and that the avails and proceeds of the contract, after certain deductions for expenses, should be held by the trustees for the use and benefit of the several persons owning and holding shares in the capital stock of the Credit Mobilier of America, and for the use and benefit of the assignees of such holders who might comply with the provisions of the agreement. On the third of July, 1868, the first agreement was so far changed and modified by a new agreement executed by all the parties, that the trusts in favor of the stockholders and the assignees of stockholders were transferred to and vested in the persons specified in the instrument, who constituted all the stockholders of the Credit Mobilier. The plaintiff, at the date of the trust agreement, was and has since continued to be, a stockholder in the Credit Mobilier, and has complied with all the provisions of the agreement. The bill also sets forth the proceedings and decree in the Rhode Island suit, as is more fully stated later on. The bill alleges that in the execution of the trusts thus created, money and securities to a large amount came into the hands of the original trustees, or their successors, a portion of which has been divided among the stockholders, but the residue, alleged to amount to many millions of dollars, the trustees have failed and refused to account for and distribute; and, also, that the trustees have been guilty of willful negligence and misconduct in the management of the trusts. The prayer of the bill is for an account and for other relief.

In the second suit, the plaintiff proceeds alone in his capacity as commissioner appointed in the Rhode Island suit. The bill sets forth the construction contract between Oakes Ames and the Pacific Railroad Company, the agreement by which it was assigned to the trustees for the benefit of the Credit Mobilier stockholders, the later modifying agreement, the acceptance of the trusts by the trustees, the receipt by them of money and securities to a large amount for which they are accountable under the trust agreement, and their refusal to account. The bill further states that in August, 1868, Isaac P. Hazard and others, as stockholders in the Credit Mobilier and beneficiaries under the trust agreement, brought a suit in equity against the trustees and others in the supreme court of the state of Rhode Island; that process was issued and served upon Durant, Oliver Ames, John Duff, and some of the other defendants, who were found within the jurisdiction, and that they appeared in the suit; and, upon the decease of Ames and Duff, their executors were made parties, and duly cited to appear; that on the twenty-second of the same month an injunction was issued in the suit enjoining Durant from receiving or disposing of any dividends then declared or which should be thereafter declared, on 5,658 shares of the capital stock of the Credit Mobilier standing in his name; and that on the same day the injunction was served on Durant, Ames, and Duff, and the other

trustees; that the trustees, in violation of the injunction and conspiring with Durant to deprive the stockholders of the benefit of the injunction and of the dividends and profits on the shares, in January, 1869, and again in February, 1870, transferred and delivered to Durant certain shares and income bonds of the Union Pacific Railroad Company, being dividends on the 5,658 shares of Credit Mobilier stock; that by the final decree entered in the cause December 2, 1882, against Durant alone, it was adjudged and decreed, in accordance with the allegations of the bill, that the 5,658 shares standing in the name of Durant, as nominal owner, in fact belonged to the stockholders of the Credit Mobilier, and should inure to their benefit; and that Durant should, within 30 days from that date, transfer and deliver the shares and all dividends received by him thereon to the plaintiff and one Henry Martin, or either of them, as special commissioners, for the benefit of the Credit Mobilier stockholders; and that the commissioners should jointly and severally have power to take measures forthwith, by suit in their own name or otherwise, to enforce the transfer and delivery of the shares and dividends; and that Durant was accountable for and should pay for the benefit of the complainants in the suit, and the other beneficiaries under the trust agreement, the sum of \$16,071,659.97, within 90 days from the date of the decree. The bill further averred that Durant had disposed of the dividends and was insolvent. The prayer of the bill was for an account of all the profits received by the trustees under the trust agreement, and of the dividends paid over to Durant, and for such orders and decrees as should be necessary to carry into effect the Rhode Island decree. The defendants in each case are three of the original trustees, the executors of others who have deceased, three persons substituted in the place of deceased trustees, and the Credit Mobilier of America, alleged to be a corporation created under the laws of the state of Pennsylvania. In each case the plaintiff prays for process against those of the defendants who are citizens of this state, and that those residing out of the state may be cited to appear. Those residing out of the state were not served with process, and did not appear. The executors of Oliver Ames, an original trustee, who died in 1877, the executors of John Duff, who died in 1881, appointed in March, 1868, in place of an original trustee, Frederick L. Ames and F. Gordon Dexter, appointed in place of deceased trustees, the only defendants who were citizens of Massachusetts, appeared and filed demurrers, upon which the cases were heard.

An objection is taken in the first suit that the plaintiff's bill is brought in two capacities—one as commissioner under the Rhode Island decree, and the other in his individual capacity in behalf of himself and the other stockholders. But we think the bill is susceptible of a different construction. That the plaintiff can sue as a stockholder in behalf of all cannot admit of question. By the decree in

the Rhode Island suit, which upon its face seems to be valid as between Durant and the other stockholders, it has been finally determined that the 5,658 shares standing in Durant's name as nominal owner, and all dividends accruing thereon, in fact belong to the other stockholders. It was therefore proper that this should be made to appear to the court, so that in the distribution of the avails of this suit the proportion pertaining to the shares should not be paid over to Durant as owner, but should either go to the plaintiff, as commissioner or receiver appointed to receive them by a court of competent jurisdiction, or in some other form, to be settled in the final decree, should inure for the benefit of the stockholders. Considered in this view, the averments of the bill relative to the plaintiff's appointment as commissioner are pertinent and material.

Another objection is that the executors of the deceased trustees are not accountable for breaches of the trust committed by their testators in their life-time. But that the executors are liable in such cases to the extent of the assets in their hands, is clear upon all the authorities. In *Hill, Trust*. 520, the rule is stated to be this:

"The executor or administrator of a deceased trustee is liable to the extent of the assets for a breach of trust committed by the testator or intestate in his life-time; and this liability may be enforced by suit. And when there are several co-trustees, who have been all implicated in a breach of trust, the representatives of those dying first will be liable to the same extent jointly with the surviving trustees, or their representatives if dead."

In *2 Perry, Trusts*, § 877, the rule is thus expressed:

"The representatives of a deceased co-trustee are liable to the extent of assets received by them, for a breach of trust committed in his life-time, and they may all be joined that their relative rights may be ascertained in the suit."

There is nothing in the bill to show that the securities alleged to have come into the hands of the trustees cannot be transferred by the defendants before the court. Whether if this were otherwise it would afford an excuse to the defendants for not accounting for the securities, is not a question which it is necessary now to consider.

Another ground of demurrer in the first suit, assigned *ore tenus* at the argument, is that the suit cannot be maintained, or a decree of the character sought be made against the defendants who have appeared, until all the other existing trustees shall also have appeared and submitted to the jurisdiction. Section 737 of the Revised Statutes—a re-enactment of the first section of the act of February 28, 1839 (5 St. 321)—is as follows:

"When there are several defendants in any suit at law or in equity, and one or more of them are neither inhabitants of nor found within the district in which the suit is brought and do not voluntarily appear, the court may entertain jurisdiction, and proceed to the trial and adjudication of the suit between the parties who are properly before it; but the judgment or decree rendered therein shall not conclude or prejudice other parties not regularly served with process nor voluntarily appearing to answer; and the non-joinder

of parties who are not inhabitants of nor found within the district, as aforesaid, shall not constitute matter of abatement or objection to the suit."

The effect of this statute and of the forty-seventh equity rule, made to regulate the practice of the court under it, has received the construction of the supreme court. The rule now well settled by the decisions is this: When there are parties who cannot be subjected to the jurisdiction of the court, whose interest in the subject-matter of the suit and in the relief sought are so bound up with the other parties that their presence is an absolute necessity, without which the court cannot proceed and make an effectual decree, the suit will not be maintained; but when an effectual decree can be made between the parties actually before the court, it will entertain the suit and proceed to administer such relief as may be in its power, although there may be absent parties, whose presence the court would require, if within its jurisdiction. *Shields v. Barron*, 17 How. 130; *Barney v. Baltimore City*, 6 Wall. 280; *Kendig v. Dean*, 97 U. S. 423; *Goodman v. Niblack*, 102 U. S. 556; Story, Eq. Pl. §§ 78, 79.

Taking the narrative of the bill to be true, as we are bound to do by the demurrer, the trustees, acting jointly, have received many millions of dollars in money and securities, the property of the stockholders, which they still retain, and refuse to account for under the trust agreement; and they have also been jointly guilty of gross negligence and misconduct in the management of the trusts, from which the stockholders have suffered loss. Can the co-trustees relieve themselves from all liability in such a case by simply taking up their residences in different states? We think not. By the familiar rules of the law, the liability of co-trustees, who have joined in a breach of the trust, is several as well as joint. If they are jointly implicated in the breach, they may be properly joined by the *cestui que trust* in a suit to enforce their liability, and he may have a decree against them jointly; but he may take out execution against any one of them separately, as each is liable for the whole amount. If any one of them is compelled to pay the whole, he may have contribution from the others who are implicated with him. Undoubtedly difficulties may arise in adjusting the equities between the co-trustees, where all of them are not before the court, but the inconvenience springs from their own wrongful acts, and should be suffered by them, and not by the *cestui que trust*. *Palmer v. Stevens*, 100 Mass. 461; *Hill, Trust*. 520; 2 Perry, Trusts, § 848.

We therefore hold, upon the case stated in the bill in the first suit, that this court can render an effectual decree against the defendants who have appeared, and has jurisdiction to entertain the suit against them in the absence of the other trustees, who cannot be served with process.

In the second suit, the plaintiff sues alone in his capacity as commissioner. He does not now ask to maintain the bill for any other purpose than to compel the trustees to account for the dividends on

the 5,658 shares paid to Durant after the service of the injunction. His position is that the dividends were charged in the hands of the trustees with a trust in favor of the stockholders, who were the equitable owners of the shares; and, as the trustees paid them to Durant, with notice of the equitable title, and with the purpose of preventing them from coming to the stockholders, they should be held accountable for them to him as the person officially authorized by the Rhode Island court to collect and receive them. Whether, under such circumstances, a suit for the dividends by the stockholders could be sustained against the trustees, it is not necessary to inquire. The plaintiff has no interest in them derived by assignment from the stockholders, and no transfer of the shares has ever been made to him by Durant. His claim rests solely upon his appointment as commissioner. Although called a commissioner in the decree, it is evident that his powers and duties are solely those of a receiver, and he must be treated in that capacity alone.

It was decided in the case of *Booth v. Clark*, 17 How. 322, a decision binding in this court, that a receiver appointed by a court of chancery, being a mere officer and servant of the court appointing him, and having no title to the fund by assignment or conveyance, or other lien or interest than that derived from his appointment, cannot, in his own name, maintain a suit in another jurisdiction to recover the fund, even when expressly authorized by the decree appointing him to bring suits in his own name. This of itself is a fatal objection to the second suit, and makes it unnecessary for us to consider the other objections which have been made to the bill.

In the first suit the demurrers are overruled, and in the second the demurrers are sustained.

DAVIS v. DUNCAN, Receiver, and another.¹

(Circuit Court, S. D. Mississippi. 1884.)

1. RECEIVER—LIABILITY FOR TORTS OF EMPLOYEES.

A receiver is not personally liable for the torts of his employees; it is only when he commits the wrong himself that he is personally liable.

2. SAME—ACTION—PROCEEDING *IN REM*.

Proceedings against a receiver for the torts of his employees, is in the nature of a proceeding *in rem*, and renders the property held by him as receiver liable in compensation for such injuries.

3. SAME—RAILROAD COMPANY.

A railroad company is not liable for injuries inflicted by a receiver or his servants while its property was in the possession of a receiver, and when it was out of the possession of the property and had no control over it.

4. SAME—DISCHARGE OF RECEIVER—DISPOSITION OF FUNDS.

After entering an order discharging a receiver, and directing him to turn over the property in his hands to the defendant corporation, and which or-

¹Reported by B. B. Boone, Esq., of the Mobile, Alabama, bar.

der was complied with by the receiver, the court cannot, after the adjournment of the term at which the order was made and entered of record, in any way alter, change, modify, or expand the decree discharging the receiver, and again obtain jurisdiction over the property and funds which it had by its decree ordered the receiver to turn over to the corporation.

5. SAME—PRESIDENT OF CORPORATION ACTING AS RECEIVER.

The fact that the receiver was also the president of the corporation can make no difference. It is the corporation that holds the property and not the president; he is only the official agent of the corporation.

6. SAME—CLAIMS FOR PERSONAL INJURIES—PAYMENT.

If the decree discharging the receiver, and under which the property was turned over to the railway company, had provided that it should be subject to the satisfaction of all claims, whether for personal injuries committed by the employees of the receiver or for other claims, arising while the property was under his control, and whether the receiver was discharged or not, the court, as a court of equity, would provide for a proper adjustment and payment of such claims, as such a provision would have been a retention of jurisdiction of the cause to that extent.

7. SAME—DEFENSE OF RECEIVER—HOW PLEADED.

Although permission has been granted by a court to sue its receiver, the right of the receiver to set up any defense he may have is reserved; and this can be done by plea, answer, or demurrer.

Demurrer to Bill.

L. T. Bradshaw and L. Brame, for complainant.

E. L. Russell, B. B. Boone, and Frank Johnson, for defendants.

HILL, J. The question for decision in this cause arises upon defendants' demurrer to complainant's bill. The bill in substance states and charges that defendant Duncan, in a suit in equity pending in this court, was duly appointed a receiver of the Mobile and Ohio railroad, and the property belonging to said company; that, acting as such, he was, on the nineteenth day of January, 1883, engaged by his agents, servants, and employes as a common carrier of passengers for hire over said road; that complainant was a passenger on one of the trains, having paid his fare to the town of West Point, on said road; that the night was dark when the train arrived at that place, and there were no lights to enable passengers to see in getting off the train; that while attempting to get off the train, without any signal, the train made a sudden start, which caused a jerk, by which he was suddenly thrown against the platform, and his thigh bone was broken, and other injuries were inflicted upon his person, and from which he has suffered much pain of body and mind, and has been at great expense in being cured of these injuries, some of which he fears may attend him through life; and that in consequence of these injuries he has been unable to attend to his business affairs, and has thereby been ruined in fortune, and has suffered damage to the sum of \$15,000 by reason of the negligent and wrongful acts of the conductor, engineer, and employes of said Duncan, and for which he claims damages in the said sum of \$15,000. The bill further charges that on the tenth day of February, 1883, in the matter of said receivership, a decree was made and entered in this court, approving and confirming all the accounts and dealings of said Duncan, and accepting his resignation and discharging him as receiver, upon condition

that he should produce and file, in this court, the acquittance and receipt of said Mobile & Ohio Railroad Company in full settlement, as set forth in said decree, but that he has not done so, as complainant is informed and believes, and charges that said resignation has not been accepted and said receiver discharged. That said Duncan, in applying for his discharge, led the court to believe that all matters, except pending suits, by and against him as receiver, had been settled, and that therefore it was unnecessary to continue said receivership except for the purposes of pending suits or actions, and that said Duncan must be held chargeable with knowledge of his, complainant's said injuries, and his right to compensation out of the property and assets in his hands as such receiver, and that he did not bring notice of the same to the court when said order of discharge was made, and that complainant had no notice of the proposed surrender of said receivership, and never did have notice of said proceedings until shortly before the filing of this bill, on the twenty-eighth of December, 1883, and insists that he ought not to be affected by the same. The bill further alleges that said Duncan was the president of said Mobile & Ohio Railroad Company, and one of its directors, at the time of the injuries, and at the time of the surrender of said railroad and its property, and still is; that a large portion of the railroad and property so surrendered is in the state of Mississippi, and in the possession of said Duncan; and that the rights of no third parties have intervened.

These are all the charges in the bill that need be stated to an understanding of the questions presented by the demurrer. It is agreed that in considering the demurrer the decree discharging the receiver, as entered, may be considered by the court, as if set forth in the bill. The proceedings in this court were in aid of and ancillary to the proceeding in the circuit court of the United States for the Southern district of Alabama, where the main suit was instituted and terminated; consequently, this court adopted as its decree the decrees of that court, so far as they related to settling the rights of the parties to the suit and the discharge of the receiver, settling only by its own independent decrees the rights and liabilities growing out of the receivership between the receiver and third parties within the jurisdiction of this court. The decree of the said circuit court for the Southern district of Alabama was made on the twenty-fourth day of January, 1883, and recited that said Duncan, as receiver, had fully accounted with the court for all his acts as such receiver, and was ready to surrender all the property in his hands as such, and which the railroad company was ready and willing to receive. Whereupon the court "ordered, adjudged, and decreed that said William Butler Duncan do, with all convenient speed, deliver all the property in his possession as receiver, under the former order of this court, in the states of Alabama, Mississippi, Tennessee, and Kentucky to the said Mobile & Ohio Railroad Company, to be by said corporation managed and op-

erated as authorized by its charter, and upon the filing in this court by said Duncan of the acquittance and receipt of said railroad company, as directed by the former order of this court, the resignation of said receivership by said Duncan is hereby accepted, and he and his sureties forever discharged from all liability as said receiver, except that all pending actions and suits by or against said receiver shall be carried on and prosecuted to conclusion the same as if the said Duncan continued the receiver of this court in this cause." This decree was received and adopted and entered by this court as ancillary to and in aid of the proceedings in said cause in that court on the tenth day of February, 1883.

The bill admits that the property in the hands of the receiver has been turned over to the railroad company, and that the acquittance and receipt was filed in that court before the filing of the bill in this cause, but that the acquittance and receipt has not been filed in this court. It is not denied that the bill sets forth a *prima facie* claim for damages, unless the right to recover the same has been lost by the surrender of the trust property and assets by the receiver, and his discharge before the commencement of these proceedings. The turning over of the property and filing the acquittance and receipt, in the court at Mobile, was under the decree of that court a complete discharge of the receiver, except as to pending suits by and against Duncan as receiver. This court only entertained jurisdiction of the case in aid of and ancillary to the proceedings in Mobile, and only for the purpose of settling controversies between the receiver and third parties, growing out of the receivership. The filing of the acquittance and receipt of the railroad company in this court was unnecessary and unimportant, and the want of which did not, in my opinion, continue the liability of the receiver or render the property and assets turned over by him liable for any of the acts or wrongs committed by him, or his agents or employees.

As to all pending suits, in whatever form, by or against Duncan as receiver, in either the circuit court of the United States, in Alabama, or in this court, the receivership and the right to prosecute such suits to a conclusion was reserved, and any decree or judgment against the receiver became a charge against the property and assets so turned over, in the same manner that it would have been had the order of discharge never been made in either court. In other words, the railroad company took the property *cum onere* as to these claims. A receiver, as such upon principle and authority, is not personally liable for the torts of his employees. Were he so liable, few men would take the responsibility of such a trust; it is only when he himself commits the wrong that he is held personally liable. The proceedings against him as receiver, for the wrongs of his employees, is in the nature of a proceeding *in rem*, and renders the property in his hands, as such, liable for compensation for such injuries. *Meera's Adm'r v. Holbrook*, 20 Ohio St. 137; *Klein v. Jewett*, 11 C. E. Green, 474; *Jordan v. Wells*, 3

Woods, 527; *Kennedy v. Indianapolis & C. R. Co.* 11 Cent. Law J. 89. The railroad company is not liable for the injuries complained of in the bill, for the reason that they were committed while it was out of possession of the property, and had no control over it. This conclusion is sustained by principle and authority. *Ohio, etc., R. Co. v. Davis*, 23 Ind. 560; *Bell v. Indianapolis, etc., R. Co.* '53 Ind. 57; *Metz v. Buffalo, etc., R. Co.* 58 N. Y. 61; *Rogers v. Mobile & O. R. Co.* 17 Cent. Law J. 290; *Meara's Adm'r v. Holbrook, supra.* There is no allegation in the bill that Duncan had any agency in bringing about the injuries complained of, or knew anything in relation thereto when either the decree of the court at Mobile, or of this court, discharging him as receiver, was made, and it is to be presumed that he did not have personal knowledge of the occurrence, or that any claim was intended to be made for damages therefor. I take it for granted that it was supposed there were no claims for damages against the receiver, or, rather, against the property or funds in his hands, which had not been put in suit, or a reservation would have been made holding the funds and property liable, as was done in favor of those in suit. I am satisfied that such was the case, or cases like the present one would have been provided for by the decree of this court in discharging the receiver, as was done in the case of *Mississippi Cent. R. Co.*

It is very much to be regretted that this provision was not made, as it may work a serious wrong to the complainant; but the question is, can this court, after the adjournment of the term at which the order was made, in any way alter, change, modify, suspend, or expand the decree discharging the receiver, and again obtain jurisdiction of the property and funds which it had by its decree ordered the receiver to turn over to the corporation, and which it is admitted was done. I am not aware of any rule by which this can be done. I do not believe that the fact that Duncan is the president of the corporation can make any difference. It is the corporation that holds the property, and not Duncan; he is only the official agent of the company. The corporation took the property free from any liens or claims growing out of the receivership, except those reserved and provided for by the decree under which the surrender was made to the company, and under which it is now held. Had the decree under which the property was turned over provided that it should be subject to the satisfaction of all claims, whether for personal injuries or otherwise, committed by the employes of the receiver while the property was under his control, whether the receiver was discharged or not, this court, as a court of equity, would provide for a proper adjustment and payment of such claims, as such a provision would have been a retention of jurisdiction to that extent.

The only authority referred to by complainant's counsel in support of the proposition that the discharge of the receiver does not operate as a discharge of the property held by him for torts committed before the discharge, is the case of *Miller v. Loeb*, 64 Barb. 454, re-
v.19,no.7—31

ferred to by High, Rec. §§ 268, 848. When that case is examined it will be found not to apply to the case at bar. The rule stated in that case is that the discharge of a receiver by order of the court is no bar to an action against him by third persons claiming property of which he has taken possession; when it is alleged that the receiver has sold such property after notice of the owner's claim thereto, the court will permit the owner to bring an action against the receiver, notwithstanding he has been discharged, especially where the claimant had no notice of the receiver's application for discharge. This was a case in which the receiver had possession of the property of another, and, with knowledge of his claim, sold the property.

In the present case the property in the hands of the receiver, and which he turned over to the company in obedience to the order of the court, never was the property of the complainant, and could only be reached by the establishment of the claim for damages in such way as the court might direct, and obtaining the order of the court that the same should be paid by the receiver out of the trust property in his hands. This was not done, and the property is now beyond the jurisdiction of this court.

It is insisted by complainant's counsel that a receiver occupies the position of an executor of an estate, and that the courts have holden that the discharge of an executor does not relieve him from liability from suit when the discharge is granted. In that case the judgment is against the executor in his fiduciary capacity, but must be satisfied out of any of the funds belonging to the estate in his hands, if any he has; if not, may be satisfied out of such property or means as may have passed into the possession of the devisee or legatee, and upon which the creditor had a lien created by law for the payment of his demand, the devisee or legatee having taken the property *cum onere*. In the case at bar this relation and liability does not exist as above stated. The only authority to which I have been referred or have been able to find analogous to the present case is the case of *Farmers' Loan & Trust Co. v. Central R. R. of Iowa*, 7 FED. REP. 537; in which Judge LOVE, in the circuit court of the United States for Iowa, in a very learned and exhaustive opinion, holds that no action can be maintained against the receiver of a railroad after such officer has been discharged and the property transferred to a purchaser under an order of the court in a foreclosure proceeding; and such purchaser takes the property subject to all claims against the receiver, when the court has reserved the jurisdiction upon final decree to enforce, as a lien upon the property, all liabilities incurred by such receiver. This opinion was concurred in by Judge MCCABY, the circuit judge. This ruling does not conflict with the positions stated.

It is contended by complainants' counsel that to deny the relief prayed for is to acknowledge a right and deny a remedy, which it is insisted is contrary to legal rules. Rights are often defeated for the want of applying the proper remedy within the proper time, and under

which hardships are sometimes suffered; but complainant may not be altogether remediless. The employe or employes who caused the injuries, if the receiver or the property on're in his hands was liable, are also liable, as having been the direct and wrongful cause of the injuries. The fruits of a suit against them, it is true, may be very uncertain.

It is insisted by complainant's counsel that the court, or one of its judges, having given leave to file the bill against the receiver, should not now dismiss it, but will permit the cause to proceed to final decree, as though the receivership remained. In all such cases the leave to bring suit in any form reserves the right to the receiver to set up any defense he may have, which can be done by plea, answer, or demurrer. *Jordan v. Wells, supra.*

After a careful consideration of all the questions involved, I am unable to come to any other conclusion than the one that the bill does not present a case authorizing the court to grant the relief prayed for in the bill. While at the same time I regret that the final decree did not provide for this and all other claims against the receiver, or the property and funds which were in his hands, and to which it would have been liable had proceedings been pending when the final decree was entered.

The result is that the demurrer must be sustained and the bill dismissed.

DESMOND v. CITY OF JEFFERSON.

(Circuit Court, W. D. Texas. January 18, 1883.)

1. MUNICIPAL CORPORATION—AUTHORITY TO ISSUE BONDS.

Authority conferred upon a municipal corporation to purchase property for its uses implies the power to issue negotiable bonds for that purpose.

2. SAME—POWERS CONFERRED BY CHARTER.

The charter of a city empowers it to organize a fire department and regulate the same, and to adopt such other measures as should "conduce to the interest and welfare of said city." *Held*, that the city was authorized to purchase a fire engine, and to issue its negotiable bonds therefor.

3. SAME—MUNICIPAL BONDS—VALIDITY PRESUMED.

Municipal bonds which recite the ordinance under which they were issued will be presumed to be valid without the production in evidence of the ordinance itself.

At Law.

Thomas P. Young, for plaintiff.

Chas. A. Culberson and *H. McKay*, for defendant.

TURNER, J. This suit was filed in this court January 18, 1883. The plaintiff seeks to recover upon quite a number of bonds, with coupons attached, issued by the proper authority, viz., the mayor,

and attested by the recorder, and dated the third day of September, 1870. Of these bonds there were 54 for the sum of \$100, and one for the sum of \$50. These bonds were substantially as follows:

"STATE OF TEXAS, CITY OF JEFFERSON.

"No. —.

Fire Engine Bonds.

\$100

"Authorized by an ordinance of the city of Jefferson. On the first day of July, 1880, the city of Jefferson, Marion county, Texas, will pay to the bearer of this bond one hundred dollars, with interest from date at the rate of ten per cent. per annum, payable annually at the office of the treasurer of the city of Jefferson. This debt is authorized by an ordinance of the city of Jefferson, passed on the eighteenth day of April, 1870, and entitled an ordinance to provide for the issuance of bonds for the purchase of a *steam fire engine*.

"In witness whereof, the mayor of the city of Jefferson, in pursuance of said ordinance, hath hereunto set his hand and affixed the seal of the city of Jefferson this, the (3d) third day of September, 1870.

[Signed]

"A. G. MALLOY,

"Mayor of the City of Jefferson.

"Attest: J. C. LANE, Recorder."

To each of these bonds coupons were attached for the interest, as the same accrued by the terms of the bond, and they were as follows:

"The city of Jefferson will pay to the bearer ten dollars for 12 months' interest, due June, 1880, on bond No. (say) 54, for \$100.

[Signed]

"A. G. MALLOY, Mayor."

Process issued and was served upon John Penman, the officer stating in his return that said Penman was the acting mayor of the city of Jefferson, Texas,—service made January 18, 1883. On the fourteenth day of February, 1883, this court then being in session, the said Penman filed a motion under oath to quash the service on the ground that he was not the mayor. The motion to quash was signed by counsel, and stated that the defendant appeared for the purpose of the motion only. On the same day, however, counsel for the defense filed in court special exceptions to the petition, and also filed answer to the merits. These pleadings, by way of caption, state that in case the motion to quash is not sustained, then they rely upon the exceptions and answer to the merits. At that term of the court the entry upon the minutes shows that the cause was continued by consent of the parties, and no action had upon the motion to quash until the present time. I am of opinion that if this motion could ever have been available it is too late at this time to press that question. I find answer to the merits filed—action taken with the concurrence of the defendant's counsel, who are attorneys of this court. The motion to quash, therefore, is denied, as I find here in the case an appearance which binds defendant, whether properly served or not.

It is admitted that these bonds were used in the purchase of a fire engine for the city, and that if the city had authority to issue these

bonds and coupons, that, upon the merits of the case, the plaintiff has a right to recover, and that there are no equities existing against the bonds and coupons. It is, however, contended that the plaintiff has not made out his case because he has not produced in evidence the ordinance referred to in the bonds themselves. These bonds recite upon their face that they were issued in pursuance of an ordinance passed by the city of Jefferson, dated April 18, 1870, entitled "An ordinance to provide for the issuance of bonds for the purchase of a *steam fire engine*." It is believed to be well settled that, if the power to issue these bonds existed in the corporation, the holder will be protected, and when, as in this case, the authority appears on the face of the instrument, the courts will presume that the authority was rightfully exercised.

This brings me to the consideration of the main question, viz., whether the authority in fact did exist in the corporation to issue these bonds, with the interest coupons attached, which are in the nature of commercial paper. It may be remarked that in this case none of the evils which flow from the exercise of this power are present, as the bonds were disposed of for the very purpose mentioned in the bonds themselves. The engine was procured for and used by one of the organized fire companies of the city. Did the power to issue these bonds exist? The charter of the city of Jefferson was passed September 11, 1866. It confers upon the city the usual powers, such as contracting and being contracted with. * * * It gives power "to organize a fire department, and to regulate the same, and to pass such other laws as may be deemed necessary for the prevention and extinguishment of fires," etc. If there were no other grant of power, it would seem to me that it must be held from this that the right to purchase the engine was clearly granted, if not by specific grant, by necessary implication. The department could not be rendered effective without it. But this is not all the power vested in the city by its charter. After enumerating the above and numerous other powers, it provides it may "do such other acts and pass such other ordinances, not inconsistent with the constitution and laws of this state or of the United States, as may conduce to the interest and welfare of said city." This is a very large and, in the light of experience with reference to other municipal corporations, we might say, a dangerous grant of power. Can any one doubt that under this authority the city of Jefferson had the right to issue these bonds? She was made the sole judge as to what would conduce to the interest and welfare of the city, and the exercise of this power was in direct furtherance of the specific grant in the charter to "organize a fire department, and to regulate the same, and to pass such other laws as may be deemed necessary for the prevention and extinguishment of fires." To my mind this power was ample.

There is no case to be found where, if the power is given by specific grant or by necessary implication, the courts have held that this

character of paper is not obligatory upon the municipality. Counsel in this case are forced to admit that the right to purchase this engine was given it, if not by specific grant, by necessary implication, it being a necessary and legitimate thing with which to carry out the object of the charter. But they say, while that is true, no right existed to issue commercial paper, and that to that extent the act was *ultra vires*. As I understand the authorities they are not sustained in this view of the law. We must bear in mind that these bonds were not issued for the purpose of borrowing money, but for the purpose of purchasing a steam fire engine, and were so used in fact. Mr. Dillon, however, says (see 1 Dill. Mun. Corp. 199, 200) few adjudications favor the idea that it makes any difference whether for the one purpose or the other. That corporations may exercise the following powers cannot be disputed: (1) Those granted by express words; (2) those necessarily or fairly implied in or incident to the powers expressly granted; and (3) those essential to the declared objects and purposes of the corporation. See 1 Dill. Mun. Corp. 173.

I am referred by counsel to the case of *Police Jury v. Britton*, 15 Wall. 566. In that case the bonds were declared to have been issued without authority. The police jury did not have any right to issue them; among other reasons, that the right to issue bonds at all was coupled with conditions not complied with; and again, that the police jury were authorized to issue bonds to the extent of \$200,000, which power had been exhausted before those bonds were issued. And by an examination of that case it will be seen (see page 572) that it is conceded it is not necessary in *all* cases that express authority to issue such security is necessary, and concedes that the power to purchase property for a market-house confers the right to issue bonds of this character. This is upon the well-settled doctrine that where these securities are issued to purchase property for the use of the corporation, the same being necessary to carry out the object and purpose of the act of incorporation, they are valid and binding, and may properly be issued as in this instance, viz., with the qualities of commercial paper. It will be seen, therefore, from a careful examination of that case that the doctrine therein announced, when applied to the facts in this case, sustains the views of plaintiff in this case.

I am next referred to the case of *Chisholm v. City of Montgomery*, 2 Woods, 592. In this case the bonds were issued by the city to aid in the construction of plank-roads—works of internal improvement. The judge held (1) that there was no authority found in the charter for the issuance of these bonds; and I will add that the building of plank-roads was foreign to the purposes for which the charter was granted. The learned judge held them void, and there can be no doubt of the correctness of the determination. But it is said that the case of *The Mayor v. Ray*, 19 Wall. 468, is authority against the validity of these bonds. Let us see. In that case Mr. Justice BRADLEY delivered the opinion of the court. The case was reversed because

the court below refused to let the mayor show that the holder purchased after maturity, and that the bonds were tainted with fraud. It is true in delivering this opinion Mr. Justice BRADLEY declares that without *express authority* a municipal corporation cannot lawfully exercise the right to issue this class of paper. On examination of the case, however, it will be seen that upon the question involved here, in part, and as to the reasoning of Judge BRADLEY upon the question, Justices HUNT, CLIFFORD, SWAYNE, and STRONG took occasion to dissent, declaring that the doctrine announced by Mr. Justice BRADLEY as to the point in question is not the law as settled by repeated decisions of that court.

One other point is made, and that is that as the act of incorporation provided that bonds for certain purposes might issue, viz., for building jails, erecting wharfs, building free bridge, aiding the improvement of the navigation between the city of Jefferson and Shreveport, Louisiana, or in the construction of railroads to or from Jefferson, as matter of law, for all other expenditures, certificates of indebtedness, not in the shape of commercial paper, could alone issue.

Section 10 of the act of incorporation confers the general powers, and confers all the powers, as I think, to purchase the engine, and to make the ordinance under which it was purchased, and which authorized the issuance and makes binding these bonds. It is section 12 that grants authority to issue bonds for the purposes mentioned in that section. Some of the purposes, it must be admitted, do not pertain to the exercise of the ordinary or legitimate business of city government; and such authority was necessary; and the doctrine of *exclusio unis*, etc., does not obtain, in my judgment, to the extent of destroying the power to purchase the engine under the ordinance passed in pursuance of the extended authority to pass any law or ordinance that the city should deem advisable not in conflict with the laws of the United States or of this state. There can be no doubt of one thing—that the merits of this case are with the plaintiff. The city has had and retains value received. The defense has pleaded the statute of limitations to such of the coupons as were past due four years before the institution of this suit, and to this extent the defense is sustained. And it seems to me that there is another view of this case that must be fatal to the defense. It is this: the defendant has and still holds for its use the engine purchased with these identical bonds, makes no complaint with reference to its not being all that could be desired, and I think must be held estopped from denying plaintiff's right to recover.

Judgment for plaintiff for the amount due upon the bonds sued upon, and upon such of the interest coupons as were not barred at the date of filing this suit, together with costs of suit.

ALLISON, EX'X, etc., v. CHAPMAN.

(Circuit Court, D. New Jersey. January 20, 1884.)

ACTION UPON JUDGMENT OBTAINED BY FRAUD IN ANOTHER STATE.

In an action of debt in one state upon a judgment obtained in another, a plea that the judgment was obtained by fraud is no defense. To avail himself of such a defense, the judgment debtor must invoke the aid of the court upon its equity side.

In Debt.

J. Henry Stone, for plaintiff.

A. Q. Keasbey, for defendant.

NIXON, J. This is an action of debt upon a judgment obtained in the circuit court of the United States for the district of West Virginia. The first plea is that the alleged judgment was obtained by fraud and covin. The plaintiff moves to strike out the same. The question is whether such a plea is allowed as a common-law defense to an action brought upon a judgment from another state. There is undoubtedly a conflict of authority and much confusion existing on the subject, arising partly from the failure of courts to observe the precise nature and character of such judgments, and partly from the legislation of some of the states, allowing equitable pleas in suits at law. The courts of civilized nations generally make distinction between foreign and domestic judgments, holding a record of the former to be only *prima facie* evidence, and a record of the latter conclusive evidence. The provision of the constitution of the United States, (article 4, § 1,) that full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state, and that the congress may prescribe the manner in which they shall be proved, and the effect thereof, places the judgment of the different states upon a peculiar footing. They are neither foreign nor domestic judgments, although partaking more of the qualities of the latter than the former.

The attention of the supreme court was early called to the effect which the above-stated provisions of the constitution of the United States, supplemented by the act of congress of May 26, 1790, (1 St. at Large, 122,) had upon judgments obtained in other states. It was claimed in *Mills v. Duryee*, 7 Cranch, 481, that they should be treated as foreign judgments, and that *nil debet* was a good plea in a suit upon such a judgment. But the court denied the validity of the plea, alleging that it rendered the above clause of the constitution unimportant and illusory; that the record of the judgment duly authenticated was conclusive upon the parties; and that *nul tiel record* was the only proper plea. The counsel for the defendant in his brief justified his plea by the authority of the case of *Bank of Australasia v. Nias*, 16 Q. B. 717, where it was held that a plea that the judgment on which the suit was brought was obtained by fraud, would be good;

but he did not advert to the reason why it was good. The reason is disclosed by Lord Chancellor SELBORNE, in *Ochsenbein v. Papalier*, L. R. 8 Ch. App. Cas. 695, which was an application for an injunction to stay a suit at law upon judgment to which the defendant had put in the plea of fraud. He refused to interfere upon the ground that the court at law had jurisdiction, the parliament having passed statutes permitting such equitable defenses to be pleaded in suits at law. The obvious inference from the opinion is that, in the absence of such legislation, the plea would not be allowed.

This subject is fully discussed in 2 Amer. Lead. Cas. 658, and the conclusion is reached that the allegation in a plea that a judgment was procured through fraud is not a good common-law defense to a suit brought upon it in the same or a sister state. To sustain the position he quotes (1) *Benton v. Bergot*, 10 Serg. & R. 240, where the supreme court of Pennsylvania held, on demurrer, that in a suit on a judgment in the court of another state the plea of fraud in obtaining it was bad; (2) *Granger v. Clark*, 22 Me. 128, where the controversy was over a domestic judgment, and where the court said that even if fraudulently obtained, it must be considered conclusive between the parties until reversed; (3) *Christmas v. Russell*, 5 Wall. 290. The supreme court in this case, speaking of judgments of sister states, say: "They certainly are not foreign judgments, under the constitution and laws of congress, in any proper sense, because they 'shall have such faith and credit given to them in every other court within the United States as they have by law or usage in the courts of the state from whence' they were taken; nor were they domestic judgments in every sense because they are not the proper foundation of final process except in the state where they were rendered. Besides, they are open to inquiry as to the jurisdiction of the court and notice to the defendant, but in *all other respects* they have the same faith and credit as domestic judgments." And in regard to domestic judgments the court add, that, under the rules of the common law, if rendered in a court of competent jurisdiction, they can only be called in question by writ of error, petition for new trial, or by bill in chancery. Third persons *only* (quoting 2 Saund. 1 Pl. & Ev. pt. 1, p. 63,) can set up the defense of fraud or collusion, and not the parties to the record, whose only relief is in equity, except in the case of a judgment obtained on *cognovit* or a warrant of attorney. This last case I think governs the present motion. The plea must be stricken out.

If the defendant wishes to impeach the judgment for fraud or covin in obtaining it, he must invoke the aid of the court upon the equity side, whose peculiar province it is to grant relief in cases of this sort. See *Glover v. Hodges*, Saxt. 119; *Power's Ex'rs v. Butler's Adm'r*, 3 Green, Ch. 465; *Moore v. Gamble*, 1 Stockt. 246; *Tomkins v. Tomkins*, 3 Stockt. 512.

AULTMAN and others v. THOMPSON.

(Circuit Court, D. Minnesota. February 25, 1884.)

NEW TRIAL.

New trial ordered, unless defendant should consent to a judgment against him for a certain sum.

Motion for a New Trial.

S. L. Pierce, for plaintiffs.

Rogers & Rogers and Daniel Rohrer, for defendant.

NELSON, J. On the trial of this case the court decided that the defendant could offer proof tending to show that the harvester and binder and mower sold to Valentine were worthless, or failed to perform work in accordance with the conditions of their sale. Such proof was offered, by depositions, of the character of the harvester and binder, but not in reference to the mower. When the plaintiff's counsel was asked if he had any evidence to meet the proof offered by defendant, he answered "No," and the court said it would be unprofitable to keep the jury, as plaintiff could not recover on the guaranty of the obligations given by Valentine for this implement. It was stated that plaintiffs were entitled to judgment on the notes given for the mower, and guarantied by defendant, amounting to \$98.75 and interest, as no evidence had been offered of its failure to fulfill the terms of sale, and the court said it would dismiss the case, and, on a motion for a new trial or reinstatement, could protect the plaintiffs if they were entitled to recover this amount. The motion for a new trial has been submitted with briefs from all the counsel, and on a review of the case I think the plaintiff should recover upon the three notes guarantied for the sum of \$93.70, and interest at 10 per cent. from February 15, 1879, amounting in all to the sum of \$140.90. If the defendant will not consent that a judgment for this amount may be entered against him a new trial must be granted.

The defendant is given 20 days from this day, February 25, 1884, to determine; and in case his counsel do not indicate within the time his consent to judgment, by filing a request with the clerk of the court, an order for a new trial will then be entered.

In re LEONG YICK DEW.

(Circuit Court, D. California. February 25, 1884.)

CHINESE IMMIGRATION—RESTRICTION ACT—CERTIFICATE OF PREVIOUS RESIDENCE—WHEN EXCLUSIVE EVIDENCE.

The act of May 6, 1882, restricting Chinese immigration permits all laborers who were in this country at any time before the expiration of 90 days after the passage of the act, and who shall produce the certificate provided for by the

act, to go and come at pleasure, and no evidence of previous residence, except the prescribed certificate, can be received from those laborers who quitted the country since the certificates were obtainable; but those who went away before the act was passed, or before certificates were to be had, must be allowed (as was held in the *Case of Chin A On*, 18 FED. REP. 506) to prove their previous residence by any competent evidence.

Application for a Writ of Habeas Corpus. The opinion states the facts.

T. D. Riordan, for petitioner.

S. G. Hilborn, U. S. Atty., for the Government.

Before SAWYER, HOFFMAN, and SABIN, JJ.

SAWYER, J. The petitioner, a Chinese laborer, who was residing in the United States on the seventeenth day of November, 1880, left San Francisco for China, by steamer, on June 16, 1882, without obtaining the certificate provided for in section 4 of the act of congress of May 6, 1882, commonly called the restriction act. He has now returned and he seeks to land without such certificate, upon other proof of his residence in the United States at the date of the conclusion of the late treaty with China than the certificate provided in said section 4 of the restriction act. The question is whether he is entitled to land upon other satisfactory proof of former residence, without having obtained and produced such certificate. The treaty with China authorized the government of the United States to "regulate, limit, or suspend" the coming of "Chinese laborers" to, or residence in, the United States. But it provided that "the limitation or suspension shall be reasonable, and shall apply only to Chinese who may go to the United States as laborers, other classes not being included in the limitation." And it was further expressly provided that "legislation taken in regard to Chinese laborers will be of such character only as is necessary to enforce the regulation, limitation, or suspension" of immigration. It is still further provided that "Chinese laborers who are now in the United States [at the date of the treaty, November 17, 1880] shall be allowed to go and come of their own free will and accord, and shall be accorded all the rights, privileges, immunities, and exemptions which are accorded to the citizens and subjects of the most favored nation." This treaty having been ratified by the contracting parties, congress, on May 6, 1882, passed "An act to execute certain treaty stipulations relating to Chinese," commonly called the restriction act, under which the questions at issue now arise. As it is not stated in the act when it should go into operation, we have no doubt that it took effect immediately upon its approval by the president.

Section 1 of the act provides—

"That from and after the expiration of ninety days next after the passage of this act * * * the coming of Chinese laborers to the United States be and the same is hereby suspended; and during such suspension it shall not be lawful for any Chinese laborer to come, or having so come, after the expiration of said ninety days, to remain in the United States."

Section 2 provides—

"That the master of any vessel who shall knowingly bring within the United States on such vessel or land, or *permtt to be landed*, any Chinese laborer from any foreign port or place shall be deemed guilty of a misdemeanor, and shall be punished by fine of not more than five hundred dollars for *each and every such Chtnese laborer* so brought," etc.

It will be observed that the language of the provisions of these two sections is broad, comprehensive, and sweeping, and that it in express terms prohibits "any" and "each and every" Chinese laborer from coming, or being brought into, or landed, or permitted to be landed in the United States or having come to remain, and, standing alone, would exclude each and every Chinese laborer, whether he had been in the country before or not. It would be difficult to express that idea more explicitly. But section 3 puts a limitation upon the comprehensive language of the two preceding sections, and makes an exception in the following terms:

"The two foregoing sections shall not apply to Chinese laborers who were in the United States on the seventeenth day of November, eighteen hundred and eighty, or who shall have come into the same before the expiration of ninety days after the passage of this act, *and who shall produce to such master before going on board such vessel, and shall produce to the collector of the port in the United States at which such vessel shall arrive, the evidence hereinafter in this act required, of his being one of the laborers in this section mentioned.*"

Thus the exceptions are not Chinese laborers who were merely in the United States on the day mentioned, but Chinese laborers who were not only in the United States on that day, but who, in addition, "shall produce to such master before going on board such vessel, and shall produce to the collector of the port in the United States at which such vessel shall arrive, *the evidence hereinafter in this act required, of his being one of the laborers in this section mentioned.*"

Such is the plain language of the act defining the exceptions; and we are not authorized to enlarge the exceptions thus plainly defined by any latitudinarian or unwarranted construction. We cannot take half of the definition of the exception and reject the other half. We must take it as we find it, and that requires the certificate *as evidence of residence as well as the residence*. It seems clear to us that congress, with reference to Chinese laborers leaving the country, and having an opportunity to obtain the requisite certificate, intended to prescribe the evidence upon which they should be permitted to re-enter the United States, and that the evidence prescribed is a limitation upon, and forms a part of, the definition of the exceptions intended to be made to the comprehensive language of the preceding section of the act. And that evidence is the certificate to be furnished to the laborers departing from the county by the collector, or his deputy, of the port whence he takes his departure, provided for in the next section, being section 4 of the act. This, we think, is the only evidence of prior residence and a right to return of a departing laborer contemplated by the act of congress. The sweeping language of sections

1 and 2 quoted, it will be seen, are not permissive in form, but expressly prohibitory, and excludes, in unmistakable terms, each and every Chinese laborer, and but for the exceptions, also explicitly defined in the next section, none of that class could be admitted. None but those coming within the plain meaning of the language of the exception can be taken out of the excluding provisions. There is no other provision in the act to indicate a different policy, or that congress did not intend to make the required certificate the only evidence of a right to return, as to all those Chinese laborers, who, having a right to the certificate and the ability to obtain it, depart from the country without obtaining it. On the contrary, the only other sections affording any inference or light on this point are section 5, pointing out the mode in which the same class of persons desiring to depart *by land* shall procure similar certificates; and section 12, which provides "that *no Chinese person* shall be permitted to enter the United States by land without producing to the officer of customs the certificate in this act required of Chinese persons seeking to land from a vessel." This provision is, positively, prohibitory also, and not permissive; and it particularly and expressly forbids an entry without the particular evidence prescribed by this act. There could scarcely have been intended one rule of evidence for those entering by land and another for those landed from vessels. We think, then, that the certificate provided for is the only evidence of the right to re-enter the United States, or having re-entered, to remain, of a Chinese laborer who has departed from the United States, having the opportunity afforded by the act to obtain the certificate required, whether he comes by land or by sea.

We do not wish to be understood as questioning the construction adopted by the district court, in the *Case of Chin A On*, 18 FED. REP. 506, in regard to those Chinese laborers who were living in the United States at the date of the conclusion of the treaty, November 17, 1880, or subsequently, and who left the United States prior to May 6, 1882, the date of the passage of the restriction act. On the contrary, we are fully satisfied of the propriety of the construction given in that case. Congress could not possibly have intended to require that class of Chinese laborers to procure the required certificate where it was a physical impossibility for them to obtain it; and it would be absurd, under the circumstances, to hold that congress intended to, arbitrarily, exclude that class in direct violation of the express terms of the treaty protecting them. Congress had declined to enact any such legislation as is contained in the restriction act while the Burlingame treaty was in force, for the reason that it would be an act of bad faith on the part of the United States towards China, and a direct violation of the solemn stipulation of the treaty between the two governments. The United States went to the trouble, expense, and delay of sending a special mission, composed of three distinguished gentlemen, to China, for the express purpose of procuring

a modification of the Burlingame treaty, in order to enable the United States to adopt the legislation now in question without committing an act of bad faith towards China, and without violating the treaty stipulations between the two nations. A treaty was made with the modifications sought, which was ratified by, and apparently satisfactory to, both nations. And the modified treaty, in express and the most explicit terms, protected the class in question in their right to remain in the United States, or "to go and come of their own free will and accord," and also provided that they "shall be accorded all the rights, privileges, immunities, and exemptions which are accorded to the citizens and subjects of the most favored nation."

It is expressly stipulated in the supplementary treaty that the "legislation taken in regard to Chinese laborers will be of such character *only as is necessary* to enforce the regulation, limitation, or suspension of immigration," and that "the limitation or suspension shall be reasonable." Conceding the legislation requiring Chinese laborers departing from the United States after the passage of the act in question, and having an opportunity to do so, to procure and produce the required certificate to be "necessary" and "reasonable," still such a requirement as to those who departed after the date of the treaty, and before the passage of the act, or before it was practicable or possible to obtain the certificate, could neither be necessary nor reasonable. If congress, then, intended by this act to make this provision requiring the prescribed certificates applicable to those Chinese laborers who were in the United States at the date of the treaty, and who left before the passage of the act of May 6, 1882,—before it was possible to obtain the certificate,—then it was the deliberate intention of congress to act in bad faith towards the government of China, and to violate the solemn obligations of the very treaty it had taken so great pains to obtain, in order to enable it to honorably legislate at all upon the subject. Why take all this trouble to negotiate a treaty if it was intended at last to flatly disregard it, and legislate in direct violation of its most solemn and vital stipulations? Congress might, with just as much propriety, have ignored and disregarded the Burlingame as the supplemental treaty. There would be just as much propriety in wholly repudiating the treaty as to repudiate it in this vital part, which the Chinese government took care to have inserted. It would be to the last degree absurd, under the circumstances, to suppose for a moment that congress intended to make the provisions of sections 3 and 4, relating to certificates, applicable to the class of Chinese laborers referred to. We cannot attribute to congress a deliberate intention to commit any such act of bad faith without provisions manifesting such a purpose far more explicit than any found in the act.

Again, the same section which requires the certificate gives to the departing Chinese laborer an absolute, indefeasible right, without cost or expense, to have the certificate, in order that he may be able to produce it as evidence of his right to re-enter the United States.

The necessity to produce it, and the right to have it, in order that he may produce it, are correlative conditions. The one provision is the complement of the other. They are reciprocal, and must go together. The obligation to produce the certificate presupposes the practicability, or, at least, the possibility, of procuring it, in order that it may be produced. The two provisions go together, and form but one legal conception. The obligation to produce and the right and ability to obtain it are *dependent*, and *not independent*, conditions. One is the counterpart of the other, and it is not to be supposed that congress would have adopted one branch of the proposition without the other, otherwise it would have distinctly done so in terms. If, then, it is impossible to comply with the condition, the impossible condition must be regarded as not intended as to this class of laborers; or if intended, it must be void. The law requires nothing impossible—*Lex non cogit ad impossibilia*, (Bouv. Law Dict. "Maxims;" Broom, Max. 242;) and *Lex non intendit aliquid impossibile*, (Bouv. Law Dict.)—the law intends not anything impossible—are among the most venerable maxims of the law. In a statute, "No text imposing obligations is understood to demand impossible things." Sedg. St. Law, 191. "Provisions in acts of parliament are to be expounded according to the ordinary sense of the words, unless such construction would lead to some unreasonable result, or be inconsistent with, or contrary to, the declared or implied intention of the framer of the law, in which case the grammatical sense of the words may be modified, restricted, or extended to meet the plain policy and provision of the act." Dwarries' St. 582. The rule is to construe words "in their ordinary sense, unless it would lead to *absurdity or manifest injustice*; and if it should so vary them as to avoid that which certainly could not have been the intention of the legislature, we must put a reasonable construction upon the words." Id. 587. See *Donaldson v. Wood*, 22 Wend. 399; *Lake Shore Ry. Co. v. Roach*, 80 N. Y. 339. "All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to *injustice, oppression, or an absurd consequence*. It will always, therefore, be presumed that the legislature intended exceptions to its language which would avoid results of this character. The reason of the law in such cases should prevail over the letter." *U. S. v. Kirby*, 7 Wall. 486. "In whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect. * * * To require a heavy and almost impossible condition to the exercise of this right, with the alternative of payment of a small sum of money, is, in effect, to demand payment of that sum." *Henderson v. Mayor of New York*, 92 U. S. 268. See, also, *Lessee of Brewer v. Blougher*, 14 Pet. 198; *U. S. v. Freeman*, 3 How. 564. So, in the case of the class of Chinese laborers now under consideration, to require them to produce a certificate as the *only* evidence of their right to land, when it was impossible or impracticable to procure it, would be, in effect, to absolutely and un-

conditionally exclude them. Yet it is manifestly the policy, intent, and reason of the law to carry out in good faith the stipulations of the treaty that they "*shall be allowed to go and come of their own free will and accord,*" and "*be accorded all the rights, privileges, immunities, and exemptions which are accorded to the citizens and subjects of the most favored nation.*"

We are therefore fully satisfied that those Chinese laborers who were in the United States on November 17, 1880, and left before the passage of the restriction act, and those also who came into the United States and departed therefrom between that date and May 6, 1882, and even afterwards, before the collector was prepared to issue the certificates provided for in section 4 of the restriction act, "in such form as the secretary of the treasury shall prescribe," are entitled to re-enter the United States upon satisfactory evidence other than the certificates provided for in said section 4.

The secretary of the treasury *first* issued his circular, notifying the various collectors of the ports of the United States of the passage and terms of the restriction act, and indicating the form of certificate to be used,—*which form, under the act, is to be prescribed by him alone*,—on May 19, 1882, and that circular was received at the port of San Francisco on May 26th, in time for the outgoing steamer for China, which sailed on June 6th. The secretary, however, did not send out his blanks, or authorize any to be printed by the collector, or furnish full instructions in time to arrive before August 4th, the date at which the right of Chinese laborers to enter the United States expired. They were in fact received at this port on August 8, 1882. The Chinese consul, on consultation with the officer in charge of the collector's office, had blank certificates printed, at his own expense, upon the same sheet with a certificate or passport issued by himself, which were issued by the collectors to outgoing Chinese laborers, and which, by direction of the secretary of the treasury, through telegraphic correspondence, were marked "Temporary." The first of these certificates was dated June 6th. From that time till August 8th these temporary certificates were issued, at first on the same sheet with the other issued by the Chinese consul, and afterwards separately. These certificates have been recognized by the collector when presented by returning Chinese laborers. Up to the date of the circular of the secretary of the treasury, received at San Francisco May 26th, the secretary had not prescribed the form of the certificate, and clearly the collector's office at San Francisco was not in a condition to execute the law according to its terms in time for any Chinese laborers departing prior to the sailing of the steamer which left on June 6th. We therefore hold that those Chinese laborers who departed from San Francisco prior to June 6th could not reasonably procure the prescribed certificate, and they must be admitted, on their return, on other satisfactory evidence of their having been in the United States between November 17, 1880, and

the date of their departure. On and after June 6th the collector was prepared to carry out the law according to its real intent, and all Chinese laborers departing from the port of San Francisco on and since that date, having had an opportunity to procure the required certificate, will be required to produce it.

UNITED STATES v. CHESMAN.¹

(Circuit Court, E. D. Missouri. March 30, 1881.)

INDICTMENT FOR MAILING AN OBSCENE AND INDECENT PUBLICATION.

An illustrated pamphlet, purporting to be a work on the subject of the treatment of spermatorrhea and impotency, and consisting partially of extracts from standard books upon medicine and surgery, but of an indecent and obscene character, and intended for general circulation, held to come within the provisions of section 3893 of the Revised Statutes.

Indictment for depositing in the mail a publication of an obscene and indecent character. The indictment describes the publication as "a pamphlet entitled 'Prof. Harris' New Discovery for the Radical Cure of Spermatorrhea and Impotency, with the Anatomy and Physiology of the Generative Organs, Illustrated; and the Science of a Radical Cure.' By his 'new departure' in the treatment of those troubles, viz., local absorption at the seat of the disease,"—which said publication is so indecent that the same would be offensive to the court here, and improper to be placed on the records thereof.

William H. Bliss, for the United States.

Dyer, Lee & Ellis, for defendant.

MCCRARY, J. In this case, by agreement, counsel have submitted to the court the question whether the publications complained of come within the provisions of section 3893 of the Revised Statutes, which prohibits the mailing in any post-office of any publication of an obscene or indecent character. We have considered this question after a full oral argument by counsel, and we are clearly of the opinion that the publications referred to in the indictment and information do fall within the provisions of this section of the statute. They are clearly both obscene and indecent, and, in our opinion, within the meaning of the statute. It is not necessary, perhaps, to say more, but I may remark that it has been insisted by counsel for the defendant, with great earnestness, that the publications in question are, in their character, medical, and that the matters complained of are, to a large extent, extracts from standard medical works. It may be, and probably is, true that much of the offensive matter is taken from books upon medicine and surgery, which would be proper

¹Reported by Benj. F. Rex, Esq., of the St. Louis bar.

enough for the general use of members and students of the profession. There are many things contained in the standard works upon these subjects which, if printed in pamphlet form and spread broadcast among the community, being sent through the mail to persons of all classes, including boys and girls, would be highly indecent and obscene. I am not prepared to say, and it is not necessary now to decide, whether these medical books could be sent through the mails without a violation of the statute. The publications before us are not medical. It is manifest from an examination of them that they are intended to be circulated generally among the people. We decide at present nothing more than they come within the provisions of the statute, and that when deposited in the post-office, directed to any actual person, the law is violated, without regard to the character of the person to whom they are directed. This, perhaps, may be shown by way of mitigation or aggravation of the offense, but not in justification.

See, generally, *U. S. v. Kaltmeyer*, 16 FED. REP. 760, and *Bates v. U. S.* 10 FED. REP. 92, and note.

TOWER v. BEMIS & CALL HARDWARE & TOOL Co. and others.

(Circuit Court, D. Massachusetts. February 23, 1884.)

1. PATENTS—WHAT IS PATENTABLE—MERE AGGREGATION.

The mere combination in a convenient form of several devices, having no common purpose, is not patentable.

2. SAME—IMPROVED MONKEY-WRENCH.

Patent No. 56,166, for an improvement in monkey-wrenches, cannot be held to cover every wrench in which the cam is solidly attached to the jaw, since similar arrangements were in use before the letters issued.

In Equity.

D. Hall Rice, for complainant.

John L. S. Roberts, for defendants.

LOWELL, J. The plaintiff owns patent No. 56,166, issued to Byron Boardman, July 10, 1866; and it is admitted that the invention was made in October, 1865. The patent is for an "improved tool," or, as the specification says, "an improved combination tool;" and "the [one] object of this invention is to combine a pipe-wrench with a monkey-wrench, in such manner that two of the jaws of the latter shall serve as gripping-jaws for firmly holding rods or pipes of varying diameters, which it may be desirable to turn." A second and third purpose are to combine a screw-driver with the handle of a wrench in certain convenient modes. Of the five claims, only two have been mentioned in this suit, and only one is said to be infringed; claim "1, as an improvement in monkey-wrenches, the combination of the cam, n, with

the movable or fixed jaw-head of a monkey-wrench, so as to form thereof a pipe-wrench, substantially as described."

One Park had obtained a patent in 1865, No. 48,027, for a tool which described and claimed "a combined hammer, claw, monkey-wrench, socket-wrench, and screw-driver." Boardman's tool is confessedly and intentionally an improvement upon Park's tool. In the latter, the jaws of a monkey-wrench were placed on one side of the common handle, and a hammer and claw on the other side. Boardman put into the claw of Park's hammer a serrated piece of steel, called "the cam, n," which had a rocking motion, and he made a notch in the hammer opposite the cam, and in this way the claw and hammer formed a pipe-wrench, as well as a claw and hammer. Two monkey-wrenches and two pipe-wrenches had been put upon a single handle before October, 1865, but no tool had been made with a monkey-wrench on one side and a pipe-wrench on the other of the same handle. A monkey-wrench has its jaws always parallel and preferably smooth, so as to work to the best advantage upon parallel-sided nuts. A pipe-wrench should have a notch or curve in one of its jaws, to embrace the pipe or rod; a serrated surface in the other, to take better hold; and this part should have a rocking motion, so that the grip of the wrench can be loosed by merely reversing the handle.

The plaintiff contends that Boardman's pipe-wrench, considered by itself, was the first which had the cam so placed that the strain would come upon a solid jaw. The old form of this kind of tool, of which the defendants made about one hundred dozen a year, for six or seven years before 1866, was that patented by Bartholemew & Merriek, in 1849, No. 6,002. In this tool, which was an improvement upon one patented by Merriek in 1848, the upper jaw was curved or notched, to embrace the rod or pipe, and the lower jaw was serrated and had a rocking motion by being pivoted at its lower end, immediately above the nut, which actuates the movable jaw. The cam was solid with the jaw, but the plaintiff insists that too great strain came upon the pivot. There is no evidence in the record that the Bartholemew & Merriek wrench ever broke at the pivot, and the Exhibit 1, which represents it, appears to be strong; but the wrenches in litigation here are still stronger.

Amos Call, a member of the defendant corporation, obtained a patent in 1866, No. 57,621, for an improved pipe-wrench, which, in structure, is the Bartholemew & Merriek tool, with the addition that the rocking jaw is loosely confined by two collars. The invention was made later than Boardman's. The special advantages of this tool are not explained, but it is obvious that the collars prevent the rocking-jaw from rocking too far, and if there was danger of its breaking at the pivot, it overcomes this difficulty by bringing the strain, after the rocking has gone far enough, upon the collars, and through the collars upon the handle of the tool. Since this wrench was invented

the defendants have sold it instead of the other form. This tool is admitted not to infringe the patent in suit. The defendants likewise make and sell a tool which unites upon a single handle the jaws of a monkey-wrench on one side, and the jaws of the Call pipe-wrench on the other. The question is whether this tool infringes the first claim of the patent.

The primary examiner rejected Boardman's application, saying:

"The tool, as described and shown, is an aggregation of four distinct tools, answering to four different purposes, some widely dissimilar, and others analogous, but in no particular does any one of these tools add any value to either of the others, or co-operate therein to effect a common purpose, and hence no combinable relationship exists between them. That the aggregation of these several tools in the manner shown results in a convenient article, is not questioned, and, as an article of manufacture, the tool so resulting may possess patentable novelty," etc.

The examiners in chief reversed this decision.

Since 1866 the supreme court have decided that there is no patentable combination, properly so-called, in an aggregation of devices which have no common purpose or effect, concurrent or successive. *Hailes v. Van Wormer*, 20 Wall. 353; *Reckendorfer v. Faber*, 92 U. S. 347; *Pickering v. McCullough*, 104 U. S. 310; *Packing Co. Cases*, 105 U. S. 566. Applying the rule of those cases to the facts of this, they decide that a broad claim cannot be sustained for merely putting together two old tools for convenience of manipulation in their several and wholly distinct uses; but that the patent must be limited to some patentable improvement, either in the method of combining the tools, or in one or more of the tools themselves. No invention is claimed which relates to the mode of combination; but the pipe-wrench itself is said to be an improvement on all which preceded it.

The cam, *n*, is specifically claimed in the second claim thus:

"The manner herein described of securing the pipe-wrench cam within a recess, so that this cam will be firmly sustained by the solid metal surrounding it, during the operation of turning a cylindrical object, and allowed to play loosely when released, substantially as described."

It is not contended that the second claim is infringed, and if it claims the cam, *n*, as broadly as the invention will permit, the first claim is not infringed, which is for the combination of the cam, *n*, with one of the jaw-heads of a monkey-wrench. The defendant's cam, or rocking serrated jaw, is like the old jaw of the Bartholemew & Merrick wrench, and not at all, in appearance, at least, like a cam rocking in a recess. It has solidity, to be sure, but this is not obtained by affixing it any more firmly to the jaw than it was in Bartholemew & Merrick's, where it was a part of the jaw itself, but in putting a collar round that jaw, which prevents its rocking so far as to bring a dangerous strain upon the pivot.

There were several kinds of cams in use in pipe-wrenches before 1866, one of which is in the wrench patented to Phillips in 1859, No. 23,857. In this wrench the serrated cam had a sliding motion

upon the solid lower jaw of a pipe-wrench. The plaintiff's expert says that this wrench must have been of no practical value, because the sliding cam has not the rocking or toggle motion necessary to release the pipe readily from the grip of the jaws when the handle is reversed. This criticism is undoubtedly sound in assuming that a rocking motion is preferable to a sliding one. It was, however, demonstrated at the hearing that Phillips' tool will work to some considerable extent. Whether it was a commercial success, I do not know. There is no evidence about it, excepting that it was patented and was made. Considering the existence of the tools which I have mentioned, and of many others having several different sorts of cams, I am of opinion that the plaintiff cannot claim every cam which is solidly attached to the jaw, or jaw-head, and, specifically, that he cannot claim the cam which the defendant uses, which is the Bartholemew & Merrick rocking jaw, made more convenient and secure by two collars which play upon the handle. It was not a known substitute for cam, *n*, because the collars were new.

It follows that the pipe-wrench of the defendants is different from that of the plaintiff; and since the broad claim of aggregating any pipe-wrench with any monkey-wrench upon a single handle cannot be sustained, I do not see, as I have already said, that a wider meaning can be given to cam, *n*, in the first claim, than if the patent was for the pipe-wrench alone. There is therefore no infringement.

Bill dismissed, with costs.

PENTLARGE v. KIRBY. (Three Cases.)

PENTLARGE, for Himself, and the United States, v. KIRBY BUNG
MANUF'G Co. (Three Cases.)

(District Court, S. D. New York. January 31, 1884.)

1. PATENTS—FALSE STAMPING—REV. ST. §§ 4901, 732—PENALTY.

Section 4901, Rev. St., imposing a penalty for false marking upon articles the word "patented" with intent to deceive the public, as a penal statute, is to be strictly construed. It makes penal only the act of stamping. Taking the stamped articles into another district with the intent to sell them is neither prohibited nor made penal, and cannot be construed, as in cases of larceny, as a repetition or continuance of the act of stamping in the district to which the articles are removed.

2. SAME—STATUTE CREATING NEW OFFENSE—CONSTRUCTION.

Where a statute creates a new offense and at the same time prescribes a particular and limited remedy, all different or other remedies than those prescribed are to be deemed excluded.

3. SAME—RECOVERY OF PENALTY—ACTION, WHERE BROUGHT.

As section 4901 declares that the penalty is "to be recovered by suit in any district of the United States within whose jurisdiction such offense may have been committed," *held* that no suit for such penalty can be maintained except

in the district where the act of stamping was committed, and that the general provision of section 732, that suits for penalties and forfeitures may be brought wherever the defendant may be found, does not apply to suits under section 4901.

4. SAME—COMPLAINT—DEMURRER.

In a suit to recover 10 penalties of \$100 each for falsely stamping certain wooden vent bungs with the words "Pat. Nov. 28, 1882," the complaint charged that the articles were so stamped in Cincinnati with intent to bring them to New York for sale; that they were so brought and exposed for sale; and that the defendant continued and thereby repeated and renewed said false stamping, etc. *Held*, on demurrer, that the suit could not be maintained in this district, but only in the district where the articles were actually stamped.

Demurrer to Complaint.

Brodhead, King & Voorhees, for plaintiffs.

Edward Fitch, for defendant.

BROWN, J. These six actions were brought to recover 10 penalties of \$100 in each of the six suits, under section 4901 of the Revised Statutes, for falsely stamping upon certain unpatented wooden vent bungs the words "Pat. Nov. 28, 1882," with intent to deceive the public. The section above referred to imposes upon every person "who in any manner marks upon or affixes to any unpatented article the word 'patent,' or any word importing that the same is patented, for the purpose of deceiving the public, a penalty of \$100 for each article so stamped; one-half of said penalty to the use of the person who shall sue for the same, and the other to the use of the United States, to be recovered by suit in any district court of the United States within whose jurisdiction such offense may have been committed." In the original complaint it did not appear clearly where the act of stamping was done, and on motion of the defendant, the plaintiff was required to make the complaint more definite and certain in that particular. The amended complaint, accordingly, states as follows:

"That the aboved-named defendant, at Cincinnati, in the state of Ohio, or other place without the state of New York, or without the Southern district thereof, on or about the fifteenth day of September, 1883, falsely stamped and procured to be stamped upon and affixed to ten certain unpatented articles hereinafter described the words 'Pat. Nov. 28, 1882;' and thereupon said defendant brought, and caused to be brought, said ten unpatented articles to the city of New York, within this district, and then and there, with intent to deceive the public, continued and thereby repeated and renewed said false stamps, and thereby falsely stamped said articles at said city, all for the purpose of exposing said articles, and putting the same upon the market at said city, and inducing the public at said city to understand and believe the said articles were patented, whereas they were unpatented articles."

To the amended complaint in each of the six actions the defendant has demurred for want of jurisdiction, and that no cause of action is stated.

The statements in the complaint above quoted, to the effect that the defendant, at the city of New York, "continued and *thereby* repeated and renewed said false stamps, and *thereby* falsely stamped said articles at said city," etc., are plainly not averments of any real act of

stamping or affixing the marks referred to, within this district, but only a statement of such legal effect as the plaintiff claims to result from the previous act of stamping the articles at Cincinnati, or other place without the state of New York, with the intention of bringing them here for sale so stamped. The only act of stamping averred is plainly at Cincinnati, or other place without this district. The question to be determined, therefore, is, whether when the stamping is done without the district, with the intent to bring the stamped articles within this district and there sell them in fraud of the public, and such articles are accordingly brought here and offered for sale, any offense is committed under section 4901, for which a penalty can be recovered in this district.

The statute in question, though a public statute and designed to prevent impositions upon the community, is, nevertheless, a highly penal one. The articles stamped may be of comparatively little value; yet a penalty of \$100 is fixed for the stamping of each. In these suits \$6,000 are claimed as penalties. One half of any recovery in such suits may go to whomsoever it may please to sue, though the plaintiff have no special interest in the subject, and may not have sustained any actual injury. It is an action *qui tam* for the use of the informed and the government. Such penal statutes are always construed strictly; that is, they are not to be extended to acts which do not clearly come within the plain meaning and ordinary acceptance of the words used. The offense, being created by statute, does not extend, and cannot in such cases be construed by the courts as extending, beyond the fair meaning of the language employed in designating the offense. *Ferrett v. Atwill*, 1 Blatchf. 151, 156.

The offense under the third subdivision of section 4901 is clearly the act of marking upon or affixing to any unpatented article the word "patent," or any word importing that the same is patented, for the purpose of deceiving the public. The intent to deceive must accompany the act; but the act which is made penal is affixing the mark or stamp, and nothing else. The acts in this case, with the accompanying unlawful intent, were wholly completed at Cincinnati, or other place without this district. The statutory offense being therefore complete before the articles were brought into this district, the prescribed penalties could clearly have been recovered under the last clause of the statute within the district where it was thus committed.

The plaintiff, while admitting that the defendant was liable to suit within the district where the articles were in fact stamped, contends that, because the articles are brought within this district and offered for sale here pursuant to the original intention, the plaintiff may also sue for the penalties here—*First*, because the offense, as it is claimed, is a continuous one, and is in effect repeated and continued within the district where the articles are brought; and, *second*, because by section 732 of the Revised Statutes it is provided that "all pecuniary

penalties and forfeitures may be sued for and recovered either in the district where they accrue or in the district where the offender is found."

1. I cannot sustain the contention that any offense under section 4901 is "committed," or "repeated," within this district, in consequence of the articles being brought here, and exposed for sale in pursuance of the original intention. The statute has not made penal the act of offering such falsely stamped articles for sale, or the act of bringing them from one district to another with such intention. Had the articles been thus stamped in Canada with the intention of bringing them here for sale, and had they then been brought here, and put on the market, no offense would have been committed under this statute, because the prohibited act would have been done without our jurisdiction, and the acts of bringing the articles into the country, and offering them for sale already falsely stamped, cannot possibly be brought within the prohibitory language of the statute. Had it been the object of congress to make penal the exposure of such articles for sale, it must be presumed that appropriate words to indicate that intention would have been used. Under the rule of construction above referred to, the language of the statute cannot be thus extended merely because the statute may be easily evaded, or because the same mischief may be done by means of other acts not prohibited, and which cannot possibly be brought within the fair meaning of the statutory terms. The language of MARSHALL, C. J., in the case of *U. S. v. Wiltberger*, 5 Wheat. 96, is specially applicable here: "The case," he says, "must be a strong one indeed which would justify a court in departing from the plain meaning of the words, especially in a penal act, in search of an intention which the words themselves did not suggest. To determine that a case is within the intention of a statute, its language must authorize us to say so. It would be dangerous indeed to carry the principle that a case which is within the reason or mischief of a statute, is within its provisions so far as to punish a crime not enumerated in the statute, because it is of equal atrocity or of kindred character with those which are enumerated. *Ferrett v. Atwill*, 1 Blatchf. 151-156. See, also, *The Saratoga*, 9 FED. REP. 322-325; *U. S. v. Temple*, 105 U. S. 97; *U. S. v. Graham*, 3 Sup. Ct. Rep. 583; *Ruggles v. State*, 2 Sup. Ct. Rep. 832-838; *French v. Foley*, 11 FED. REP. 801-804, and cases there cited.

The analogy afforded by indictments for larceny, which may be brought in any county wherein the thief is found with the goods, is not applicable here. The reason of that rule is that the legal owner's right to his goods is not changed by the theft; every moment of the thief's possession of the goods is a continuation of the original trespass, theft, or felony, amounting to a new asportation and abstraction. 1 Russ. Cr. 173. In its nature it is a continuous felonious appropriation of another man's property. But the crime of burglary, which includes the felonious entry of the particular *locus in quo*,

as an ingredient in that offense, must, at common law, be prosecuted in the county where the entry was committed; so, in the case of robbery, it is only by statute that an indictment can be brought in another county. 1 Hale, P. C. 536; *Haskins v. People*, 16 N. Y. 344, where the authorities are reviewed. In the present case, the offense is purely a statutory one, and consists solely in affixing certain marks or stamps with intent to deceive the public. The offense may be complete and the penalty incurred, though the articles are, in fact, never offered for sale or known to the public. The intent to deceive is doubtless continuous where the articles are offered to the public; but it is not that intent which is made penal, but the act of stamping when accompanied by that intent. Here that act was completed, and the "offense," therefore, wholly "committed" without this district. There was no act of marking or stamping within this district. No act prohibited by the statute was committed here. Bringing the falsely-stamped articles here, though in pursuance of the original intention, cannot, by any stretch of language, become an act of marking within this district, and hence the "offense" was not "committed" here.

2. There are, doubtless, strong grounds for permitting such actions to be brought, under the provisions of section 732 above quoted, in districts other than that where the offense was committed, if that can be allowed consistently with the established rules of statutory construction. For if after falsely stamping such unpatented articles the offender, on immediately leaving the district, cannot be prosecuted elsewhere, it will plainly be very easy in many cases to evade the statute altogether. If, on the other hand, the defendant is liable to be sued for such penalties under section 732 in any one of all the districts in the country where he may at any time happen to be found, great embarrassments in such suits might often arise. Controversies under this section, so far as they have come under my own observation, have sprung mostly out of *bona fide* differences in regard to the character of the articles, whether embraced within certain patents or not, and controversies as to the date of the patentee's rights. The requirement, also, of the statute, making the intention to deceive the public material, may demand examination of numerous witnesses at the place where the acts were done; and these various considerations might constitute possibly a sufficient reason for limiting the prosecution of offenses so highly penal to the district where they were in fact committed.

The language of section 4901 is not, in its reading, merely permissive. It seems to be mandatory in form—"to be recovered by suit in any district court of the United States within whose jurisdiction such offenses may have been committed." The enactment of the offense, of the penalty, of the persons who may sue, the mode of suit, and in what district the prosecution is to be brought, are all connected as parts of one single enactment. In such cases, where the

offense is new, and the remedy prescribed, the general rule has long been that the remedy must be sought in the precise mode and subject to the precise limitations provided by the act which creates the offense. The rule is founded upon the presumed intent of the legislative authority in connecting the new offense with the particular remedy prescribed to exclude all other remedies.

In *Millar v. Taylor*, 4 Burr. 2305, 2323, WILLES, J., says:

"If the offense, and consequently the right, which arises from the prohibition be *new*, no remedy or *mode of prosecution* can be pursued, except what is directed by the act. * * * If the act has prescribed the remedy for the party grieved, and the mode of prosecution, all other remedies and modes are excluded. * * * If the same act which *creates* the right, *limits the time* within which prosecutions for violations of it shall be commenced, that limitation cannot be dispensed with."

In *Donaldson v. Beckett*, 2 Brown C. P. 129, it was held in such cases that there can be no remedy, except on the foundation of the statute and on the terms and conditions prescribed thereby.

In the case of *Dudley v. Mayhew*, 3 N. Y. 9, STRONG, J., says, (page 15:)

"It is very clear that, when a party is confined to a statutory remedy, he must take it as it is conferred, and that *where the enforcing tribunal is specified the designation forms a part of the remedy, and all others are excluded*. The rule is inapplicable, of course, where property or a right is conferred and no remedy for its invasion is specified; then the party may sustain his right to protect his property in the usual manner."

See, also, *Almy v. Harris*, 5 Johns. 175; *McKeon v. Caherty*, 3 Wend. 494; *Renwick v. Morris*, 7 Hill, 575; *People v. Hazard*, 4 Hill, 207; *People v. Hall*, 80 N. Y. 117.

Again, section 732 of the Revised Statutes is taken *verbatim* from the act of February 28, 1839, § 3, (5 St. at Large, 322.) It is a general act applicable to a multitude of penalties and forfeitures, concerning which there is no other provision in regard to the place where the suit may be brought.

Section 4901 is taken from the act of July 8, 1870, § 39, (16 St. at Large, 203.) This act was passed long after the general act of 1839, providing for the recovery of penalties and forfeitures in any district where the offender might be found. The offense created by section 39 of the act of 1870 was new, and that section specifies definitely how and where such penalty is to be recovered. Under the rule above stated, the particular specification of the district wherein the remedy is to be pursued must be interpreted as a limitation, confining the plaintiff to the district where the offense is committed. Unless that were the intention of the clause in question, no reason appears for its insertion at all, since under the general act of 1839, then in force, suit might have been brought, if nothing had been said about it, wherever the offender might be found. No reason appears for applying a general statutory provision in extension of the remedy particularly designated by the act creating a new offense, which

would not apply equally in favor of such an extension by means of the ordinary common-law remedies; and yet it is well settled that the latter are excluded under the rule of construction above referred to, and the same rule must, therefore, be held to exclude the application of section 732 to suits brought under section 4901.

Other sections of the act of July, 1870, furnish further support to the construction here given. Sections 79 and 82 of that act provide for the recovery of damages in "any court of competent jurisdiction." Section 94 provides for the recovery of the penalty in any district court where the delinquents "may reside or be found." Section 98 provides for the recovery of a penalty of \$100, by action precisely similar to the present, in cases of copyright, "in any court of competent jurisdiction;" and the same provision is made, as respects damages and penalties, by sections 99, 100, 101, and 102. In view of all these other sections of the same statute, permitting the suits for those penalties to be brought "wherever the defendant may be found," the exceptional language of section 39, providing that the suit for that penalty is to be brought "in the district where such offense may have been committed," warrants the inference of a particular intent to limit prosecutions under that section to the district where the offense was in fact committed. If, under this construction, the statute may, in some cases, be easily evaded, that must be set down to the explicit and peculiar limitation of the statute itself. It is for congress to apply the remedy, if any is needed, and not for the courts to attempt it, through a departure from the well-settled rules applicable to the construction of penal statutes and the remedies presented thereby.

The demurrers are sustained, and judgments thereon ordered for the defendant, with costs.

WINNE, Suing for Himself, as well as for the United States, v. SNOW.

(District Court, S. D. New York. February 11, 1884.)

1. PATENTS—FALSE MARKS—REV. ST. § 4901—DEMURRER—ACTION QUI TAM.

An action brought by an informer for his own benefit and that of the United States, under section 4901, Rev. St., for falsely stamping the word "patented" on an unpatented article, is an action *qui tam*, in which the plaintiff may properly describe himself as bringing the action for the benefit of himself and of the United States. In such cases the United States is not regarded as a party to the action, and a demurrer for misjoinder of parties will not be sustained.

2. SAME—JURISDICTION.

Such an action may be brought in the district where the offense is committed; and the jurisdiction of the court does not depend on the residence of the parties.

3. SAME—PARTIES.

Such an action may be brought, under the statute, as well by a person suffering no special injury, as by one who is specially damaged by the defendant's illegal acts. Averments of special damage in the complaint are, therefore, immaterial

and irrelevant; but though they may be stricken out on motion, they are not a ground of demurrer under the New York Code of Procedure.

4. SAME--AVERMENTS--EVIDENCE.

In such an action it is not necessary to aver or prove that the articles falsely stamped were capable of being patented; if not patentable, and if the acts alleged were incapable of deceiving the public, that is matter of defense.

Demurrer to Complaint.

W. E. Ward, for plaintiff.

Charles M. Stafford, for defendant.

Brown, J. The complaint charges that on or about the nineteenth day of May, 1883, the defendant, within this district, did mark or stamp upon 500 basket-cover fastenings, which were unpatented, the words and figures, "Patented May 30th, July 25, 1871," importing that they had been patented at those dates, with the intent and purpose of deceiving the public. The complaint further states that the plaintiff is the patentee of a useful improvement in basket-cover fastenings, and is engaged in business in manufacturing and selling such articles for the public; that the defendant's acts were for the purpose of injuring the plaintiff in his business; that defendant forbade the public the use of plaintiff's improvement, and threatened to prosecute the persons who should use and sell it; that the plaintiff's basket-cover fastening was better and cheaper than the defendant's and that the plaintiff had been greatly injured in his business by the defendant's wrongful acts, to the amount of \$50,000; that all of these acts of the defendant were contrary to section 4901, Rev. St., whereby, by virtue of said statute, an action had accrued to the plaintiff to demand of the defendant a penalty of \$100 for each of said basket covers so falsely stamped, amounting to \$50,000; for which he demanded judgment for himself and the United States. The defendant demurs—*First*, for the improper joinder of parties plaintiff; *second*, misjoinder of causes of action,—one for penalty, the other for damages to the plaintiff's business; *third*, that the court has no jurisdiction; *fourth*, that the facts stated are not sufficient to constitute a cause of action.

1. The suit is a *qui tam* action to recover a penalty under section 4901, one-half of which is to go to the plaintiff, and the other half to the United States. The plaintiff, in stating that he sues "for himself as well as the United States," states only a legal fact apparent on the face of the statute, and in a form long recognized as proper. In such cases the United States is not regarded as a party to the action; the form of the title indicates only that it is a *qui tam* action, prosecuted by an informer, to recover a statutory penalty; and the objection of misjoinder is not well taken. *Cloud v. Hewitt*, 3 Cranch, C. C. 199; *Ferrett v. Atwill*, 1 Blatchf. 151; *Cole v. Smith*, 4 Johns. 193; *Olipphant v. Salem Flouring Mills*, 5 Sawy. 128.

2. The matter set up as special damage to the plaintiff is unnecessary and irrelevant. Any informer is entitled to the same recovery that any other person who was specially injured by the defendant's

wrongful acts would be. *Pentlarge v. Kirby*, ante, 501. This special matter, however, is plainly not stated in this complaint, as a separate cause of action, and no relief is prayed for in reference to it. As irrelevant matter, it might be stricken out on motion under the New York Code of Procedure, which regulates the practice here in common-law actions; but it cannot be objected to by demurrer.

3. In actions based upon this statute, the citizenship of the parties is immaterial; the action must be brought in the district where the offense is committed. *Pentlarge v. Kirby*, supra.

4. It is urged that the complaint does not state facts sufficient to constitute a cause of action, because it does not allege that the articles stamped were capable of being patented; and the case of *U. S. v. Morris*, 2 Bond, 24; 3 Fisher, Pat. Cas. 72, is cited in support of this view. If it appeared from the complaint itself that the articles were of such a nature that the public could not possibly be deceived by the mark "patent" put upon the articles, it might be that the complaint should be held insufficient; because the intent to deceive the public is a necessary ingredient in the offense. Beyond that, however, I cannot go; and in cases like the present, where there is nothing to indicate that the articles may not be patentable, and the public misled by the false and deceptive stamping alleged, I see no reason for shielding persons who seek to impose upon the public, from the penalties imposed upon them by the plain language of the law; or for requiring the plaintiff to allege, or to prove, more than the statute requires. Any defense of the kind referred to, in so far as it bears on the intent to deceive, is open to the defendant. This subject was fully considered by DEADY, J., in the case of *Oliphant v. Salem Flouring Mills*, supra, and I fully concur with the result which he reached, holding it unnecessary to allege or prove that the article stamped was patentable. See *Walker v. Hawkhurst*, 5 Blatchf. 494.

The demurrer should, therefore, be overruled; with liberty to the defendant to answer within 20 days, on payment of the costs of the demurrer.

GIANT POWDER CO. v. SAFETY NITRO POWDER CO.

(Circuit Court, D. California. February 18, 1884.)

1. PATENTS—REISSUE—WHEN ONLY PARTIALLY INOPERATIVE.

Whenever a patent is so far inoperative that it fails to secure all that the patentee was, by his specifications, entitled to claim, it is inoperative within the meaning of the statute, and the patentee is entitled to a reissue.

2. SAME—DECISION OF PATENT-OFFICE CONCLUSIVE UPON COLLATERAL QUESTIONS.

The decision of the commissioner of patents is conclusive upon all questions relating to the manner in which a patent was obtained, and the courts can only consider what appears upon the face of the patent.

3. SAME—REISSUE IN LANGUAGE OF ORIGINAL.

One who, under honest misapprehension, surrenders a valid patent, and takes a reissue which proves to be void, is entitled to a reissue of the first patent in the identical language originally used.

4. EQUITY PLEADING—PLEA—AMENDMENT—MULTIFARIOUS ISSUES—DELAY.

A plea in equity must be confined to a single issue, unless special leave is obtained to plead double; and an amendment of a plea so as to raise a multitude of issues will not generally be allowed, especially after long delay. The defendant must answer over.

Motion for Leave to File an Amended Plea.

Hall McAllister and *George Harding*, for complainant.

M. A. Wheaton, for respondent.

Before SAWYER and SABIN, JJ.

SAWYER, J., (*orally*.) In the case of *Giant Powder Co. v. Safety Nitro Co.*, a motion for leave to file an amended plea, setting up several distinct defenses, has been argued in connection with the argument as to the sufficiency of the plea already filed. The Giant Powder Company was the owner of original patent, No. 78,317. This patent was surrendered and reissued as patent No. 5,619. Afterwards, for the purpose of correcting a clerical error, patent No. 5,619 was surrendered and reissued as patent No. 5,799. A suit upon this last patent was decided by Mr. Justice FIELD in this court, in which it was held that the reissue was broader in its scope than the original invention as described in the original patent No. 78,317, being for a combination of nitro-glycerine with some non-explosive absorbent material, while the reissue embraced explosive as well as inexplusive absorbents, and Mr. Justice FIELD held that in that particular the reissue was broader than the originally-patented invention, and for that reason void. *Giant Powder Co. v. Cal. Vigorit P. Co.* 6 Sawy. 509; [S. C. 4 FED. REP. 721.] In consequence of this decision, patent No. 5,799 was surrendered and reissued again in patent No. 10,267, and in patent No. 10,267 both the specification and the claim are identical with those of the original patent No. 78,317, which had before been surrendered and reissued in the patents before mentioned.

These facts are set up in the plea, and it is claimed that patent No. 10,267 is void, it being identical with the original surrendered patent No. 78,317. That patent was surrendered as being inoperative; and as a reissue can only be had where the patent is inoperative, it is claimed that the original patent must have been held to be wholly inoperative. I think counsel are mistaken in that proposition. A patent may be inoperative, in my judgment, when it is inoperative in part. I do not think it must be absolutely inoperative in its entirety. If it is inoperative so far as not to cover all that the party is entitled to claim, and what he is entitled to claim appears in the specifications, it being inoperative to that extent, I think it would be inoperative within the meaning of the provisions of the statute, and entitle the party to a reissue, covering his entire invention. It does not necessarily follow that patent No. 78,317 was wholly in-

operative, or void, or useless. I am not aware that it has ever been held by any court to be utterly invalid in all its parts. It was not even claimed at the argument that the patent, as originally issued, was inoperative, in fact, as to the combination of nitro-glycerine with inexplusive absorbents.

The question of fraud in procuring the reissue, in my opinion, does not arise on this plea, because the question as to whether a mistake has been innocently made in not covering by the patent all that the party was entitled to cover—the question whether there is a fraud in the surrender and application for a reissue—is one of fact, for the officers of the patent-office alone to decide, and their determination is conclusive in a collateral proceeding. This court can only examine and pass upon what appears upon the face of the patent, and see whether there is anything to indicate its invalidity, or render it void upon its face. All questions of fact behind the patent are to be examined, heard, and conclusively determined by the commissioner of patents. This principle has been affirmed over and over again by the supreme court.

I do not think the fact that the patent was reissued in the identical terms of the original patent No. 78,317 renders it void. The specifications of the patent last surrendered were amended by omitting the objectionable parts. Patents are constantly reissued for portions of the specifications and claims in the identical language of the original patent. Each claim in its nature substantially and in effect covers a distinct and separate invention, and is an independent patent in substance and effect. It might be the subject of an independent patent; and if in any reissue, so far as the patents are identical, those claims are valid in the reissued patent having another or additional valid claim, or a modified claim, or some other change in the specification, I do not perceive why they would not be valid in a patent limited to them alone. If they can all stand together, I do not see why a reissued patent, covering the identical claims by themselves, may not stand and be valid. Patents may be reissued in divisions. It is not necessary that all claims in the reissue should be included in one patent. They are often issued in divisions, and I suppose that a patent might be reissued in divisions in the identical language as to some of the claims, the changes being included in another and separate division or patent; that is to say, all claims, or inventions, which are fully covered and operative, may be reissued by themselves in one division in the identical language of the original surrendered patent, and all other claims, on amendments to the specifications, and covering the invention shown by the amended specifications, in another division or patent. I do not see why a part of the original claims may not be reissued in one division in identically the same language as in the original patent, and the rest in another. If this can be done without affecting the validity of the reissues, and a party finds that he has made a mistake and surrendered

a valid patent and obtained a void reissue, I do not perceive why he may not fall back upon his old patent and have it reissued on a newly-amended specification embracing that portion which is valid. If parts which are identical are valid in connection with other parts in a reissue, I do not perceive why they should not be valid in a reissue containing no additional matter.

In this particular class of cases it is quite extensively claimed by the bar, I think, that the supreme and some of the circuit courts have made something of a departure in some of their late decisions upon reissues, including the reissue in question. Mr. Justice FIELD held patent No. 5,799 to be void, while several of the circuit judges at the east held it to be valid, and the supreme court has recently repeatedly affirmed the principle of the decision of Mr. Justice FIELD on the circuit. Where courts make a mistake, it may, very properly, be conceded that a patentee may well make an honest mistake himself. On the argument of the plea, my attention was called for the first time to the case of *Gage v. Herring*, 107 U. S. 646, [S. C. 2 Sup. Ct. Rep. 824,] in which I think the principle involved in the plea is distinctly determined. The court says:

"The invalidity of the new claim in the reissue does not indeed impair the validity of the original claim, which is repeated and separately stated in the reissued patent. Under the provisions of the patent act, whenever, through inadvertence, accident, or mistake, and without any willful default or intent to defraud or mislead the public, a patentee in his specification has claimed more than that of which he was the original or first inventor or discoverer, his patent is valid for all that which is truly and justly his own, provided the same is a material and substantial part of the thing patented, and definitely distinguishable from the parts claimed without right; and the patentee, upon seasonably recording in the patent-office a disclaimer, in writing, of the parts which he did not invent, or to which he has no valid claim, may maintain a suit upon that part which he is entitled to hold, although in a suit brought before a disclaimer he cannot recover costs. Rev. St. §§ 4917, 4922; O'Reilly v. Morse, 15 How. 62, 120, 121; Vance v. Campbell, 1 Black, 823. A reissued patent is within the letter and the spirit of these provisions."

If a reissued patent is within the letter and spirit of these provisions, as stated, and "the invalidity of the new claim in the reissue does not indeed impair the validity of the original claim, which is repeated and separately stated in the reissued patent," it is not apparent to my comprehension why a second reissue, embracing the valid claim alone of the original patent, would not be valid. I cannot, therefore, say that the patent (No. 10,267) is void by reason of anything asserted in the plea upon the grounds set forth. The plea must therefore be overruled.

With reference to the filing of the proposed so-called amended plea, I think it is not within the reasonable discretion of the court to allow it to be filed at this late day. In view of the circumstances of this case, as they appeared before this court in the various stages of the proceedings, I think it would be an abuse of its discretion to allow the plea to be filed, if it were otherwise a proper plea. In fact, the proposed amended plea sets up all the defenses that can be made to

a patent, and it would involve the trial of the whole case, with the exception of the single question of infringement. The object of a plea, where there is some certain, single issue, requiring but little evidence that will dispose of the whole case if sustained, is to try that issue without putting the parties to the expense of the trial of the case at large; and pleas are limited to a single defense or issue unless, by permission of the court, the defendants are allowed to plead double. If the court allows this so-called amended plea to be filed, it would allow parties to try all the issues in the case with the exception of the one issue as to infringement, and it would be necessary to try the whole case on the merits by piecemeal. Besides, it comes too late. After this plea was originally filed it was stipulated that it stand for an answer so far as it was available as a defense. An answer and replications were filed, and the parties commenced taking testimony. In the course of taking the testimony the solicitor for the defendant ascertained the importance of having the case decided on his plea, provided it was good, and thought that he was at a disadvantage in his then position, as on the question of infringement he would be obliged to disclose the secrets of his composition. He therefore moved, upon affidavits, to be relieved from the stipulation, taking the plea for an answer. He claimed, among other things, to have misunderstood the practice of the court. After argument, the court, thinking that there might be something in the plea, as this exact point had never been decided, so far as it was aware, and, if good, it would save the expense of a trial, relieved the party from the stipulation, and allowed the plea to be set down for argument. It was supposed that the exact question had never been presented before, and when the argument was made upon the stipulation the court had not seen the case of *Gage v. Herring, supra*, which, it is thought, decides the principle. I thought that there was, perhaps, something in the plea. At all events, I thought that it was worthy of being carefully considered, for if the plea is good, and the patent absolutely void upon its face, I saw no occasion for putting the parties to the great expense of going to a trial of all the issues in the case. I therefore set aside the stipulation, and allow the defendant to withdraw its answer in the case, and set the plea down for a hearing. It was set down for a hearing, and continued from time to time, until finally it came up for argument, counsel from Philadelphia coming out to argue the case on the validity of the plea. When the plea was called for argument, it was found that there had been a change of solicitors, and an application was made by the substituted attorney at the moment for leave to file the proposed so-called amended plea, which presents all the issues in the case with the exception of the one issue of infringement. I think, under the circumstances, that it would be improper, and it would be an abuse of discretion to allow this so-called amended plea to be filed at this late day.

Leave to file the proposed amended plea is therefore denied.

NATIONAL CAR-BRAKE SHOE CO. v. TERRE HAUTE CAR & MANUF'G Co. and others.

(Circuit Court, D. Indiana. January 30, 1884.)

1. PATENTS FOR INVENTIONS—PARTIES IN ACTION AT LAW FOR INFRINGEMENT.

In an action at law for infringement of a patent, all parties who participate in the infringement are liable, although some are simply acting as officers of a corporation; all parties who participate in a tort or trespass are liable, and a man cannot retreat behind a corporation and escape liability for infringements in which he actively participates.

2. SAME—CONSTRUCTION OF PATENT.

It is for the court, as a matter of law, to construe a patent, and for the jury, as a question of fact, to determine whether it has been infringed, and the amount of damages that should be allowed.

3. SAME—BURDEN OF PROOF—DAMAGES.

In an infringement suit, the burden is on the plaintiff to show the amount of damages he has suffered; and if he furnishes reasonably satisfactory evidence on that subject, he is entitled to substantial damages, otherwise to nominal damages.

4. SAME—EVIDENCE OF DAMAGE—LICENSE.

On the question of damages, it is competent for a patentee to prove the prices at which licenses were granted under the patent while it was in force; but in order to be competent evidence of value, the prices agreed upon must be prices fixed with regard to the future, when there is no liability between the parties, and the parties not being subject to suits are presumed to act voluntarily, and therefore to make up their minds deliberately as to what would be a fair price. Such arrangements, licenses thus granted, fees thus fixed, are competent evidence to consider in determining what the actual value of an invention is, and what the recovery ought to be for its use.

5. SAME—PAYMENTS MADE IN SETTLEMENT.

It is not competent for a patentee to prove the prices paid for infringements already perpetrated; such settlements are not at all admissible on the subject of value.

6. SAME—AMOUNT OF DAMAGES.

The value of an invention for which an infringer is liable is the value at the time of the infringement. A man who has got a patent owns it as property, and if anybody sees fit to infringe it he is bound to pay for its fair value; and the fact that there is something else just as good or better does not entirely destroy its value, but may affect it.

7. SAME—CONFUSION OF GOODS.

The doctrine of a confusion of goods has no application to a suit for infringement of a patent, especially where there is only a confusion of book-keeping and not a confusion of the articles themselves, the articles being incapable of mixture.

8. SAME—CONCEALMENT—PRODUCTION OF BOOKS.

If a party shows an unwillingness to let the truth out, and keeps back facts and the means of getting at facts, in his power, then the jury is warranted in drawing the strongest possible inferences against him, which may be drawn from the evidence actually given in favor of the other party. But if he comes forward with his books, furnishes all the evidence in his power, and is fairly candid in the matter, no inferences should be drawn against him, except such as are fairly drawn from the evidence adduced.

9. SAME—RECORD OF PATENT—NOTICE.

Every one is bound to take notice of the existence of a patent, and of the rights of parties under it; like the record of a deed to real estate, the record of a patent at Washington is notice thereof to all the world.

Action for Damages for Infringement.

Banning & Banning, for plaintiff.

Claypool & Ketcham, for defendants.

WOODS, J., (*charging jury*.) This is an action by the plaintiff against the defendants claiming damages for the alleged infringement of a patent granted to James Bing, October 6, 1863, for an improvement in car-brake shoes. The burden of proof is upon the plaintiff to show the facts, so far as they are material, alleged in the complaint,—that it had a patent; that the defendants infringed it; and the amount of damages that it has suffered by reason of the infringement. The defendants are three—the car company and two individuals who are shown to be officers of the company. The action is in the form of a suit in trespass on the case, and consequently if all the defendants have participated in the infringement they are all liable, though the individuals were acting simply as officers of the company in doing it. All parties who take part in a tort or trespass are liable. A man cannot retreat behind a corporation, and escape liability for a tort in which he actively participates. So there is no question, probably, in the case but that all the defendants are liable, if any. There is no dispute that the plaintiff has a patent. The patent itself has been put in evidence, and is conclusive of the fact that the patent-office issued it to Bing, under whom the plaintiff claims. It is for the court to tell you what the claim of the party is in his patent, and what he acquired by the patent. It is for you, as a question of fact, to determine whether the defendants have, by anything that they have made, infringed the patent of the plaintiff.

The plaintiff in his patent makes two claims. The first is for the two parts of the brake, the shoe and the sole, adjusted together in a particular way described, for the purpose of producing a rotary motion. To this claim the rotary motion is essential, and any implement which does not produce the rotary motion is not an infringement of that claim of the patent. But there being two claims in the patent, an implement may infringe one and not the other; and if the defendants have manufactured an article which infringes either claim, the plaintiff is entitled to recover in the action for that infringement; and if it infringes both claims, of course the plaintiff is entitled to recover. I instruct you, on the authority of Judge DRUMMOND, who is my official superior in this circuit, as well as upon my own judgment of the law of the case, and of the proper interpretation of the patent, that the second claim does not embrace the idea of rotary motion, and may be violated by an implement which is not designed to produce, and does not in fact produce, the rotary motion. The second claim is simply for a combination of the two parts of the brake already mentioned,—the shoe and sole,—and of the clevis and bolt made in the substantial form described in the patent; but it is not necessary, as I have said, that it shall be so made as to produce rotary motion. It is simply for the combination of these parts, in substantially the way they are described, without reference to rotary mo-

sion, for the accomplishment of whatever benefits will result from the combination of the parts in that way. If the benefit be the ease in taking apart and putting together, or taking out old pieces and putting in new, or any other benefit that results from that combination, whether described in the letters patent or not, the inventor has the right to the benefits of the combination that he has thus produced. As already stated, it is for you to determine, as a question of fact, whether the implement manufactured by the defendants, which I believe is conceded to be in the form of this red model which I take in my hands, designated "J. S.," does infringe the patent of the plaintiff in respect to either claim,—the combination for rotary motion, and the general combination of the four parts, without reference to rotary motion. Now, it is argued by one side that this piece resting squarely down upon the shoe, and not pushed forward by this toe, will not produce rotary motion, and therefore does not violate this patent in respect to the claim for rotary motion. On the other hand, it is argued that this will produce rotary motion on the principle the plaintiff contends for. I leave that to you as a question of fact. If this implement, constructed in this way, will produce the rotary motion to some extent,—it may not be to the full extent of a model constructed in the form of the patent,—it is a violation of the first claim of the patent. If it will not produce rotary motion at all, then it is not a violation of that claim.

The next question is whether this model is substantially a combination of the same parts as are included in the second claim of Bing's patent. In order that there be an infringement, it is not necessary that the parts be exactly alike. If they are substantially the same in construction, and produce substantially the same result in substantially the same manner, it is an infringement. It takes more than a mere difference in form to escape an infringement. If a man has procured a patent—a combination patent—consisting of certain parts, one of which, for instance, is a clevis like that, coming down in two arms upon the outside of the ears of the brake head, the question in this case is whether the substitution of a single strap like this escapes that patent. If this strap was a thing already known to mechanics as something that, in this connection, would produce substantially the same result as the clevis, in the same connection,—a mere substitution of one thing that is equivalent to the other,—it then must be treated as an infringement. The defendants do not escape if this is substantially the same, and was a thing known to mechanics already, and substituted merely to produce substantially the same result as the clevis; and if not involving any invention, it is a mere mechanical equivalent. Such a change does not enable a party to escape liability for infringement. The question is for you. Counsel have argued it before you and I shall not enlarge upon it. It is for you to say whether there is a substantial change in anything more than mere form from that to this. If there is no substantial

change, no change except in form, then this should be treated as an infringement of the plaintiff's second claim.

Considerable has been said in argument, and some evidence adduced, in reference to decisions made by Judge DRUMMOND, of this circuit, that a certain brake-shoe used by the Illinois Central and the Lake Shore railroads, which are claimed to be substantially identical, even in form, with this model, are an infringement of the plaintiff's patent. I say to you that such decisions have been made; but they were decisions in particular cases, made, of course, with reference to the evidence adduced in those cases; and while they are entitled to weight upon your minds, they are not absolutely conclusive upon you. I leave it to you, as the law leaves it, a question of fact whether this is an infringement of that; that is, whether the brake-shoe represented by this model is an infringement of the Bing patent. You should hold that it is, unless there is some departure more than in mere form; that is, unless the result accomplished by this is by a substantially different contrivance, operating in a substantially different way from the Bing brake-shoe. If you find that the implement made by the defendants, of which this is conceded to be a model, is an infringement of the plaintiff's patent, then will arise the question, which counsel have more earnestly argued before you, and which is for you, perhaps, the more important question in the case—what damages shall be awarded? The burden of proof is upon the plaintiff to show the amount of damages that he has suffered, and to furnish the jury reasonably satisfactory evidence to enable them to reach a conclusion on that subject; and, if the plaintiff has furnished you that proof, it is your duty to award him substantial damages. If there has been an infringement, he is entitled to nominal damages anyway; but if the evidence shows that the patent is of real value, then he is entitled to substantial damages, according to the proof. As a general proposition, the weight that testimony shall have is a question for the jury; but the court may lay down general principles which will enable the jury to understand how the testimony should be weighed. I instruct you that it is competent for a patentee, in order to enable the jury to measure his damages, to prove contract prices at which licenses had been granted under the patent while it was in force, but that it is not competent for him to prove the prices paid for infringements; that is to say, payments made in settlement of infringements already perpetrated. In order to be competent evidence of value, the prices agreed upon must have been fixed with regard to future use, when, there being no liability between the parties, they are presumed, on both sides, to have acted voluntarily, and therefore to have made up their minds deliberately as to what was a fair price. Such arrangements, licenses thus granted, fees thus fixed, are competent evidence to consider in determining what the actual value of an invention is, and what the recovery ought to be for its use. But settlements for past transactions, where the parties are

liable to suit if they do not pay, I instruct you, are not admissible as evidence for the plaintiff upon the subject of value.

Now, there is in evidence the deposition of Mr. Shaw, and counsel have discussed before you the weight that it should have. They dispute whether Mr. Shaw, in this deposition, has spoken about payments made for past use, or a price agreed upon for future use, or payments partly for past and partly for future uses. I leave that to you. The testimony is before you, and it is for you to say what it means, and what effect you will give it in this respect.

Other evidence has been introduced as to the value of the patented brake-shoe as compared with others, and some question is made of what the comparison should be. The plaintiff's counsel insists that no comparison shall be made with any implement that had not been in use, or been invented,—if it was a patented implement,—before the patent sued upon was issued. I am not able to agree fully with that position. The action being for damages, (not profits,) I suppose the defendants are liable—if they are liable for anything—for the value of the invention at the time they appropriated it. A patent issued on a particular day for a particular contrivance, might, with reference to the business of the community, and the uses to which it could be put, be worth a given sum on that day and at that time. If it was the only contrivance that could be used to accomplish the purpose for which it was adapted, it would of course constitute a monopoly, and would command the market for whatever price should be fixed upon it. If shortly after it was invented and put into use some new contrivance, entirely different, and not infringing it in any respect, but useful for accomplishing the same purpose, should be invented and brought into use, it is evident that competition would arise, and the first patent, instead of then being the sole occupant of the field, would have to meet the competition of the new, and might not be worth so much as when it was first produced. I think the jury have the right—and I so instruct you—to look to the facts as they existed at the time of the infringement. If the patent was useful when invented, and was an improvement of actual value over what then existed, the fact that something else was invented afterwards that was better than it, would not take away its entire value, so that the one who should prefer to use it or manufacture it could say, "I shall pay nothing for that because I might have taken something better." A man who has a patent owns it as property, and if anybody sees fit to infringe he is bound to pay for its fair value; and the fact that there may be something else just as good as that or better does not destroy its value, but it may affect your judgment of what the actual value is. The fact that this company chose to make this implement, with the combined parts,—that is, if you find those combined parts are an infringement of this patent,—is conclusive upon the company that they regarded it as a valuable instrument, thus combined, and its actual value in use, under the circumstances existing at the

time, the value of that combination, which constitutes the patent, should be awarded to the plaintiff in damages; but the existence of these other implements, patented or unpatented, is a matter that you have a right to consider in arriving at what your judgment of its actual value shall be. Of course, if the rival implements are patented, the existence of them could have no effect, or but little effect, upon the value of the invention in suit, except as they furnished competition in the market. If there existed some contrivance that was not patented at all, or that was free to everybody, which subserved substantially the same purpose, that might still further in your minds depreciate the value of this; but the mere fact that such a thing did exist would not destroy entirely, and could only be treated as modifying, the value of this at the time. In this connection I will refer to a point to which counsel have called my attention. It is claimed by plaintiff's counsel that the burden of proof is on the defendants to show that those implements which were brought forward are free if they want to claim the benefits of them as free implements. If they are patented, then of course the parties resorting to them would have to pay royalty for their use, and if they chose to go to this instead, they should pay royalty on this, the fair royalty, whatever it is. But counsel for defendants have asked me to say to you, that if, during the examination of the witnesses, it was conceded by the counsel for the plaintiff that any one of these implements was not patented, you have a right to accept that concession and treat it as proof of the fact that that particular one was not patented; and they claim that the one which has been called or designated as the reversible sole was admitted by counsel for the plaintiff not to be covered by any patent,—not to have been patented,—and therefore you are entitled to treat that as an unpatented implement; and so far as the existence of that in the market could have affected the fair value of this, you should consider it as a free instrument. I instruct you that a concession made by counsel may be treated by the jury as a fact against the party whose counsel made the concession.

There is one other point that I will instruct you about. In his opening statement the plaintiff's counsel claimed to you that if he made proof that these defendants constructed a brake which was a violation of his client's patent, and showed that they had constructed a certain number of brakes altogether, the burden of proof would then fall upon the defendants to show just how many were constructed after the form of the Bing patent; and that unless they offered that proof you should find that all made by them were constructed in that way, on the principle of the confusion of goods; that is, that a party who mixes his goods with another man's, so that they cannot be separated, is liable to lose his own goods with those that he commingles with them. That rule does not apply in this case, for the manifest reason that whenever you go and look at a car you can tell what brake is on it. If there is any confusion, it is confusion in the book-keep-

ing, and not of the goods. The brakes could not be mixed; one brake is always separable from another; and the burden is upon the plaintiff to show how many articles were made in infringement of its patent; and the plaintiff is entitled to recover for the infringement of only such number as upon the evidence you are satisfied were made by the defendants. It is only in a case of this kind,—and I do not mean to intimate that there is any cause for invoking the rule here; I leave that solely to you, as you are the judges of questions of fact. If a party shows an unwillingness to let the truth out, and keeps back facts, and the means of getting at facts in his power, then the jury is warranted in drawing the strongest possible inferences which may be drawn from the evidence actually given in favor of the other party; but further than this, there is no doctrine that can have any applicability in this case, and I do not say that this doctrine is applicable; I do not say to you that the defendants have manifested any disposition to keep back any facts in their power. If, when they made these implements, they actually knew they were violating somebody else's patent, and purposely omitted keeping any record of how many violations were perpetrated, then you would be entitled to draw the strongest inferences against them, if there were any evidence of that fact. But if they have brought forward their books, and furnished all the evidence in their power, and have been fairly candid in the matter, as much so as men may reasonably be expected to be when their interests are heavily at stake, you would not be justified in drawing any inferences, other than such as may fairly be drawn from the evidence adduced. In reference to this subject of knowledge of the patent, I say to you that every one is bound to take notice of the existence of a patent, and the rights of parties under it, and is held responsible to pay for every infringement that he actually perpetrates, just as if he did know it. It is like the record of a deed; the record of patents at Washington is notice to every one, just as your title deeds on the records of the proper county are notice to all the world of your title. But, while a man is held to have this constructive knowledge, he may be in actual ignorance of the fact; and so if these defendants were actually ignorant of the existence of this patent at the time they made the implements which are claimed to be an infringement, they should not be deemed subject to criticism or reproof because they have come here with their books in such shape that they cannot tell from their books what infringements they did commit. It is only when a man consciously does wrong, and so does it as to conceal the facts, that he is subject to such criticism and to this harsh rule of evidence.

DUNCAN v. SHAW and others.

(District Court, S. D. New York. February 7, 1884.)

1. SHIPPING—SEAMAN'S WAGES—ADVANCE NOTE—DISCHARGE AFTER NEGOTIATION—INDORSEE—REV. ST. § 4534.

Where an advance note is given upon the shipment of a seaman for a voyage, and it is transferred to a *bona fide* indorsee, under section 4534, the latter may recover of the owners of the vessel the amount thereof, notwithstanding the seaman's discharge by the master before sailing, and notwithstanding that the note contained the proviso that the seaman "be duly earning his wages." By giving the advance security, the master under the statute incurs the risk, as respects a *bona fide* indorsee, of the seaman's discharge before the vessel sails.

2. SAME—CASE STATED.

Where the shipping commissioner, at the request of the master, gave such an advance security to the seaman shipped by him, with the consent of the master, the master having full opportunity previously for ascertaining the fitness of the seaman, and the master subsequently discharged the seamen by reason of drunkenness on the evening preceding the sailing of the ship, and the latter act not being sufficient ground of discharge by the maritime law, *held*, that the master was not entitled as against the indorsee of the security to allege the general unfitness of the seaman of which he had previously means of knowledge; that the security was valid, and could be enforced by the indorsee; and that the shipping commissioner being obliged to pay it, could, therefore, recover the amount in an action against the owners. *Held, also*, that the shipping commissioner, having defended in a former action against him on the note, without notice to the present defendants, was not entitled to recover against them the costs of the former suit.

In Admiralty.

Benedict, Taft & Benedict, for libelant.

Alexander & Ash, for respondents.

Brown, J. This libel was brought to recover for moneys paid by the libelant upon an advance note of \$60, dated December 26, 1877, and given for two months' advance wages to the cook of the ship S. Hignett. The libelant was then, and is now, United States shipping commissioner at this port. His deputy, at the request of the captain of the ship, procured a cook for the ship, who signed the shipping articles; and the deputy at the same time, as requested by the captain, signed the advance note in the following form:

"Seaman's Advance Note.

"NEW YORK, December 26, 1877.

"Three days after the final departure of the ship Sarah Hignett from New York, for Calcutta, I promise to pay Joseph Harley, or his order, sixty (60) dollars, provided he is then duly earning his wages.

"\$60.

FRED C. DUNCAN, Dep'y U. S. Ship'g Com'r."

The cook had been employed upon the ship for two weeks previous, with the understanding on the part of the captain that he would be shipped for the voyage. On the morning of the day that the ship sailed, the captain, being dissatisfied through evidence of the cook's drunkenness, determined not to allow him to proceed on the voyage, called upon the shipping commissioner, discharged the cook, and pro-

cured another in his stead. The steward had previously indorsed and transferred the note to one Weinhold, acknowledged receipt of \$60 thereon, and directed payment of the note to him or bearer. Weinhold, shortly after the vessel sailed, commenced suit upon this note against the commissioner and deputy commissioner in one of the city courts, and recovered judgment thereon, with costs. This judgment was paid by the libellant, who thereupon sues the owners of the ship, as for money paid at their request. Though the judgment was in form recovered against the deputy alone, as the deputy in fact acted on behalf of the shipping commissioner, and the latter has adopted his acts in that respect and paid the judgment, he is entitled to sue for reimbursement.

I have no doubt, upon the evidence, that the steward was, on the whole, an unfit person for the voyage. During the two weeks before the day of sailing, the master had, however, abundant opportunity to observe the steward's general unfitness. He knew that this steward was to be shipped by the shipping commissioner, and the latter acted at the master's request in procuring the shipping articles to be signed by the cook and in giving the advance note. The captain and owners became bound, therefore, by that engagement, and by the advance security given on account of it, in pursuance of sections 4532, 4534, Rev. St.; they could not allege previous unfitness as a defense against that obligation. By the section last named, it is provided that "if the seaman sails in the vessel from the port of departure mentioned in the security, and is then duly earning his wages, *or is previously discharged with consent of the master*, but not otherwise, the person discounting the security may, ten days after the departure of the vessel from the port of departure mentioned in the security, *sue for and recover the amount promised in the security*, with costs, either from the owner or any agent who has drawn or authorized the drawing of the security." By this section, it will be perceived, a recovery upon a note may be had not only if the seaman be duly earning his wages, but also in case he has been previously discharged with the consent of the master. The necessary effect of this provision is that a master who gives, or causes to be given, an advance security, for a seaman's wages, thereby incurs in favor of an indorsee all the risk of the seaman's discharge within a period of 10 days. It is not necessary to determine whether the liability would still exist where the discharge was for some gross misconduct on the seaman's part, such as, by the maritime law, would clearly be good ground for immediate discharge; since in this case the only act alleged after the seaman was shipped was a single drunken spree on the evening before the ship sailed, which alone is not a sufficient ground for such a discharge.

The note in this case contained the condition, "provided he [the seaman] is then duly earning his wages." As the seaman at that time was not earning his wages, had the right of recovery upon the note rested merely upon the ordinary rules of law, plainly no recovery

could have been had, because the condition was not complied with. But it is clear that upon such a note the right of recovery is not to be determined by ordinary legal rules; since the statute is explicit, that the person discounting the security may recover the amount promised by the security, with costs, if the seaman has been previously discharged with the consent of the master. The seaman in this case clearly was so discharged, without sufficient new cause arising after he was shipped; and the person who discounted the security had, therefore, a statutory right to recover the amount mentioned in it, not by force of the terms of the note, but by force of the statute. The libellant, when sued, did not give notice to the respondents. This, however, is immaterial, since the judgment itself is regarded as immaterial, here. Being liable to an indorsee, under the statute for the amount mentioned in the security, as an agent for the owners, who had authorized the drawing of the security, the libellant might have paid it without suit; and upon such payment he would have become entitled to reimbursement from the respondents as principals, without reference to any judgment.

The libellant is, therefore, entitled to recover the sum of \$60, with interest, from the time of payment, together with costs in this court. Not having given notice of the suit in the city court to the respondents, he is not entitled to recover of the latter the costs in that court.

GOVE v. JUDSON and another.

(District Court, S. D. New York. February 8, 1884.)

SHIPPING—SEAMEN—SHIPPING ARTICLES—DISCHARGE—EXTRA WAGES—SECTION 4582.

An American seaman discharged from an American vessel in a foreign port, because the captain "has no funds to pay and could sail no further," will be deemed discharged with his own consent within the meaning and equity of section 4582, which was designed to furnish the seaman, in such cases, with means of return to his own country; and no consul being found in the foreign port nor extra wages paid there, as required, the seaman may maintain an action in admiralty on his return, against the owners, for his two months' extra pay.

In Admiralty.

J. A. Hyland, for libellant.

E. Seymour, for Sturges, one of the respondents.

BROWN, J. The libellant, an American seaman, in May, 1879, shipped on board the American bark *Rocket*, then lying at Newcastle, Australia, as first mate, for a voyage to the port of Saigow, Cochin China; thence to such ports as the master might direct, and thence to the United States. The libellant sailed from Newcastle, acting as first mate, and the bark arrived at Saigow in September of the same year. The crew then wanted to be discharged on the ground

of too much pumping, and on the tenth of September all were discharged by the captain, including the libellant; the vessel being then unseaworthy, and the captain stating that "there were no funds to pay with, and that she could sail no further." The libellant at the time demanded extra pay, and to go before the consul, but was told by the captain that there was no consul there; and the libellant, upon inquiry, was unable to find any consul; and only wages up to the time of discharge were paid by the master. As the claim for extra wages is not founded on the shipping articles, the formal defects in their certification and acknowledgment are immaterial. *Dustin v. Marray*, 5 Ben. 10. Under section 4582, if a seaman be discharged in a foreign port, with his own consent, three months' pay is required to be paid to the consul, two-thirds of which, by section 4584, are payable to the seaman on engaging his return to the United States. It has been repeatedly held, in this and other courts, that upon such a discharge, if the payment is not made to the consul, the seaman may by suit recover the sum to which he is entitled. *The Hermon*, 1 Low. 515; *Wells v. Meldrun*, Blatchf. & H. 344; *The Blohm*, 1 Ben. 228; *The Caroline E. Kelly*, 2 Abb. (U. S.) 160; *Coffin v. Weld*, 2 Low. 81. In the case of *Hoffman v. Yarrington*, 1 Low. 168, it was held that, under the provisions of the act of August 18, 1856, (Rev. St. § 4583,) extra wages will not be required where the vessel has been condemned as unfit for service from sea-damage arising during the voyage. In the present case there is no evidence that the vessel had been condemned as unfit for service.

It is objected that the evidence shows that the discharge of the libellant was not "with his own consent." What the libellant testifies on that subject is, "My discharge there was not my voluntary act, it was compulsory; by compulsion, I mean the captain told me there was no funds to pay, and could sail no further; I requested the captain to find a consul," etc. This evidence does not show that the libellant's discharge was not, under the circumstance which he explains, "with his own consent," within the meaning of the statute. His discharge was evidently "with his own consent," although that consent was constrained and rendered necessary under the circumstances, and, in that sense, compulsory, because the captain had no funds to pay, and could sail no further; and such duress will not deprive him of his right to extra pay. *Bates v. Seabury*, 1 Spr. 433.

The discharge not being within the exception of section 4583, the libellant's claim is evidently within the equity of the statute and its intention to provide American seamen with the means of return to this country; and he is therefore, I think, entitled to a decree for two months' pay, amounting to \$80, with interest from the time of filing the libel, September 7, 1881, making \$91.60, with costs.

RAY v. ONE BLOCK OF MARBLE.

(District Court, S. D. New York. January 26, 1884.)

DEMURRAGE—BILL OF LADING—READINESS TO DISCHARGE.

Where the bill of lading for a block of marble weighing seven tons provided that it should be discharged by the receiver within six hours after written notice of the master's readiness to deliver it, or pay demurrage, £15 per day, *held*, that the ship was bound to afford reasonable and customary facilities for the discharge; and the receiver being prepared to move the vessel some 250 feet to the usual place of discharge at his own expense, as was usual, and the mate, in the absence of the captain, having repeatedly refused to permit the vessel to be thus moved, partly for the reason that she had not her anchors aboard, *held*, that she was not in readiness to deliver within the meaning of the bill of lading, and could not recover during the time of such refusal.

Action for Demurrage.

A. J. Heath, for libellant.

W. W. Goodrich, for claimant.

BROWN, J. This action was brought to recover demurrage for delay in the discharge of a block of marble weighing about seven tons. The bill of lading contained the following clause:

"The marble to be discharged in New York, at the expense and risk of the receiver, six hours after written notice being given by the master that he is ready to deliver the same, or to pay demurrage at the rate of fifteen pounds sterling per running day."

To discharge her general cargo the vessel went to Coe's stores and lay along-side a bulkhead, at right angles with the line of the pier, near the end of which a permanent derrick was erected, and which was the usual and chief place in this city for the discharge of blocks of marble. The vessel was only about 250 feet distant from this derrick. The consignee was notified of readiness to discharge by a postal-card, mailed to him on a Friday forenoon, and which was received at his office at about 5 p. m. This was too late to be a valid notice for that day. The consignee had previously engaged Mr. Smith, the proprietor of the marble yard and derrick close by, to unlode the marble as soon as the vessel was ready. Mr. Smith had previously, on Friday, sent his son to the vessel to arrange to have her hauled to the derrick, 250 feet further along the bulkhead and pier, in order to discharge the marble. The captain was absent from the vessel, and the mate declined to say anything on the subject in his absence. It was a usual and customary thing for vessels discharging other cargo near by, and also having marble aboard, to discharge the marble at this slip, and to be hauled along-side the derrick by Mr. Smith's men for the purpose of quick discharge; and vessels waiting to discharge marble were usually hauled along-side the derrick in turn by Mr. Smith's men. On Saturday morning the consignee again went to the vessel with Mr. Smith, or his son, and again requested permission to move the vessel to the derrick, and offered sufficient men to move her

at once. The captain was again absent, and the mate declined to do anything. They remained there till near noon, and the captain not appearing, they went away. The day was very stormy, and no removal of the block of marble could safely have been made by the use of shears. On Monday morning, the vessel being in readiness to proceed to Hunter's Point to load, procured a tug for that purpose, and in passing out of the slip stopped a short time at the derrick, where the block was speedily discharged by Mr. Smith, and the vessel then proceeded on her way. She now claims three days' demurrage.

Upon the facts stated the claim of demurrage seems to me destitute of any equity. Had the vessel got her spare anchor and chains aboard on Friday or Saturday and been then really ready to move, there is no reason to suppose any refusal would have been made to the request to suffer her to be hauled along-side the derrick for the purpose of discharging the marble. The request was a reasonable one, and I am satisfied the moving of the ship would have been attended by no difficulty or danger. The condition of the bill of lading, requiring removal of the marble within the short time of six hours after the vessel was ready to discharge, imposed on the captain at least the duty of permitting her to be hauled in the usual manner and at the consignee's expense to a place where the discharge could be made expeditiously. Upon an agreement for discharge in so short a time, it must be implied that the ship would accede to any reasonable and customary facility for discharging. This was twice proposed to the vessel and twice refused, the captain not being present to answer, though it was business hours and he was long waited for. The mate's answer, that the vessel was not ready to move on account of the spare anchor and chains which were still on shore, shows that the vessel was not in fact "ready to discharge" the marble within the meaning of the bill of lading, because she was not ready to be moved the short distance of 250 feet, which the consignee had the reasonable and customary right to have her moved at his own expense. On Monday she had got her anchors aboard and was then ready, and she then proceeded to the derrick and discharged the block with no substantial detention. I think it is clear that she did not in fact sustain any detention through any acts of the consignee; and the libel should be dismissed, with costs.

THE VADERLAND, etc.

(District Court, S. D. New York. December 29, 1883.)

ADMIRALTY PRACTICE—NEW TRIAL—APPEAL.

After a hearing in an admiralty cause in this court, and a decision rendered upon complicated questions of law and fact, the cause should not be reopened and a new trial had for the introduction of further evidence in this court, where there does not appear to have been any mistake or misapprehension in regard to the evidence taken and the facts proved; such relief should be sought upon appeal to the circuit, where the additional facts may be proved as a matter of right.

In Admiralty.

Rodman & Adams and R. D. Benedict, for Wolff & Co.

Edward S. Hubbe and John E. Parsons, for steam-ship company.

BROWN, J. Upon the motion for a rehearing in the above case, (18 FED. REP. 733,) it does not appear to the court upon the evidence taken that any error was committed in holding the white damage to be within the exception of the bill of lading under the term "rust," in the absence of any evidence of the restriction of the meaning of that word by commercial usage to the rust of iron. If the court is in error in that respect, an appeal to the circuit court is the appropriate remedy. So far as the supposed error of the court rests upon the alleged commercial use of the word "rust" in a restricted sense, if such restricted use can be proved through further evidence, that error can also be corrected on appeal by the introduction of the appropriate testimony to prove the fact; and relief must be sought in that manner, and not by a rehearing, or by an opening of the cause for further evidence on a new trial in this court. The court, being unable from the testimony to find satisfactorily what was the actual cause of the white damage, or by whose fault it arose, was bound to examine and consider the terms of the bill of lading. The failure of counsel on both sides to aid the court by any consideration of the meaning of the word "rust," did not relieve the court from this duty. If any actual misapprehension or mistake in regard to the facts proved had appeared to have been committed, the court would gladly seek to correct it; but that does not appear.

According to the settled practice, therefore, the relief desired should be sought upon an appeal to the circuit court; and as such appeal would, doubtless, be taken by one side or the other, in any event, the final disposition of the cause will in fact be expedited by following the usual practice; and the motion for a rehearing should be denied.

THE ELVINE.

(District Court, S. D. New York. February 11, 1884.)

SHIPPING—SEAMEN—SHIPPING ARTICLES—EVIDENCE.

Though shipping articles may be attacked by the seamen, and shown by parol to be incorrect, fraudulent, or void; yet, in case of dispute as to the amount of wages agreed on, the shipping articles will control, the seaman being competent to bind himself thereby, unless the articles are shown to be invalid by a reasonable and satisfactory preponderance of evidence.

In Admiralty.

Beebe & Wilcox, for libelant.

Jas. K. Hill and Wing & Shoudy, for claimants.

Brown, J. I have no doubt that the shipping articles of July 31, 1883, were signed by the libelant; the handwriting is admitted by the libelant to be like his, and a comparison with other signatures of his leaves, I think, no question on that point. These articles fix the rate of wages at \$40 per month. Shipping articles are required to be signed under section 4520; and though their correctness may be attacked, and though they may be shown by parol to be incorrect, fraudulent, or void, (*The Cypress*, Blatchf. & H. 83; *Page v. Sheffield*, 2 Curt. 377, 381,) unless this be satisfactorily established, the seaman will be held bound by the terms prescribed in them. *The Atlantic*, Abb. Adm. 451; *Slocum v. Swift*, 2 Low. 212; *Willard v. Dorr*, 3 Mason, 161, 169. The intention of the master to pay but \$40 per month is clear, not only from his own testimony, but from that of other witnesses. The testimony of the libelant and of other witnesses who corroborate him, that he declined to ship for less than \$45 per month, produces no little embarrassment in the testimony; and in such a case the original articles, as they stand, must control. There is no such clear and satisfactory proof of either fraud or mistake as would justify the court in disregarding them.

The evidence as to the articles signed at Fernandina is equally conflicting. It is unfortunate that the original document is not produced by one of the parties. The certified copy could not furnish any information by inspection as to whether the original articles had been altered from \$45 to \$40 per month. The certified copy of the articles is made competent evidence by section 4575, and the burden therefore seems to be upon the libelant to prove that it is incorrect. The original articles, however, signed in New York, and bearing no marks of alteration, give the libelant's wages as \$40 only; and these articles were designed to cover the whole period of the libelant's services. On the whole, I think this original must be held to be controlling, and that the libelant should be entitled to a decree at the rate of \$40 per month only.

THE GARDEN CITY, etc.

(District Court, S. D. New York. January 31, 1884.)

1. COLLISION—RIVER AND HARBOR NAVIGATION—RIGHT OF WAY.

A steamer meeting another in the fifth situation, and bound to keep out of her way,—if able to do so through stopping and backing,—has no right to go to the left and attempt to cross the bows of the other when there is not sufficient time or space to pass in that manner without a collision, unless the other vessel either stops or changes its course; the latter has the right of way, and the right to proceed on her course without obstruction.

2. SAME—SIGNALS—TIMELY NOTICE.

In river and harbor navigation, although for good reason a vessel may, under the inspectors' rules, signal that she will go to the left, instead of the right, these rules require early notice of such intention, and such a notice is not early or timely when it would compel the other vessel to stop in order to avoid a collision, unless in a situation where the former vessel has no other alternative.

3. SAME—INSPECTORS' RULES.

Under the inspectors' rules the vessel signaled is bound to give an answer promptly, either of assent or dissent.

4. SAME—MUTUAL FAULT.

Where the ferry-boats G. C. and R. were approaching each other in the East river in the fifth situation, and the latter being on the former's starboard hand, and the G. C., instead of stopping and backing, as she might have done, signaled with two whistles, and at the same time starboarded her helm so as to cross the R.'s bows, and the latter made no answering signal, and the G. C., after going about a length under a starboard wheel, again signaled with two whistles, to which there was no response, and she then stopped and backed until the collision, which happened shortly after, and the evidence being contradictory as to the other details of the maneuvering of the two vessels, *held*, that both were in fault; the G. C., for undertaking to pass to the left and cross the R.'s bows without assenting signals, and the latter for not answering as required, and thereby preventing the embarrassment and confusion of the G. C., which in this case plainly contributed to the collision.

5. SAME—EXCUSE—DEPARTURE FROM RULES.

Though the G. C. ran in connection with railroad trains, and the avoidance of unnecessary stops was desirable, and though the usual course of the R. at this point was to swing to port, *held*, that these facts, though a sufficiently good reason for the signal of two whistles, given by the G. C., regarded merely as a proposition or request to pass to the left, were not a justification for any departure from the rules of navigation, without assenting signals from the R. in reply.

In Admiralty.

Benjamin D. Silliman, for libellant.

Shipman, Barlow, Larocque & Choate, for claimant.

BROWN, J. This action was brought to recover damages for a collision between two ferry-boats—the Republic and the Garden City—about 4:30 o'clock, in the afternoon of August 17, 1878, off Catharine street, in the East river. The day was fair, the wind light, the tide three-quarter ebb. The Republic belonged to the Catherine-street ferry, and was proceeding across the river towards Main street, Brooklyn. The Garden City was coming down the river from Hunter's Point, with the tide, to her slip at James street. At the time of collision the Garden City was heading nearly down the river, but a little

v.19,no.7—34

toward the Brooklyn shore; the Republic was going nearly across the river, but heading a little downward. The starboard bow of the Garden City, which was much the larger boat, struck the port bow of the Republic, and her guards ran over the deck of the latter, inflicting some injury. The blow was comparatively a light one, as both boats were nearly stopped.

According to the account given by the pilot of the Republic, as he was about clearing his slip on the New York shore he was obliged to stop to allow the steam-boat Superior to go up the river just in front of him. As she passed him he saw the ferry-boat Alaska about 600 feet up river, off Market street, coming nearly directly down river, but heading a little to the westward, and estimated to be about 300 feet off the New York shore, and the Garden City, as the pilot estimated, about six or seven lengths—that is, about 900 feet—astern of the Alaska, and nearly in her wake, but about half a breadth further out in the river. He testified that as the Superior passed him he gave one whistle, intended for both the Alaska and the Garden City, which, the pilot says, was replied to with one whistle by both; that he then went ahead; that the Alaska slowed and stopped, passing astern of him; that the Garden City, instead of stopping or slowing, sheered out into the river when about five or six lengths off—i. e., about 700 feet—and blew two whistles; that he then stopped his own engines, but did not blow any whistle in reply to this signal of the Garden City; that then the Garden City stopped her engines; that he then started ahead, and blew one whistle simultaneously, being then about a length from the Garden City, and that the latter thereupon started ahead, blowing two whistles; that he then stopped and backed until the collision; that he was obliged to go ahead in order to get out of the way of the Alaska; that there was not room to swing round up river and go between the Alaska and the Garden City; and that the collision was about 300 feet off the New York shore, or at least not more than one-quarter across the river.

The pilot of the Garden City testifies that he was about 100 feet further out in the river than the Alaska, and considerably astern of her; that he heard the signal of one whistle from the Republic and the Alaska's reply of one whistle; that he did not understand that signal to be intended for him, and gave no whistle in answer to it, and that he did not blow one whistle at all; that when about off pier 37 or 38, and some 500 or 600 feet distant from the Republic, and five or six seconds after her one whistle, he gave her a signal of two whistles and immediately starboarded his helm, to which the Republic made no reply; that four or five seconds afterwards, and after passing about another length, and when off pier 37, he blew two whistles again, and at the same time stopped and backed, and kept backing with his helm to starboard till the collision; that the Republic did not, after she had signaled the Alaska, make a stop, as alleged, and then go ahead a certain time with one whistle; that he himself

did not, as alleged, go ahead after stopping and backing; that the Republic did not whistle at all after her first whistle to the Alaska; that under his own reversed engine he got seven or eight turns backwards, and would probably have been entirely stopped by another turn; that when he blew his second two whistles and stopped and backed off pier 37, the Alaska was about half a length out and away from the slip, and about 300 feet from him, and that the Republic was also about 300 feet from him, and nearer the New York shore, heading a little up river; that the usual course of the Catharine-street ferry-boats at that time of tide was to come out from the slip under a starboard helm and go up the river, swinging within a space of about 300 feet.

The other witnesses called upon each side, though differing in some details, generally corroborate the account given by the respective pilots, as above stated, the greater number of experienced nautical men being undoubtedly on the side of the libelants. The pilot of the Alaska states that the Garden City was about 400 feet astern of him when the Republic's one whistle was given, and about 50 to 75 feet further out in the river; that the Republic passed from 200 to 300 feet ahead of the Alaska; that she could not have swung round so as to go, as the Superior did, between the Alaska and the Garden City; and that the latter might have avoided the collision by slowing and backing, as the Alaska did.

Without considering more minutely the differences in the accounts given by the respective parties, nor relying much on the various estimates of distance given, it seems to me clear that the chief responsibility for this collision must rest with the Garden City, and that there are several distinct faults with which she is chargeable.

1. There were no such obstructions as to prevent the application of the ordinary rules for the navigation of the East river. The Garden City in coming down had the Republic upon her own starboard hand; the latter was seen in sufficient time for the Garden City to avoid her, and, by the statutory rule, the Garden City was therefore bound to keep out of the way, leaving the Republic free to keep her course. The evidence, as it seems to me, leaves no doubt that had she slowed and backed, as the Alaska ahead of her did, there would have been no difficulty. The two vessels being in the fifth situation, the ordinary course required of the Garden City by the inspectors' rules was to pass to the right; that is, astern of the Republic. There was no controlling reason compelling her to adopt the exceptional course of going to the left and attempting to cross the bows of the Republic. This departure from the ordinary rule was clearly the primary cause of the collision; and where such departures are not called for by any controlling necessity, and are adopted upon the mere option of the vessel bound to keep out of the way, they ought to be held to be at the peril of the vessel adopting them, un-

less it appears that, notwithstanding such departure, the collision was brought about solely by the fault of the other vessel. *The Chesapeake*, 5 Blatchf. 411; *The St. John*, 7 Blatchf. 220. That cannot be held to be the case here, notwithstanding the fault of the Republic in not answering the signal of two whistles, because I am satisfied that had the Republic kept her course without stopping, as she was entitled to do, whatever be considered her course, whether straight across the river as then headed, or swinging up the river as customary, the collision could not have been avoided, and that the only way of avoiding it, after the Garden City's two whistles and star-board helm, was by the Republic's stopping and backing, which the Garden City had no right to impose upon her.

2. While the inspectors' rules recognize (page 38) circumstances in river and harbor navigation in which "for good reason the pilot may find it necessary to deviate from the rule requiring him to go to the right," they also require that in such a case he shall give "early notice of such intention by two blasts of the steam-whistle." Except in some exigency of navigation which did not exist here, no notice can be considered early or timely, on the part of a vessel which is bound to keep out of the way, that would require the other vessel to stop in order to prevent a collision, for if this were allowed, then the vessel bound to keep out of the way would, in effect, reverse the obligation of the statute, which provides that she shall keep out of the way and that the other shall keep her course. The former, in effect, would be dictating to the latter, and compelling the latter to stop and give way contrary to the statute, which declares that the former is the vessel which shall keep out of the way of the latter. The notice then must be so timely as not to require the other boat to stop. There may plainly be special circumstances in river navigation where this rule would not apply, as where a boat is coming down with the tide and another is coming out of a slip too near to be avoided by going astern of her; and so in various other circumstances which might be instanced. The rule referred to applies only to ordinary navigation where there is no obstruction and nothing to prevent the vessel bound to keep out of the way from doing so, and giving time by signals as to her proposed course. The signal of two whistles given by the Garden City I must hold, was not in this case such early and timely signal as is required by the inspectors' rules, because, in the situation of these two ferry-boats at that time, I regard it as impossible for the Garden City to have avoided the collision by going to the left unless the Republic stopped and backed. As the Garden City could not require this of the Republic, so long as she could herself keep out of the way of the Republic by slowing and going to the right and allowing the Republic to keep on in her course as she had a right to do, it follows that under these circumstances her signal was too late, and that the time had already passed when the Garden City might lawfully go to the left, of her own option, inde-

pendent of any assent of the Republic, and that the Garden City was in fault for attempting to do so.

3. Again, there being no necessity for the Garden City to go to the left, and the signal of two whistles being given too late as the exercise of a positive right to cross the bows of the Republic, since that would have compelled the Republic to give way, that signal was lawful at the time it was given only as a proposition or request to the Republic to be allowed to pass to the left by the latter's aid and consent. The pilot of the Garden City had no right, therefore, to starboard his helm immediately on giving the signal, as the evidence shows that he did, before receiving an assenting response from the Republic. This was in effect dictating the course of the other vessel and depriving her of the right of way to which she had the superior right, under penalty of collision if she failed to yield. Until the Republic assented to this exceptional course, as proposed by the signal of two whistles, the Garden City had no right to act upon it. Her doing so manifestly contributed to the collision, and, upon this ground, as well as the others, she must, therefore, be held responsible. *The Johnson*, 9 Wall. 146, 155; *The Milwaukee*, 1 Brown, Adm. 313, 325; *The Delaware*, 6 FED. REP. 198; *The Franconia*, 3 FED. REP. 397, 401, 403; *The Hudson*, 14 FED. REP. 489.

While the primary responsibility for this collision rests upon the Garden City, for the reasons above stated, the Republic seems to me as plainly chargeable with violation of the inspectors' rule, which required her to "answer promptly" the signal of two whistles given by the Garden City proposing her exceptional course. These rules, enacted in conformity with section 4412 of the Revised Statutes, are of binding obligation. The supervising inspectors were authorized to frame these rules in consequence of more particular provisions, and more exact information being required by pilots in regard to each other's movements in rivers and crowded harbors than the ordinary rules of navigation afford. Nowhere is the need of these rules more urgent and an observance of them more essential than in navigation about this port. In the case of *The B. B. Saunders*, 19 FED. REP. 118, I have recently held it a fault to maneuver in accordance with a signal before answering it. The Republic in this case did not answer either of the two signals of the Garden City. Having disobeyed this rule, to avoid being charged with responsibility, the burden of proof is upon the Republic to show that her failure to reply could not possibly have affected the result. *The Pennsylvania*, 19 Wall. 125, 137. The libellant's counsel urges that this did not affect the result because the boats were already so near to each other that a collision was then inevitable. This contention seems to me not sustained by the evidence; and it is also attended by considerable improbability. The evidence shows that there were two signals given by the Garden City of two whistles each, besides several toots indicating danger. The pilot of the Garden City testifies that he had given no previous signal of one whistle to the Republic; so that, ac-

According to his testimony, his first two whistles were the first signal given by him to the Republic. Now, it is certainly highly improbable that a pilot of any experience or sense of responsibility, such as the pilot of the Garden City certainly was, would give a signal proposing to cross the bow of a ferry-boat for the first time when he was so near to her that a collision was inevitable; and the improbability is still greater if he had previously agreed to go to the right by a signal of one whistle. The testimony of the pilot of the Republic, moreover, is to the effect that the Garden City stopped at some time after her first two whistles, whereupon he started his own engine ahead, and that he might, as he thinks, have thus cleared the Garden City, if the latter had not again started ahead under two whistles. The engineer of the Republic testifies that under this, her last, headway she made about six revolutions. This must have carried her forward some considerable distance. The two vessels were approaching each other nearly at right angles, and as they collided at the bows, and both boats were then almost stopped, a very little less forward motion on the part of the Republic would clearly have prevented the collision. These considerations, as it seems to me, prove conclusively that when the two whistles of the Garden City were first given, the situation and heading of the boats could not have been such as to involve any necessity of a collision. The situation was not *in extremis*, as in the case of *The Chesapeake*, *supra*.

Nor can it be said that the failure of the Republic to answer the first two whistles of the Garden City did not result in contributing to the collision, because she at once stopped her engines, assuming it to be true that she did so; for there is no question that her failure to respond led the Garden City, after going about a length, to repeat her signal, and at the same time to stop and reverse her engines. Even this signal was not responded to; for the Republic, according to her own story, then went ahead, and, in doing so, as stated above, collided gently with the Garden City. Had the Republic intended to keep on at all after the Garden City's first two whistles were given, considering that this would, as I find, and as the libellant's witnesses testify, have involved danger of collision, she should have replied to that signal promptly with one whistle, showing her dissent; and, in that case, the pilot of the Garden City would have known of the dissent and that he must reverse at once, as he did afterwards, instead of waiting for a reply until he had gone a length ahead, when his signals were repeated, and when he did commence to back. This difference of time in backing was of itself sufficient to have prevented the collision, and was the direct result of the Republic's failure to respond with one whistle if she did not intend to accede to the course proposed by the Garden City. If, on the other hand, the Republic did intend to assent to the signal of two whistles, and to give way to the Garden City, as it would seem that she did intend, from the fact of her stopping, if the account given by her pilot be correct, then she was equally bound to reply "promptly," so as to permit the Garden

City to go ahead confidently and without stopping. Had such assenting response been given and the Garden City allowed to continue going ahead, instead of backing, the Republic stopping meantime, as her pilot says she was then stopped, the collision could not have happened. I have much doubt, however, as to this part of the account given by the pilot of the Republic. The story of the pilot of the Garden City seems the more natural and probable. This part of the case shows evident embarrassment and confusion, occasioned by the failure to respond to the signals, as required; and such failure has been repeatedly held to be a fault. *a The Clifton*, 14 FED. REP. 586; *The Grand Republic*, 16 FED. REP. 424, 427; *The Beaman*, 18 FED. REP. 334; *The B. B. Saunders*, *supra*.

The Garden City ran in connection with railroad trains, and it was a natural and lawful purpose to make good time and as few stops in navigation as possible. Her pilot had a right, also, to take into consideration the usual practice of ferry-boats to swing to the northward on coming out of their slip at that time of the tide. While neither of these considerations, nor both combined, could furnish any justification for any disobedience or neglect of any rule of navigation, general or local, nor authorize the Garden City to cross the bows of the Republic without the consent of the latter, unless she could do so without compelling the Republic to stop, they did furnish good and sufficient reasons for proposing to pass to the left, which her pilot evidently supposed would accommodate both, and required the Republic to answer promptly under the inspectors' rules.

Nor can I find any justification for the Republic's going ahead in the manner stated by her pilot, if his account in that particular be correct, after he had once stopped, on hearing the Garden City's first two whistles. For the Republic must then have been to the westward of the Garden City's course; under her six revolutions ahead the Republic must have made a considerable distance to the eastward, so that whether the Garden City went ahead or backed, it was the last movement ahead by the Republic which immediately contributed to the collision, and it could not have happened without that. The Garden City was, doubtless, already in fault, for the reasons I have stated above; and her fault was apparent, at least, to the pilot of the Republic; but this did not dispense with the use of all reasonable means and nautical skill on the part of the Republic to avoid a collision, notwithstanding the existing faults of the Garden City; and the danger of collision was then so evident that both alike were bound to keep away from each other. *The C. C. Vanderbilt*, 1 Abb. Adm. 361, 364; *The Vim*, 12 FED. REP. 906, 914, and cases cited.

For these reasons the Republic must also be held in fault, and the damages to her, less the damages to the Garden City must be apportioned between the two. The libelants are entitled to a decree accordingly, with costs, with an order of reference to ascertain the amount, if the parties do not agree.

ASTSRUP v. LEWY and others.

LEWY and others v. THE EXCELLENZEN SIBBERN, etc.

(District Court, S. D. New York. February 7, 1884.)

1. SHIPPING—IMPROPER STOWAGE—DAMAGE TO CARGO.

Where in a short but violent gale the bottom of a bark gave way in the middle from four to five inches, through overloading with iron rails amidships, causing a bad leak, whereby a cargo of rags was damaged, *held*, that the negligence of the vessel in improper stowage was the proximate cause of the leak, for which the ship was responsible, and that the consequent damage was not through perils of the seas, within the exception of the bill of lading.

2. SAME—MASTER'S AUTHORITY TO SELL—NOTICE.

The master has no authority to sell damaged cargo in a foreign port without notice to the owner or shipper, when there is abundant time and means for communication with him.

3. SAME—CASE STATED—BILL OF LADING—QUALITY UNKNOWN.

Where the bark E. S., laden with rags and railroad iron, in a voyage from Libau to New York, sprung a leak in a gale in the North sea through overloading amidships, whereby some of the rags were wet; and being obliged to put in at Cowes for repairs, the cargo was all unloaded, and a considerable portion of the rags was found to be hot, steaming, and rotten, and not capable of being put into condition to be brought to New York; and communication being practicable with the shipper at Libau by mail within three days, and by telegraph daily; and that portion of the cargo not capable of being brought to New York having been sold after repeated surveys, and under the advice of the consul, after notice sent by him to the shipper at Libau without answer or direction received in reply, and the sale being fairly made, *held*, that the sale was justifiable, but that the vessel was responsible for all loss occasioned by the leak through overloading amidships. *Held, also*, that under the terms of the bill of lading, "quality unknown," the vessel might show bad condition of the rags when shipped; that the steaming condition of the rags on the morning following the gale was an indication that part were probably shipped in bad condition; and there being no direct evidence of their condition when shipped; *held*, that that question should be submitted for further evidence before the commissioner in connection with proof of damage occasioned by the ship's leak.

4. EVIDENCE—COMMISSION—ANSWER TO GENERAL INTERROGATORY.

Upon commission to examine the consul at Cowes as a witness in behalf of the bark, the consul, in reply to the last general interrogatory, whether he knew anything further to the advantage of the ship, having replied that he and his firm communicated with the shipper at Libau before the sale and received no answer or direction; the subject being nowhere else alluded to in the pleadings, interrogatories, or testimony, and the commission having been returned and filed a year before the trial, *held*, that the answer should stand, and that it was sufficient *prima facie* evidence of proper communication with the shipper in the absence of any countervailing evidence, and that the motion to suppress that answer or for leave to cross-examine by further interrogatories should have been made before trial.

The above libel *in personam* was brought to recover the sum of \$1,566.62 freight for 941 bales and 66 bags of rags shipped on the bark Excellenzen Sibbern, at Libau, April 22, 1880, to be delivered in New York. The libel *in rem* was brought to recover damages for the non-delivery of 524 bales and 28 bags, part of the above shipment, valued at \$15,000. The rags not delivered were sold by the master at Cowes, at which port he had been obliged to put in, in distress. The cargo was there unloaded for the purpose of repairing

the ship, and a portion of the rags being found so damaged by wet, heat, and rotteness that, despite all efforts to improve their condition, they were deemed unfit to be reshipped, they were condemned on survey and sold, so far as salable, and other portions thrown away as worthless. For the vessel, it was contended that the injuries to the bark were caused solely by the severe weather which she encountered in the North sea; that the rags were in a wet and unfit condition when shipped, which in part caused their damaged condition at Cowes; and that the sale of the damaged portion was necessary; was effected in the best manner; and was made after notice sent to the shipper, (the bill of lading being to order,) to which, however, no answer was received. On behalf of the shipper, it was contended that the rags were all shipped in good condition; that the damage to the vessel, and her consequent leaking, and the injury to the rags, arose from the unseaworthiness of the vessel, through the improper stowage of the iron, too great weight being placed between the main and the after hatch, which caused the bottom of the vessel to give way and her keel to drop from three to five inches; also, that no proper communication to the shipper was proved, and that the sale of the rags at Cowes was unauthorized.

The Excellenzen Sibbern was a Swedish vessel, 359 tons register, about 500 tons burden, built in 1874, and rated in 1877 in the French Veritas as A 1; length, 130 feet; beam, 27 feet; depth, 14 feet; and single decked. Her cargo on this voyage consisted of 1,362 old iron T rails, weighing about 251 tons, and 186½ tons of rags; in all 437 tons weight. Both were shipped by H. Seelig, at Libau, to be delivered in New York to order. The vessel commenced loading on February 26th; 400 rails were put in the bottom of the ship; then rags; then above the rags, in a sort of trunk-way running fore and aft along the middle of the vessel, the remaining 963 iron rails; and then rags on top. The rags were stowed by a regular stevedore; the rails by a common laborer. The bark, according to the testimony of the master, was in perfect condition on leaving Libau, having had a new set of sails and new rigging. She sailed for New York on April 9th, touched at Copenhagen, and left the Elsinore roads on the evening of the 14th. On the afternoon of the 21st she encountered a heavy gale in the North sea, which abated on the evening of the 22d. On the morning of the 23d the vessel was found leaking heavily, and, on removing the hatches, it was discovered that the bottom of the vessel had given way in the middle, so that five of the stanchions running from the keel to the deck-beams were from two to five inches short. The mate testified that the bark sprang aleak on the night of the 21st or 22d; that they "could hardly keep it up with the pumps; it kept us pumping all the time;" that after the storm "we got down in the hold and could see that the bottom was sunk four inches, from the fore part of the main-hatch to the after-hatch; she was all the way along a little, a very little, from the fore-mast to the mizzen-mast; all the keys were

broken, and all the stanchions from the main-hatch to the after-hatch;" that "she had given way a little in the water-ways and seams;" the distance she had sunk down "when it was heavy seas was between four and five inches; she jumped up and down; the bottom was keeping jumping up and down on her;" and that after arrival at Cowes the bottom was still sunk some three inches or three and a half inches, and made at anchor about two or three inches of water per hour. On the 23d, when the hatches were opened, the bales of rags were in a heated and steaming condition. On discharging the cargo at Cowes, a few days after, some of the bales were so hot as to burn the hands in handling them. On the 28th the master, having instructions from the owners of the ship, ordered the requisite survey. In the report of April 29th it is stated that the vessel "had gone down very much in her center between the fore-part of the main-hatch and the fore-part of the after-hatch. In this part of the ship the hold stanchions were torn away from the beams and had sunk about two inches; the main-mast and the beams appeared to have gone down about two inches," and the main-mast and pumps the same. In the report of the survey of the cargo, May 11th, 524 bales and 28 bags of rags were reported in a very wet and damaged state; many of them so greatly heated as to be actually smouldering; they were directed to be kept separate and in the open air as long as practicable; with the view of partly drying them. Ten other bales, slightly wet, were directed to be opened, dried, and repacked. Upon a further survey directed by the consul, the surveyors, on the twelfth of June, reported that on previous surveys, particularly on the third of June, the bales and bags above referred to had been found extremely wet and damaged, a large number of them greatly heated, and many in a rotten and partially decomposed condition; that, where practicable, the bales were opened and exposed to the air with the view of improving their condition, and that no perceptible improvement was effected; and that, believing that they could not reach New York without becoming entirely worthless, they had on the third of June condemned the whole of said bales and bags as quite unfit for shipment and had recommended their sale at auction; and that on the eleventh of June they had again re-examined the rags with a rag merchant, and that they adhered to their previous conclusion, in which the merchant concurred. About May 25th notice of the intended sale of the rags for June 15th was given by advertisements put in the *Shipping Gazette* and in the local and London newspapers; hand-bills were also extensively posted. The sale was conducted by an auctioneer accustomed to the sale of all kinds of damaged cargoes, who testifies that the sale was attended by at least 150 persons, many of whom bid for the various lots; that the competition was brisk; and that he considered the sale satisfactory for goods in such a damaged condition, many of the bales being quite rotten, and "having to be packed in bags before they could be weighed."

The consul, who was examined upon commission, in answer to the general interrogatory if he knew of any other thing of benefit to the vessel or her owners, said :

"My firm, as agents, and the captain personally, communicated with the shipper of the cargo at Libau on the arrival of the ship at Cowes, and afterwards; but the shipper made no reply to such communication nor gave any directions; the parties claiming to be the owners of the rags were not communicated with, because neither their names nor addresses were known."

The repairs of the vessel being completed, she left Cowes June 25th and arrived at New York on the thirteenth of August. A portion of the rags delivered in New York, it is claimed, were in a damaged condition. The bill of lading of the rags contained the following clause: "Quality, weight, and marks unknown; the rags loaded under and over iron."

Sidney Chubb and Chas. M. DaCosta, for the shippers.

Hill, Wing & Shoudy, for the Sibbern and owners.

BROWN, J. Upon the evidence in this case it must be held that the sinking of the keel and bottom of the bark prior to her arrival at Cowes was an unusual and extraordinary occurrence. Cumming, a stevedore, one of the experts in behalf of the vessel, testified that with heavy cargoes on the ship's bottom, it was not unusual that there should be a sinking of from one to three inches, but that he never knew of a case of a sinking of five inches; and that, in his judgment, 150 tons, with possibly 20 additional, would have been a suitable weight over a space of from 40 to 60 feet along the center of the vessel, and that the sinking of the bottom, to which he refers, might or might not cause the ship to leak, according to circumstances. The mate says that her bottom dropped from four to five inches at sea, and from three to three and a half when lying still at Cowes. Karbek, the carpenter, testified that "the ship gave way; she sank in the middle four inches." Other witnesses make it from three to four inches. Although the bark met with a severe gale, which came on during the afternoon of April 21st, it was scarcely more than of 24 hours' duration, since the protest expressly states that it abated on the evening of the 23d. The sea is spoken of as running very high, and some water swept the deck; but, it must be noted, that nothing was carried away, nor a spar lost; and it seems to me that the testimony of the experts on behalf of the shippers, and their judgment, considering the circumstances above mentioned, are entitled to the greater weight, and that there was nothing so extraordinary in the weather encountered on the twenty-first and twenty-second of April as to account for the extraordinary result upon the ship, and for her dangerous leaks, had she been seaworthy in both hull and stowage when she sailed. Accepting the testimony of the master, that her hull was in good condition when she left Libau, and her rating A1 three years previous, the only adequate cause that can be perceived for this extraordinary result is in the mode of loading the iron rails,

namely, too great quantity amid-ships. The evidence leaves no doubt that the chief sinking of the vessel at the bottom was in the middle, from the fore part of the main hatch to the after hatch, and this is where it appears, upon satisfactory proof, that the ship was overloaded. Cumming, the expert in behalf of the vessel, would allow as proper but 150 to 170 tons weight along that portion of the ship; the evidence indicates that there were at the least 225 tons within that space, and probably considerably more. Nine hundred and sixty-two of the rails were placed in the trunk-way in that part of the ship; if of average weight, they alone amounted to 176 tons. The trunk-way, which was on top of the first course of rags, was eight feet wide, running fore and aft along the center. The general mode of stowage was approved by all the witnesses, provided the upper course of rails was sufficiently distributed in length fore and aft. While the testimony on this point is not so exact and explicit as could be desired, the inference from the testimony of the mate and stevedore is strong that this trunk-way was amid-ships, and did not extend to the fore-mast, as claimed. The expert for the vessel testified that the frequent loosening of the stanchions, to which he referred, was between the main-mast and the fore-mast, and that there ought not to be weight enough aft to loosen the stanchions in the end of the ship; and that the loosening he referred to was not from the dropping of the keel, but from the ends of the beams going down. In this case, the chief dropping of the bottom was from the main hatch aft; while the captain and all the other witnesses from the ship spoke of her bottom and keel as giving way in the middle; "not worth mentioning," the captain said, "except in the middle." The mate said "the bottom sank four inches, and in the seas kept jumping up and down from four to five inches." The carpenter said "the ship gave way; she sank in the middle four inches." The weight of the cargo in the middle, even according to the testimony of the ship's own expert, with the corresponding special injury and extraordinary leaking arising from her bottom's giving way, particularly in just that part of the ship, seem to me to leave no reasonable doubt that she was overloaded in the center; and the testimony of the master, that the rails were loaded by a common laborer, while a stevedore was employed to load the rags only, would indicate that the overloading of the center arose from a want of suitable judgment and experience in the distribution of the cargo. As I must find, therefore, that this improper stowage was the cause of the vessel's giving way at the bottom, it follows that the ship must answer for the damage caused by the giving way of the vessel and by the consequent leak; since, in such a case, the damage is not to be ascribed to perils of the sea, but to the negligence and fault of the vessel. *Clark v. Barnwell*, 12 How. 280; *The Regulus*, 18 Fed. Rep. 380.

2. Under the circumstances of this case, I cannot doubt that it was the duty of the master, by the general maritime law, to communicate

with the shipper before selling the damaged rags at Cowes. Communication between Cowes and Libau could be had in the ordinary course of mail within three days, and by telegraph within twenty-four hours. There was abundant time and opportunity for communication. The ship was laid up there several weeks for repairs, and the rags were condemned by the surveyors as unfit to be taken to New York on the third of June, a week after the ship's arrival at Cowes. It is not questioned that, under the English maritime law, notice to the owner, where notice is easy and practicable, is an essential condition of a master's authority to sell or to hypothecate either the ship or cargo, whether the object be to obtain money for the repair of the ship, or merely the sale of damaged or perishable goods. *Acatos v. Burns*, 7 Exch. Div. 282; *The Australasian, etc., v. Morse*, L. R. 4 P. C. 222; *Cammell v. Sewell*, 3 Hurl. & N. 634; *The Gratitude*, 8 C. Rob. 240; *The Hamburg*, 2 Marit. Law Cas. 1; *Atlantic Mut. Ins. Co. v. Huth*, 16 Ch. Div. 474. These cases all rest upon one common principle, that the master, by virtue of his general authority, does not have any right to sell or hypothecate either the ship or the cargo; that his authority in these respects rests upon necessity solely and upon the particular emergencies of the occasion; and that this authority is therefore limited by the nature and extent of the necessity. If the owner is at hand and can be easily communicated with, the master must advise the owner of the facts, and take his directions; and where such directions may be obtained, there is neither necessity, nor authority, nor justification for the master to assume to sell or to hypothecate without notice. These principles I understand to be substantially adopted by the supreme court in the case of *The Julia Blake*, 107 U. S. 418, [2 Sup. Ct. Rep. 191,] affirming the judgment of the district and circuit courts of this district. 16 Blatchf. 472. See, also, *The Amelie*, 6 Wall. 18, 27; *The C. M. Titus*, 7 FED. REP. 826, 831; *Butler v. Murray*, 30 N.Y. 88, 99; *The Joshua Barker*, Abb. Adm. 215; *Pope v. Nickerson*, 3 Story, 465; *Myers v. Baymore*, 10 Pa. St. 114; *Hall v. Franklin, etc. Ins. Co.* 9 Pick. 466; *Pike v. Balch*, 38 Me. 302. In a case like the present, where there was no need of selling the cargo for the benefit of the ship, but the sale was made for the reason only that the damaged cargo could not properly be taken to the port of destination, and where there was abundant time and means of communication with the owner or shipper to ascertain his wishes as to the disposition of his goods, there was plainly no necessity for a resort by the master to any extraordinary and exceptional powers. While I should sustain, therefore, the principle invoked by the counsel for the shipper, I am not prepared to find, upon the case as submitted, sufficient evidence of remissness on the part of the master to hold the sale unauthorized.

No question was made as to the want of notice in the pleadings in either of these two cases. In the examination of witnesses upon commission, no question was put by way of examination or cross-ex-

amination upon this subject, nor in the examination of the master here in 1880 was any allusion made to it by counsel on either side. The counsel at Cowes, in his deposition, however, in answer to the last general interrogatory on the part of the ship, stated that his firm, as agents, and the captain personally, communicated with the shipper at Libau; but the shipper made no reply, and gave no directions. From this answer it is obvious that the consul, under whose advice the several surveys and repairs of the ship, as well as the surveys and sales of the cargo, were made, was familiar with the well-settled English rule requiring notice to be given; otherwise he would not naturally have volunteered this testimony without his attention being directed to the subject. This, of itself, furnishes a strong presumption in aid of his own testimony that such communication was sent, and that no answer was received. Upon the trial, counsel for the shipper moved to strike out this answer, for the reason that it was volunteered, and was upon a subject as to which the witness was not interrogated, and as to which there had consequently been no opportunity for cross-examination. The commission, however, had been returned and filed more than a year before the case was brought on for trial, and the court declined to strike out the testimony, for the reason that it was material, and because there had been abundant opportunity either for the motion to strike out to be made earlier, or for the return of the commission for further cross-examination if that had been desired; and as neither party had taken any steps in regard to this part of the commission, the answer should be allowed to stand. Although the consul's answer is quite general, and does not state what particular facts were communicated to the shipper, yet as the evidence of a public officer, acting in discharge of known duties under the maritime law, and in no way personally interested, it seems to me that every intendment is to be made in its favor. The goods being consigned to order, only the shipper's name was known; no other communication or notice was therefore required than to the shipper; and the consul's statement is that they communicated with the shipper at Libau and got no answer nor any directions. During the long time that has elapsed since this commission was returned and filed there has been abundant opportunity to obtain the shipper's testimony by commission, and to show, if such was the fact, that no such communication was ever received, or if received, that it was too late, or for any other reason insufficient. As no evidence of this kind has been procured, and no reason given for not obtaining it, if material, I think the answer of the consul, though brief and general, is nevertheless *prima facie* sufficient evidence of compliance with the obligation to communicate with the owner. The objection upon this ground cannot, therefore, be sustained.

3. In regard to the sale itself I see no reason to doubt that it was fairly conducted, with every reasonable preliminary effort to do the best that could be done, and to realize the best prices for the dam-

aged goods. It appears to have been well advertised; a numerous company was in attendance on the sale, and the competition brisk. No evidence was adduced that the prices obtained were inadequate. The fact that one of the purchasers, shortly after the sale, sold his lot at more or less profit, the amount not stated, is not sufficient evidence that the sale was unfair or the price realized too low.

4. The evidence as to the condition of the rags when the hatches were opened on the twenty-third of April, and when the bark arrived at Cowes on the twenty-seventh, is such that I cannot resist the conclusion that a part of the rags was not shipped in good order. The evidence as to the filthy, rotten, and offensive condition of many of the bales when unladen a few days after the arrival at Cowes, some being so hot as to be actually smouldering, is so strong as, in my judgment, to necessitate the inference of bad condition when shipped. The qualification on the bill of lading, "quality, weight, and marks unknown," takes away any presumption which might otherwise be derived from the bill of lading, of good condition internally when put aboard, and leaves this question entirely open to any inferences which may be properly drawn from the proofs. *Clark v. Barnwell*, 12 How. 272; *The Querini Stamphalia*, 19 Fed. Rep. 123, and cases cited. In the absence of any testimony as to the condition of the rags when shipped, or as to the time within which sound rags might become injured to such a degree from sea-water, the damages, as described by the witnesses, seem to me too great to be ascribed solely to the leak arising on the twenty-second of April.

In the libel filed by Lewy and others, the libelants are therefore entitled to a decree for such damages to the rags as arose from the giving way of the bottom of the vessel in the storm of April 21st and 22d, and a reference will be ordered to compute this damage. As the evidence is very meager and is insufficient to form any confident or certain judgment concerning the condition of the rags when shipped, the whole question touching that matter, as affecting the damages caused by the fault of the ship, may be heard before the commissioner upon this reference on such further evidence as either party may introduce, without prejudice from anything herein contained on that subject. The ship will be responsible for such injury only as is properly attributable to her springing a leak on the twenty-second of April through the giving way of her center, excluding whatever damage may have arisen from any improper packing or condition of the rags then shipped, if any such be found. Upon this reference, also, the condition of the rags that arrived in New York will necessarily form a part of the evidence bearing upon the question of the condition of the rags when originally shipped; and hence any question of damage to the bales which were delivered here should also be determined now, to avoid further suits on the same subject; and an amendment of the pleadings may be made accordingly, as moved for. *The North Star*, 15 Blatchf. 532, 536.

An order in conformity herewith may be settled on two days' notice.

THE ALABAMA.

(District Court, S. D. Alabama. 1884.)

ADMIRALTY—MARITIME LIEN—VESSELS—DREDGE AND SCOWS.

Dredges and scows, though never used in the transfer of passengers or freight, and furnished with no motive power of their own, are vessels, and subject as such to maritime liens for services rendered and supplies furnished.

In Admiralty.

Lyman H. Faith, for Fobes & Co. and Michael Merrigan.

Overall & Bestor and *F. G. Bromberg*, for August Kling and Cavanagh, Barney & Brown.

Pillans, Torrey & Hanaw, for Hyer & Co. and Horsler and others.

J. L. & G. L. Smith and *R. H. Clark*, for claimants.

BRUCE, J. A number of libels have been filed in this court against the dredge Alabama and two scows. One of them is founded upon a claim for towage of the dredge and scows from Mobile bay, Alabama, to Tampa, in the state of Florida. Another is for services of the operator of the dredge while engaged in her operation of dredging, and others are for materials and supplies furnished to the dredge. To these libels exceptions are filed, and one of the exceptions is common to all the libels, and excepts to the jurisdiction of the court on the ground that the claims or contracts sued on are not maritime contracts, and that no lien exists which can be enforced in the district courts of the United States as courts of admiralty. The question raised is whether the things libeled (the dredge and scow) are of such a nature as to make them the subjects of a maritime contract and lien. Evidence has been introduced to show the character of the dredge and scows, the manner in which they are built and constructed, the purpose for which they are constructed and used, and the mode by which they carry on the business of dredging. The evidence shows that the hull of the dredge is built like the hull of other boats or vessels intended for navigation. That she is strongly built to support heavy machinery placed upon her, including a steam-engine which furnishes the power necessary to operate the machinery used in dredging and deepening channels in the water-ways of commerce. The scows are constructed like other decked scows, except that they have in them what are called wells, which are inclosed spaces open in the deck and closed at the bottom of the scows with doors, which wells or spaces receive the earth which is brought from the bottom of the channel by the dredging process, and when filled the barge is towed to some place where the earth is to be dumped, when, by opening the doors in the bottom of the wells the earth passes out, and the scow, relieved of its burden, rises up. Neither the dredge nor the scows have rudder or masts, though it is in proof that some dredges similarly constructed do have masts and sails. The dredge and scows

have no means of propulsion of their own except that the dredge, by the use of anchors, windlass, and rope, is moved for short distances, as required in carrying on the business of dredging. Both the dredge and the scows are moved from place to place where they may be employed by being towed, and some of the tows have been for long distances and upon the high seas. The dredge and scows are not made for or adapted to the carriage of freight or passengers, and the evidence does not show that, in point of fact, this dredge and scows had ever been so used and employed.

It is insisted that structures of the kind described are not vessels, and are not the subjects of admiralty and maritime jurisdiction; that contracts for the service or supply of such structures are not maritime contracts; that, in order to be so, they must pertain in some way to the navigation of a vessel having a carrying capacity and employed as an instrument of trade and commerce, and that the dredge and scows in question have no relation to commerce or navigation, and in no proper sense can be considered instruments of commerce. The function of a dredge and scows, such as we have been considering, is to clean out and deepen channels in the water-ways of commerce so as to aid and facilitate ships in their passage to and from, and while a service of this kind in aid of commerce is a very different thing from commerce itself, yet it could hardly be said to have no relation to commerce or navigation. The relation may not be the most direct, and the authority relied on is not so definite and clear as necessarily to exclude water-craft which may not be engaged or adapted to the carriage of freight and passengers.

In the case of *Thackarey v. The Farmer*, Gilp. 524, the rule is thus stated: "It (the service) must be a maritime service. It must have some relation to commerce or navigation, some connection with a vessel employed in trade. * * *"

In the case cited and relied on by the claimants, reported in *Flippen*, 543, where Judge Brown, in the Western district of Tennessee, had laid down the rule that the contract must pertain in some way to the navigation of a vessel having carrying capacity, it should be borne in mind that it was a case of a raft of logs that was before him, quite unlike the case at bar here. He says the contract must pertain in some way to the navigation of a vessel having carrying capacity; * * * and in the case of *The Farmer*, *supra*, it is said it must have some relation to commerce or navigation, which is certainly no very definite and exact statement of the rule, though perhaps as much so as the question admits, for it is often difficult and even impossible to formulate a general proposition in words that will unerringly suit every case.

To say that the dredge in question has some relation to commerce or navigation is perhaps no stretch of the rule at all, but upon this subject we are to bear in mind not only the idea of commerce in the sense of the carriage of freight and passengers, but the idea of navi-

gation comes into the question as well. The dredge and scow are constructed to float in and upon the waters, they are made to sail, and for navigation, and can be used only in and upon the waters. They may have no motive power of their own, and be moved only by power applied externally, still they have the capacity to be navigated in and upon the waters, and they are water-craft made for navigation, and the dredge in question has actually made voyages on the high seas.

The case of *Cope v. Vallette Dry-dock Co.*, in the Eastern district of Louisiana, reported in 10 FED. REP. 142, and decided on appeal to the circuit court, Justice Woods delivering the opinion, and the circuit judge (PARDEE) concurring, reported in 16 FED. REP. 924, is claimed to be in opposition to this view, but I think it is not really so. That was a case of a claim for salvage services, and in the opinion the court says:

"The structure (a dry-dock) to which they (the services) were rendered, was not designed for navigation, and, being practically incapable of navigation, it had no more connection with trade or commerce than a wharf, a shipyard, or a fixed dry-dock, into which water-crafts are introduced by being drawn up on the ways. As shown by the findings, it had remained securely and permanently moored to the bank for a period of more than 14 years; it partook more of the nature of a fixture attached to the realty than of a boat or ship."

To say that the dredge Alabama, in the light of the testimony adduced in this case, partook more of the nature of a fixture attached to the realty than of a boat or ship, is out of the question. It is essentially in its nature a boat or vessel; and the fact that to operate the dredge it is not necessary to have licensed officers or skilled seamen is not important, for that does not furnish the test or criterion by which the question is to be determined. The doctrine or rule upon this subject is more satisfactorily and more authoritatively stated by the supreme court of the United States, in the case of *The Rock Island Bridge*, 6 Wall. 216, where the court, speaking by Justice FIELD, say: "A maritime lien can only exist upon movable things engaged in navigation, or upon things which are the subjects of commerce on the high seas or navigable waters." The court goes on speaking more particularly to the case there under consideration, and says: "But it [a maritime lien] cannot arise upon anything which is fixed and immovable, like a wharf, a bridge, or real estate of any kind." Though bridges and wharves may aid commerce by facilitating intercourse on land, or the discharge of cargoes, they are not in any sense the subjects of a maritime lien. The court here distinctly recognizes mobility and capacity to navigate as a prime element, in determining what things are the subjects of maritime lien.

Tested by this rule, the scows and dredge in question must be held to be the subjects of a maritime lien. It will not do to say that every water-craft which is not used in the carrying of freight and passengers is therefore not engaged in and has no relation to commerce and

navigation. That is too narrow, is not sustained by the authorities, nor can it be sustained by right reason.

In support of these views, in addition to the cases cited and commented upon, the case of the floating elevator, *Hezekiah Baldwin*, 8 Ben. 556, and *Endner v. Greco*, 8 FED. REP. 411, may be cited.

The result is that the exception to the jurisdiction of the court is overruled.

LEONARD and others v. WHITWILL.

(District Court, S. D. New York. February 6, 1884.)

1. COLLISION—VALUE OF VESSEL—HOW ASCERTAINED.

In ascertaining the market value of a vessel sunk in a collision, the commissioner or court is not restricted to the evidence of competent persons who knew the vessel and testified as to her market value, though that is in general the best single class of evidence.

2. SAME—COST OF CONSTRUCTION.

Where the period of collision is one of great stagnation in the market, and there are no actual sales to furnish a criterion of market value, the cost of the vessel, with deductions for deterioration, especially when the vessel was recently built, may be properly resorted to in determining the value.

3. SAME—CARE AND RETURN OF CREW.

Though the rescue and care of the crew of a ship sunk in a collision is not, in the absence of statutory provisions, a legal obligation in the sense of entailing penalties or pecuniary damages for neglect of it, it is a maritime obligation recognized in the admiralty; and any actual expenses incurred by the surviving ship in cases of collision in the rescue, support, and return to land of the crew of the vessel sunk, should be held a part of the pecuniary damage arising from the collision, and divided between the two vessels, where both are in fault.

4. SAME—DAMAGES—DEMURRAGE.

Where the British steamer A., which, after a collision with a schooner off Long Island, took on board the captain and crew of the schooner which was sunk, and put back towards New York with them, and on meeting a pilot-boat paid £25 for the conveyance of the captain and crew to New York, and then put about on her voyage for Europe, being detained thereby one day, and having consumed £11 worth of coal extra, *held*, that under the maritime law, as well as under the St. 25 and 26 Vict., the steamer should be allowed to bring into the account, as part of her damages arising from the collision, £20 demurrage for one day's detention, together with the £11 for coal, and £25 for the money paid for conveying the captain and crew to New York.

5. SAME—VALUE OF FURNITURE AND PERSONAL EFFECTS.

In estimates of the value of furniture or personal effects lost, a deduction may be made from the market value of similar articles new, according to the period and time of use, notwithstanding the owner's testimony that to him they were as good as new.

Exceptions to Commissioner's Report.

Scudder & Carter and *Geo. A. Black*, for libelants.

Foster & Thomson and *R. D. Benedict*, for respondents.

BROWN, J. The schooner Job M. Leonard having been sunk in the Atlantic ocean, off Long Island, on April 18, 1877, through a collision with the steamship Arragon, owned by the respondent, this

court, by its decree in November, 1879, found both vessels in fault, and it was referred to a commissioner to ascertain the damages. *Leonard v. Whitwill*, 10 Ben. 638. Exceptions to the report have been filed by both parties. The value of the schooner at the time of the loss has been reported at \$20,551. On the part of the libellant three witnesses who had seen the schooner testify that her value at the time of the loss was at least \$26,000; other witnesses for the libellant estimate her at from \$25,480 to \$33,000. Witnesses for the respondent place her value at the time of the loss from \$15,750 to \$18,000. In this wide discrepancy, the mode of ascertaining the value adopted by the commissioner was to take her cost of building, \$24,000, in 1874, and deduct therefrom 6 per cent. per annum for deterioration up to the time she was sunk in 1877, add the cost of a new set of sails recently put on her, less a slight reduction for a short period of use, and then from this deduct 5 per cent. for the difference in the cost of building and consequent market value between the year 1874 and the year 1877.

The libellant's principal exception is to the mode in which the commissioner arrived at the value of the ship, as above stated, insisting that as evidence was given of her market value by persons who had seen her and knew her, that the commissioner had no right to resort to other methods. *The Colorado*, Brown, Adm. 411; *The Ironmaster*, Swab. 443; *Dobree v. Schroder*, 2 Mylne & C. 489. While it is undoubtedly true that the best single class of evidence of market value is the opinions of competent persons who knew the vessel and who knew the state of the market at the time of the loss, it does not follow in any given case, because witnesses testify to certain facts, that either the commissioner or the court is shut up to their evidence without giving any heed to other kinds of evidence which may be offered. The cases cited by the appellant recognize equally the competency of evidence of the cost and deterioration as bearing on the amount to be allowed. Where from stagnation in the market at the time of the loss there is difficulty in fixing the precise market value, a resort to other modes of ascertaining it, especially where the vessel has been built but a few years, is at least allowable to be taken into account in arriving at a conclusion. The evidence shows that in 1877, when this vessel was lost, the market for sailing vessels was in a state of stagnation, and it was almost impossible to ascertain any actual sales which would furnish proper data or any criterion for the determination of the actual market value. The different values sworn to are after all but mere estimates, and not based on knowledge of similar sales in 1877. It is impossible in such cases to determine the amount to be allowed with mathematical certainty. I do not find from the evidence sufficient reason to interfere with the result at which the commissioner has in this case arrived. In the case of *The North Star*, 15 Blatchf. 532, the value put upon the *Ella Warley* by the witnesses varied from \$25,000 to \$110,000; the court fixed it at \$42,000. In the

case of *The Utopia*, 16 FED. REP. 507, the estimates of value ranged between \$8,000 and \$15,000; \$10,000 was allotted.

The charges of the captain for superintendence during the construction of the ship were, I think, rightly disallowed as no proper part of the cost of her building.

Another item excepted to by the libellant is the allowance by the commissioner of certain expenses incurred by the ship in providing for the captain and crew, in consequence of the sinking of the schooner at the time of the collision. These men were obliged to take refuge upon the steamer. Instead of taking them with her to Europe, she returned towards New York, and after proceeding a part of the way, came up with a pilot-boat, to which she transferred the captain and crew of the schooner, paying £25 for conveying them to New York, whereupon the steamer turned about and proceeded on her voyage. The steamer was detained in this way about a day, and consumed additional coal to the value of £11. The commissioner has allowed the value of the extra coal, the £25 paid, and £20 as demurrage for the detention of the steamer in going back with the crew, as part of her damages arising out of the collision. Counsel for libellant claims that the expenses thus incurred, amounting to £56, for the return of the captain and crew to New York, were not legal obligations on the part of the steamer, and are therefore to be regarded as charges voluntarily incurred, and not a ground of compensation in this account. In the case of *The Mary Patten*, 2 Low. 196, where both vessels were in fault, an allowance was made to one of the steamers for towing into port the other which was disabled, not by way of salvage, but as a *quantum meruit* for an act which was proper and necessary, and for the benefit of both parties, and therefore as part of the damage which the common fault had caused to the steamer. LOWELL, J., says in that case that "the duty to stand by and save life, at least, cannot be said to be of strictly legal obligation, because no law has yet visited the offender with damages for a breach of it." Nevertheless, the obligation of the ship not disabled, in cases of collision, to render all possible assistance to the injured vessel and to her crew, has been recognized as affecting the pecuniary rights of the parties when suing in admiralty. In the case of *The Celt*, 3 Hagg. 321, Sir JOHN NICOLL, in a suit against the ship that was uninjured, while he dismissed the libel because it appeared that the collision arose from no fault of the vessel sued, yet he condemned her in costs and expenses because the master had neglected to render assistance to the vessel as requested, and after taking her master and crew aboard his own vessel, had landed them in a state of destitution on the coast of Ireland.

The schooner in this case having been sunk immediately through the fault of both, some provision for her master and crew was necessary. They could not be left to drown or starve. If not returned to New York, the nearest port, they must have been taken to Europe

and back, and supported in the mean time. The necessary care of the master and crew, upon the sinking of their ship, necessarily devolved upon the Arragon, which was substantially uninjured by the collision; and the expenses necessarily attending such care should be deemed to have been incurred in the performance of a maritime duty, and not as a mere voluntary charity. Practically, these expenses were unavoidable. They were the immediate and necessary result of the collision, and consequent sinking of the schooner; and as the collision arose from the joint fault of both, these charges, which were the unavoidable result of the collision, should be held to be at the expense of both. There is no reason why they should be borne by one rather than by the other. In a court of admiralty, at least, the obligation to provide for the master and crew of the sinking ship should be regarded as obligatory, so far as to entitle the ship rendering assistance to the other to bring the necessary expense of doing so into the common account. The Arragon in this case, moreover, was an English steamer, and by 25 and 26 Vict. c. 63, § 83, failure to render such assistance is declared to be misconduct; and by that act the duty was imposed upon her master to render to the other ship and to her master, crew, and passengers such assistance as might be practicable, and failure to do this is not only made presumptive evidence that the collision was by his own wrongful act, but would have made the master liable to have his certificate canceled for misconduct. This statute having thus made the assistance to the crew of the schooner legally obligatory, there would seem to be no room for doubt that the expense to which she was put in rendering this assistance should be held a part of the legal damage arising from the collision. No objection was made to the mode in which the assistance was rendered. It seems to have been the most convenient and reasonable that could have been adopted; and this item should therefore be allowed.

In estimating the value of the captain's furniture and personal effects, certain deductions were made by the commissioner from the cost price, varying on some articles from 10 to 50 per cent., while on the remainder the market value, at the time of the loss, was allowed. Where articles have been in use for a considerable time, the owner has no right to insist upon the full cost price because he may claim that they are to him as good as new. A reasonable deduction may certainly be made from the cost of such articles, having reference to the period and manner of their use, as might be done by a jury in similar cases in an action at common law. *Jones v. Morgan*, 90 N. Y. 4, 10. As regards this and the other items excepted to, I think the commissioner's report should be confirmed.

THE MARYLAND.

THE P. SMITH.

(District Court, S. D. New York. January 24, 1884.)

1. COLLISION—RIVER NAVIGATION—HUGGING THE SHORE—STATUTES.

By the statutes of New York, steam-boats in passing up and down the East river, from the Battery northward, are bound to go as near as practicable in the center of the river, except in going in or out of their usual berths or landings, and steam-boats meeting each other in the rivers are required to go to that side which is to the starboard of such boat, so as to enable them to pass each other with safety. *Held*, the above statutes forbid steamers to keep close to the shore on going round the Battery either way.

2. SAME—ROUNDING BATTERY—MUTUAL FAULT.

Where two unwieldy steamers, one a tug with two schooners, were coming round the Battery in opposite directions so close to the shore that they were not visible to each other in time to avoid a collision, *held*, both in fault for being too near the shore, and that such fault in this case directly contributed to the collision.

3. SAME—VIOLATION OF STATUTE.

Where a violation of the statute does not directly contribute to the collision, there being plenty of time and room for the vessels to avoid each other, *semble*, such violation is immaterial.

4. SAME—CAUSE OF COLLISION.

Where the steamer M., 240 feet long and 60 feet wide, with square bows, bound from Jersey City to Harlem river, upon the ebb tide, passed close to the Battery and collided about 250 feet off pier 2 with the steam-tug P. S., having a schooner lashed on each side in tow, and both steamers had exchanged a signal of two whistles as soon as they were visible to each other around the bend, and no fault was apparent in the navigation or maneuvering of either from the time the signals were given, *held*, that the cause of the collision was that both were so near the shore that they were not visible to each other in time; that each was alike in fault in this respect, and that both were therefore liable for the damage to the schooner in tow.

5. SAME—LIABILITY OF VESSEL.

Irrespective of the statutory provisions, the obligations of prudence in navigation forbid close approach to the piers or slips in rounding the battery. The common practice in this respect affords no justification, and vessels adopting it do it at their peril, and must be held liable for the damage when this is the proximate cause of the collision.

6. SAME—AMENDMENTS TO PLEADINGS—EVIDENCE.

Where a cause of collision is fully presented upon the merits and all the facts have been put in evidence without objection, and there is no question of surprise or desire for further evidence, the cause should be determined upon the merits, as justice requires, and the pleadings be deemed amended to conform to the facts proved.

7. SAME—AMENDMENT ALLOWED—COSTS.

Where the facts necessarily known to the libelant are misstated to his procutor, so that the precise faults, as finally determined, are not stated in the libel, though charged in one of the answers, *held*, the libel should be deemed amended and the libelant recover, but without costs.

In Admiralty.

Scudder & Carter and *Lewis C. Ledyard*, for libelant.

Beebe & Wilcox, for the Maryland.

W. W. Goodrich, for the P. Smith.

BROWN, J. This libel was filed to recover damages for injuries to the schooner Francis C. Smith through a collision with the steamer Maryland on the fourth day of May, 1881, in the East river, off pier 2, New York. The Maryland is 240 feet long and 60 feet wide, with square bows, used for transporting railroad cars between Jersey City and Harlem river. She is a side-wheel steamer, with double engines, working independently. She was upon one of her regular trips from Jersey City, having left there at about a quarter before 4 p. m. After crossing the North river she passed into the eddy very near to the Battery wall, and probably within about 200 feet of the south ferry, the tide being strong ebb. The schooner was in tow of the tug P. Smith, coming down the East river, lashed upon the tug's starboard side, and projecting some distance forward of the tug. Another schooner was similarly lashed to the tug's port side. The mainsail of the port schooner had been up for some time previous, and about the time the tug was passing pier 10 the foresail was wholly or partly raised. The tug was intending to drop the port schooner upon reaching the North river, and go up the river against tide with the other. The wind was moderate from south to south-east and the day fair.

The libel charges fault upon both the tug and the Maryland in not keeping out of the way of each other, and in not having stopped and backed in time. The Maryland in her answer charges the tug with the sole responsibility, through an alleged want of sufficient power to handle the two schooners properly, and for having the sails of the port schooner raised, whereby, through the wind's being abeam, coupled with the small power of the tug, they drifted down upon the Maryland with the ebb tide, making more leeway than the tug could overcome, though headed all the time two or three points off shore. The answer of the tug charges the Maryland with fault, *first*, in keeping too near the New York piers, and that she did not change her course to avoid the tug, and did not slow, stop, and reverse in time. The pilot of the Maryland testified that when off Staten Island ferry he saw the tug and schooners apparently off about pier 10, well out towards the middle of the river, and headed rather off the New York shore towards the southern part of Governor's island; that he gave two whistles, to which the tug immediately replied with two, and that he then starboarded his wheel and stopped his port engine. Shortly after, on noticing that the tug, though headed away from the shore, was rather making towards it and towards the Maryland, he repeated the signal of two whistles, which was immediately answered with two from the tug, and that he then reversed the port engine and also the starboard engine. The answer of the tug avers that the Maryland was first seen when the tug was off Coenties' slip, that is, piers 6 to 8, and that the Smith was then well out in the river.

A careful comparison of the testimony compels me to reject entirely the estimates given of the distance of the tug and the schooners from the New York shore as they came past Coenties' slip. All the testi-

mony agrees that they were headed a little off shore; the tug was going at the rate of at least two miles through the water, and, with the strong ebb tide, about six by land. Her sails, with the wind abeam, would aid the motive power of the tug, while causing also some leeway; but her speed ahead was doubtless more, rather than less, than at the rate of six knots per hour. It could not be, therefore, over a minute and a half from the time she passed Coenties' slip until the moment of collision; and the leeway of the tug and schooners during this interval must have been comparatively slight, not over 40 or 50 feet, as stated by one of the witnesses. The precise place of the collision is, I think, very approximately fixed through the testimony of disinterested witnesses, as well as by the witnesses from the Maryland, particularly the witnesses Clark and Cahill. Their testimony, with other circumstances in reference to the position of the steamer Connecticut, which I need not here repeat, satisfy me that at the time of the collision the Maryland extended from about abreast of pier 2, back and across the south ferry, and that she was not over 250 feet distant from the end of pier 2,—probably less than that,—while the outer schooner was not over 300 feet distant from it. It is impossible for the tug with the schooners to have reached this position while headed two or three points off shore, if they were much further off when opposite Coenties' slip or pier 10. I have no doubt, therefore, that the Smith, when first seen, was within 350 feet of the shore, and she was probably intending to go into the eddy, as the Maryland had done, in rounding the Battery.

There are circumstances which lead to great doubt, also, whether, when the two steamers first sighted each other, they were not much nearer to each other than the estimates given in the testimony. From Staten Island ferry to pier 10 is about 2,000 feet; to pier 2, only about 300 feet. Hence the Maryland, from the point whence her pilot first saw the tug, viz., from off Staten Island ferry, to the point of collision, though she was going at first at a speed of five or six knots in the eddy as she passed Staten Island ferry, and then slowed down, did not go ahead much over 300 feet. The time, therefore, between the first whistles and the collision must have been very short, probably less than a minute. The clerk of the Maryland on hearing the whistles and the bells went at once from his office forward, a short distance only, and then he found the schooners but 50 feet distant. The pilot of the tug testifies that he did not see the Maryland or give his first signal of two whistles until he had reached pier 2, and that the collision was about 200 yards west of that. I have no doubt this pilot is partly in error as to where he first sighted the Maryland, but the distance of 600 feet apart at the time the first whistles were exchanged is an average between the evidence of Clark, who estimates the distance apart at 300 feet, and that of the other witnesses on the tug and schooners, who state that the Maryland was first seen when the tug was about off Coenties' slip, which was about 600 feet from the place

of collision. Their position enabled them to state exactly where they were when the whistles were blown, and their testimony is therefore much more reliable on that point than the testimony of those on the Maryland who could only estimate the position of the tug. Taking, then, the situation of the two vessels as determined upon this finding of the facts, the Maryland being a boat 240 feet long by 60 wide, in the eddy, within 200 feet of the shore off Staten Island ferry and heading for the east abutment of the Brooklyn bridge, and the tug and her two schooners coming down with a strong ebb tide, about 300 feet off Coenties' slip, and the two then for the first time seeing each other, and immediately exchanging signals of two whistles, I am not prepared to find upon the evidence any fault in the subsequent navigation of either vessel. The Maryland with her great length would not, I think, have been likely to clear the schooners by porting under a signal of one whistle, had that signal been given instead of the signal of two whistles. The evidence of the engineer and quartermaster shows that the port engine was reversed as soon as the first signal of two whistles was given. This brought the bows of the Maryland, which before were headed a little off shore, about parallel with the New York shore, but the ebb tide, when near the place of collision, catching her starboard bow, prevented her swinging further in shore; nor does it seem to me likely if the starboard engine had been reversed as soon as the signal of two whistles was given, instead of the port engine only, that this would have been any more likely to avoid the collision. The tug and schooners, also, as soon as the signal of two whistles was given, put their helms hard-a-starboard; but the motion of the tug was slow through the water, and though the schooners swung a couple of points under a starboard helm, the time was so short that they could not make any considerable offing to avoid the Maryland.

If this view be correct, the cause of the collision is to be sought further back, for it is manifest that vessels have no right to get into a position where a collision is inevitable, notwithstanding proper maneuvering by both. The charge that the P. Smith was too feeble in power to handle the schooner, properly is not sustained by the evidence, as respects her navigating where there is plenty of room, and where no quick maneuvering is required; but for quick handling in a narrow space, the tow was manifestly too cumbersome for such a tug, and she was therefore specially bound for this reason to be well out in the river. Nor can the collision be ascribed to the leeway caused by the sails. As I have said above, the effect of this cause would at most be small in the short time that elapsed between the signals and the collision, and it would certainly be partly, if not wholly, counterbalanced by the aid which the sails would give in increasing the speed, and consequently the steerage-way, of the tug through the water. The cause of the collision must, therefore, be ascribed either to the failure of the vessels to keep a proper lookout,

and to signal each other in time; or, if they were in such a situation as not to be visible to each other earlier, then either one or both vessels were in fault for navigating so close to the shore as not to come within view of each other in time to avoid the collision. The evidence shows that the two boats exchanged their first signals as soon as they came in sight of each other, viz., when the Maryland was off Staten Island ferry and the tug off Coenties' slip, each being from 200 to 300 feet only away from the piers. It follows, therefore, that the collision arose from both vessels' navigating too near to the New York shore when approaching and rounding the Battery in opposite directions.

Both boats, moreover, were proceeding in violation of the statutes of the state. By the act of April 12, 1848, (4 Edm. St. 60,) it is provided that "all the steam-boats passing up and down the East river, between the Battery, at the southern extremity of the city of New York, and Blackwell's island, shall be navigated as near as possible in the center of the river, except in going into or out of the usual berth or landing place of such steam-boat." Section 1, tit. 10, c. 20, p. *683, Rev. St., provides that "whenever any steam-boats shall meet each other on the waters of the Hudson river or any other waters in the jurisdiction of this state, each boat so meeting shall go to that side of the river or lake which is the starboard or right side of such boat, so as to enable the boats so meeting to pass each other with safety." The tug with her schooners was navigating in plain violation of the provision first above quoted, as she was far from the middle of the river. The Maryland, from the time she passed the barge office, was required by the same statute to be in the middle of the East river, instead of close to pier 2, (*The Columbia*, 8 Fed. Rep. 718,) and she was also plainly navigating in violation of the second provision above quoted. She had crossed the North river from Jersey City upon a course which, in the traffic about the Battery, her pilot well knew would in the ordinary course of business involve meeting other craft coming in the opposite direction. The Maryland had no call or business at the berths or slips along the New York shore, and by the statutory provisions she was, therefore, required to go around the Battery well out in the stream, so that vessels coming in the opposite direction could pass to the right with safety. Her course, however, was so near to the New York shore as to prevent other vessels' going with safety to the right at all, and it necessarily crowded them out in the stream to the left, instead of allowing them to pass to the right. So far as the statutory provisions are concerned, therefore, both vessels were equally in the wrong.

It is true that the practice is common for vessels in passing either way to hug the Battery shore in order to get the benefit of the slack water there on the ebb tide. The testimony was explicit, however, that there is no usage which gives this right to the vessels going one way rather than to those going the other way. It is practiced equally by

vessels going in either direction, and in either case it is alike contrary to the statutes and unlawful, except when the vessels are going in or coming out of their slips. Though vessels be navigating in violation of statute when a collision occurs, they will not for that reason be held liable, if this violation did not in any way contribute to the collision. Where vessels, though in unlawful proximity to the shore, see each other in time and agree upon mutual signals, and there is abundant room for either or both to keep out of the way of each other, the fact that one or both of the vessels were navigating in violation of the statute will then be deemed immaterial, as not contributing to the collision. *The Fanita*, 8 Ben. 11; *The Frederick M. Wilson*, 7 Ben. 367; *The Delaware*, 6 Fed. Rep. 195. But in this case the facts, I think, show that the vessels, by reason of their nearness to the shore, could not be seen by each other in time to avoid the collision, and that from the time they were seen by each other and their first whistles exchanged the collision was inevitable. The collision in this instance must, therefore, be regarded as the direct and necessary result of their close and unlawful proximity to the New York shore; in other words, their unlawful navigation in this respect was the direct and sole cause of the collision. While navigating so close to the New York piers that they could not see a half mile along the shore, each vessel also violated rule 5 of the inspectors' rules, in not giving one long whistle in rounding such a bend.

It is no answer to a failure to comply with these various rules to say that the navigation around the Battery is so crowded that these several rules and statutes are no longer practicable or applicable, or that if followed they would produce confusion. The frequency and the constancy of the danger arising from the increase of vessels makes the need of observing all these rules the more urgent; nor is there anything impracticable in keeping well out towards the middle of the East river in going into it, or in coming out of it. Both steamers in this case were about equally unwieldy and incapable of rapid handling, so as to avoid quickly any unexpected danger;—the Maryland, by reason of her great size; the tug, by reason of her comparatively slow motion through the water with two large schooners attached. Both were, therefore, equally bound by considerations of common prudence, as well as by statute, and the frequent adjudications of the courts, to keep away from the vicinity of the piers and slips. *The E. C. Scranton*, 3 Blatchf. 50; *The Monticello*, 15 Fed. Rep. 474, and cases cited; *McFarland v. Selby, etc.*, Co. 17 Fed. Rep. 253.

The language of BENEDICT, J., in the case of *The Columbia*, 8 Fed. Rep. 716, 718, is specially applicable here.

"I have not overlooked the argument based on the testimony in respect to a usage for vessels passing up the East river keeping close to the piers in order to take advantage of the eddy-tide. But no such usage can be countenanced. It is forbidden by the law, and must in every instance be held illegal by the courts. It would, indeed, be held illegal by the courts if there were no statute, because of the unnecessary danger of collision created thereby."

Upon the argument it was urged with much warmth that the court should take no notice of faults not specifically alleged in the pleadings; and that in the determination of the case all proofs or considerations not *secundum allegata et probata* should be disregarded. *The Rhode-Island*, Olcott, 505, 511; *The Vim*, 12 FED. REP. 906. In the case last cited the observations of the court were upon exceptions taken for want of sufficient definiteness in the libels in various particulars. While there can be no difference of opinion in regard to the proper practice and the policy of requiring early in the cause a definite statement of the faults charged by each, so far as they are known or may be reasonably ascertained, it is as well settled in the admiralty practice as it is in the practice under the state Code, that where the cause is fully presented upon the merits, and all the facts have been received in evidence without objection, and there is no suggestion of surprise, or desire to put in further evidence, the cause should be determined upon the merits of the whole case, according as justice requires, and that the pleadings should be deemed amended to conform to the facts proved. This was clearly laid down in the case of *The Syracuse*, 12 Wall. 167, 173, and has been repeatedly applied. *The Quickstep*, 9 Wall. 670; *The Clement*, 2 Curt. 363, where CURTIS, J., discusses this question at large; *The Lady Anne*, 1 Eng. Law & Eq. 674; *The Oder*, 13 FED. REP. 272, 283; *The Rhode Island*, 17 FED. REP. 554, 560.

In this case the answer of the tug distinctly sets up as a fault that the Maryland was hugging the New York shore. The Maryland was, therefore, fully apprised of this charge; but the libel does not charge this as a fault, and, except the charge that the vessels did not keep a proper look-out, and slow and back in time, neither of which charges do I find sustained, the libel only avers that neither vessel kept out of the way of the other,—a general charge which could not have been intended or understood to mean an unlawful proximity to the shore. The collision seems to me plainly the result, and solely the result, of the dangerous and illegal practice of navigating close to the Battery shore, instead of keeping off in the stream, as required by law. For this, both are equally answerable. All vessels following this course must be held to do so at their peril, and be held liable for the damages, when this proves to be the proximate cause of the collision. *The Uncle Abe*, 18 FED. REP. 270.

The libellant is entitled to the usual decree against both. But as the facts in regard to this specific fault were sufficiently known to those on the libellant's schooner, and ought to have been made known to the libellant's proctors and specifically pleaded in the libel as a fault, costs will be withheld, in order that no encouragement may be given to loose pleadings, or to any omission to state clearly and specifically all the material facts, showing how and why the collision came about, and the particular faults on account of which a recovery is sought, in accordance with the long-established practice in admiralty causes.

THE EMPIRE.

(District Court, E. D. Michigan. February 18, 1884.)

ADMIRALTY—JURY TRIAL—REV. ST. § 566—VERDICT.

The verdict of a jury, in an admiralty cause arising upon the lakes, and tried by jury pursuant to Rev. St. § 566, is merely advisory, and may be disregarded by the court, if, in the opinion of the judge, it fails to do substantial justice. The practice of calling nautical assessors approved.

In Admiralty. On motion for a new trial.

This was a libel for damages suffered by the barge James F. Joy, while in tow of the steam-barge Empire, and by reason of her alleged negligence. The case was tried by a jury, pursuant to Rev. St. § 566, and a verdict returned for the libelant in the sum of \$200. Motion was made for a new trial, upon the ground that there was no evidence to justify the jury in rendering a verdict for so small an amount.

H. H. Swan, for the motion.

James J. Atkinson, contra.

BROWN, J. By Rev. St. § 566, "in causes of admiralty and maritime jurisdiction relating to any matter of contract or tort arising upon or concerning any vessel of 20 tons burden and upwards, enrolled and licensed for the coasting trade, and at the time employed in the business of commerce and navigation between places in different states and territories upon the lakes, and navigable waters connecting the lakes, the trial of issues of fact shall be by jury when either party requires it." This somewhat unfortunate clause was introduced by the revisors into the statutes from a hasty dictum of Mr. Justice NELSON in the case of *The Eagle*, 8 Wall. 25. In delivering the opinion of the court he remarked "that we must therefore regard it (the act of 1845) as obsolete and of no effect, with the exception of the clause which gives to either party the right of trial by a jury when requested, which is rather a mode of exercising jurisdiction than any substantial part of it." The history of the incorporation of this dictum into the Revised Statutes is fully given in the case of *Gillett v. Pierce*, 1 Brown, Adm. 553. But, whatever be the origin of the clause in question, there is no doubt that it is the law of the land and must be respected as such. There has been great difficulty, however, in determining in what cases and in what manner it is to be given effect. It creates what appears to be a very unjust discrimination in favor of the particular classes of vessels and causes of action enumerated in the act. Why it should be given in actions of contract and tort, and denied in those of salvage, general average, and prize, and why it should be limited to American vessels plying between domestic ports, and denied to all foreign, vessels, and to American vessels engaged in foreign trade, it is impossible to conceive. *The Eagle*, *supra*.

A still more serious objection to the clause as it now stands arises from the fact that no provision is made for the review of cases so tried. If the same weight is to be given to the verdict of a jury impaneled under this act, that is given to a verdict in a common-law case, then it clearly falls within the inhibition contained in the seventh amendment to the constitution, that "no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law." As there is no provision for a writ of error in this class of cases, the defeated party would be remediless. This question was, however, passed upon in the case of *Boyd v. Clark*, 13 FED. REP. 908, in which the defeated party took both an appeal and writ of error to the circuit court. Mr. Justice MATTHEWS, before whom the case was argued, dismissed the writ of error and allowed the appeal, holding that the fact that the case was tried by a jury made no difference in determining the remedy to which the defeated party was entitled. He further observed that the provisions regarding trials by jury, in the seventh amendment, applies only to common-law juries, and that, upon appeal, admiralty cases tried by a jury in the district court stand for trial in the circuit court precisely as if they had been tried by the district judge in person.

These objections to the act as it now stands, and the further one that there is probably no class of cases which a jury, as ordinarily constituted, is so unfitted to deal with as actions for torts upon navigable waters, have been deemed so serious that the practice of trying admiralty causes by a jury has not obtained in the district court to any extent. This case, and that of *Boyd v. Clark*, *supra*, are, so far as I am informed, the only actions of tort tried by jury in this district during the almost 40 years in which the act has been in force. In lieu of this method of procedure, we have for several years past, in analogy to the trinity master system obtaining in the English court of admiralty, adopted the practice of calling to the assistance of the court, in all difficult cases involving negligence, two experienced shipmasters, who sit with the judge during the argument and give their advice upon the questions of seamanship or the weight of testimony. I believe a somewhat similar practice has obtained in some of the other district courts. *The Emily*, Olcott, 132. *The Rival*, 1 Spr. 128. The practice appears also to have received the sanction of the supreme court. *The Hypodame*, 6 Wall. 216-224; *The City of Washington*, 92 U. S. 31-38. I have frequently derived great assistance from the advice of nautical assessors myself, and have found this a most satisfactory and expeditious method of trying these cases.

The question still remains to be decided, however, what weight we shall give to the verdict of a jury impaneled under section 566. The question has never been directly decided; but in view of the opinion in *Boyd v. Clark*, *supra*, that their verdict is not binding upon the circuit court upon appeal, it seems to be a logical inference that it ought to be regarded in this court only as advisory. There is no rea-

son for giving it greater weight in one court than in the other. In chancery cases the province of the jury is said to be to "enlighten the conscience of the court," and as the court of admiralty is but the chancery of the seas, I see no reason why we should not give it the same effect here.

In the case of *Lee v. Thompson*, 3 Woods, 167, a supplemental libel was filed in the district court, upon which there arose a question as the validity of a certain assignment. The court made an order that the matter be tried by a jury, and it was tried accordingly. Upon appeal to the circuit court, Mr. Justice BRADLEY held that, although there was no power in the court of admiralty to try causes by jury, it was nevertheless proper to submit a question of fact to them for their opinion and advice; but that their decision was, after all, not conclusive, and the matter must be finally submitted to the judge of the court; citing *Dunphey v. Kleinsmith*, 11 Wall. 610.

In *Basey v. Gallagher*, 20 Wall. 670, a provision in a statute of Montana, declaring that an issue of fact "shall be tried by a jury, unless a jury trial is waived," was held not to require the court in equity cases to regard the findings of the jury as conclusive, though no application to vacate the findings be made by the parties, if, in the judgment of the court, such findings are not supported by the evidence. In delivering the opinion of the court Mr. Justice FIELD observed that "if the remedy sought be a legal one, a jury is essential, unless waived by the stipulation of the parties; but if the remedy sought be equitable, the court is not bound to call a jury; and if it does call one, it is only for the purpose of enlightening its conscience, and not to control its judgment. * * * Ordinarily, where there has been an examination before a jury of a disputed fact, and a special finding made, the court will follow it. But whether it does so or not must depend upon the question whether it is satisfied with the verdict. Its discretion to disregard the findings of the jury may undoubtedly be qualified by statute; but we do not find anything in the statute of Montana, regulating proceedings in civil cases, which affects this discretion."

While the language of the section (566) is peremptory, that either party is entitled to a jury trial, it is no more so than was the statute of Montana; and yet, notwithstanding the absolute right to a jury trial given by this statute, it was held that the jury was merely advisory. See, also, *Dunn v. Dunn*, 11 Mich. 284.

In the case under consideration the verdict of the jury was not consonant with any theory upon which the case was tried. If the jury had found there was no negligence, it was their duty to have returned a verdict for the defendant. If they found the tug was in fault, they should have returned a verdict for the damages suffered by the libelants, which the testimony showed were not less than \$800; and if demurrage were included, were nearly \$1,500. There was no evidence in the case to justify a verdict of \$200; and it must be set aside.

WESTERN UNION TEL. CO. v. NATIONAL TEL. CO. and others.

(Circuit Court, S. D. New York. March 6, 1884.)

1. JURISDICTION OF FEDERAL COURTS—RIGHT OF REMOVAL—CASE INVOLVING FEDERAL LAW.

A case may be removed to the federal courts whenever rights of the parties are alleged to depend in any way upon an act of congress, even though the act is only set up by way of defense, and though other questions not of a federal character enter into the controversy.

2. SAME—SEPARATE CONTROVERSY BETWEEN CITIZENS OF DIFFERENT STATES.

Boyd v. Gill, 19 FED. REP. 145, followed.

Motion to Remand.

Dillon & Swayne, for Western Union Tel. Co.

Dorsheimer, Bacon & Steele, for Nat. Tel. Co. and B. & O. Tel. Co.

P. B. McLennan, for N. Y., W. S. & B. Ry. Co.

WALLACE, J. Whether the complainant acquired any exclusive right as against the telegraph companies, the defendants, to build or maintain its lines upon the lands of the railway company; whether it acquired any easement not subject to a co-extensive easement in favor of the other telegraph companies; and whether any easement it may have acquired is of such character as would entitle it to compensation before the other telegraph companies can occupy the lands of the railway company with their lines, are all questions which may depend upon the force and effect of the act of congress of July 24, 1866, and arise under the issues presented by the pleadings. The suit was therefore properly removed from the state court as a controversy arising under the laws of the United States. Cases arising under the laws of the United States, within the meaning of the removal act, are such as grow out of the legislation of congress, whether they constitute the right, claim, protection, or defense, in whole or in part, of the party by whom they are asserted. If a federal law is to any extent an ingredient of the controversy by way of claim or defense, the condition exists upon which the right of removal depends, and the right is not impaired because other questions are involved which are not of a federal character. *Cruikshank v. Fourth Nat. Bank*, 16 FED. REP. 888; *Mayor v. Cooper*, 6 Wall. 247-252; *Railroad Co. v. Mississippi*, 102 U. S. 135. The motion to remand is denied.

The defendant the Baltimore & Ohio Telegraph Company, has also removed the suit upon its separate petition, alleging that there is a controversy which is wholly between it and the complainant citizens of different states. Within the recent decision of this court in *Boyd v. Gill*, 19 FED. REP. 145, such a separate controversy is not disclosed by the pleadings. See also *Peterson v. Chapman*, 13 Blatchf. 395. So far as the removal has been effected upon this petition the suit should be remanded.

CARDWELL v. AMERICAN RIVER BRIDGE CO.

(Circuit Court, D. California. March 3, 1884.)

NAVIGABLE RIVERS—UNSETTLED QUESTION OF STATE AND FEDERAL POWERS.

The supreme court of the United States, in the case of *Escanaba Co. v. Chicago*, 2 Sup. Ct. Rep. 187, determines that the control of "rivers wholly within the bounds of a state" is held by the legislature thereof, until the congress of the United States passes some act assuming control for the national government. In the *Wheeling Bridge Case*, 13 How. 519, the same court held that the mere confirmation by congress of a compact theretofore made between Kentucky and Virginia, relative to keeping open the Ohio river, was tantamount to an act assuming such control. Under these two decisions, *quære* whether such navigable rivers of California are within the control of that state, or have been removed therefrom by the act of congress admitting it into the Union, which act contains these words: "All navigable rivers within the state of California shall be common highways and forever free, as well to the inhabitants of that state as to the citizens of the United States, without any tax, duty, or impost therefor." Decided (*pro forma*) the latter.

Escanaba Co. v. Chicago, 2 Sup. Ct. Rep. 187, and other cases reflecting on the matter in discussion, noted and commented upon, and their various distinguishing points mentioned.

In Equity.

Scrivener & McKinney, for complainant.

H. O. & W. H. Beatty and *J. B. Haggin*, for defendant.

SAWYER, J. This case is clearly within the rule as laid down in the *Wallamet Bridge Case*, 7 Sawy. 127; S. C. 6 FED. REP. 396, 780. If that case can be sustained in the broad terms of the rule stated, then the demurrer in this case should be overruled. Since that decision was rendered, the supreme court of the United States has decided the case of *Escanaba Co. v. Chicago*, 107 U. S. 679, S. C. 2 Sup. Ct. Rep. 185, which defendant insists overrules the principle announced in the *Wallamet Bridge Case*; that, under the clause of the act admitting Oregon into the Union, the state has no power to authorize the construction of bridges over the navigable waters of the state which shall materially obstruct their navigation. It must be admitted, I think, that there is language in the opinion that favors that view; and I am by no means certain that the court did not intend to go as far as its broadest language indicates. It is sought to distinguish this case from the *Chicago Bridge Case*. If it can be distinguished, it must be on the following grounds: In the *Blackbird Creek Case*, 2 Pet. 245, arising in Delaware, the *Schuylkill Bridge Case*, 14 Wall. 442, in Pennsylvania, and all others since decided, following the decisions in those cases, it was held that congress, under its authority to regulate commerce and establish post-roads, had power to control, for those purposes, the internal navigable waters of the various states; that as soon as congress legislates in regard to any such navigable waters, its power becomes exclusive and the states cannot afterwards authorize any material obstruction to their navigation; but, till congress acts, the legislature of any state has the power to authorize the ob-

struction of any navigable waters within its borders, by the erection of bridges, dams, or other structures for the convenience and advantage of commercial intercourse. It was held, with respect to the navigable waters of Delaware and Pennsylvania, that congress had never acted, and, consequently, the legislation of these states authorizing the obstructions complained of was valid.

The question, therefore, is, has congress acted, with reference to the navigable waters of California, by legislating upon the subject, in such sense that its control has superseded the power of the state legislature and become exclusive? If so, then the case is distinguishable from any of the cases, other than the *Wheeling Bridge Case*, before decided by the supreme court. If congress has so acted, that legislation is found in the act admitting California into the Union, which act provides "that all the navigable waters within the state shall be common highways, and forever free, as well to the inhabitants of said state as to the citizens of the United States, without any tax, impost, or duty therefor." 9 St. 452, 453. How can the American river be a "common highway," or how can it be "free" to "the citizens of the United States," or "the inhabitants of the state," with a low bridge across it, without a draw, and so constructed as to preclude all navigation by steamers or vessels? To be a common highway, or to be free to all to use as such, involves a capacity to be *practically used as a highway*, and such capacity is wanting where there is an impassable barrier or obstruction. This provision is a law of congress, and it is valid, not as a compact between the United States and the state of California, but as a law of congress, passed by virtue of the constitutional power of congress to regulate commerce among the states and with foreign nations, and to establish post-roads. *Pollard's Lessee v. Hagan*, 3 How. 224, 225, 229, 230; *Wheeling Bridge Case*, 13 How. 566; *Mining Debris Case*, 18 FED. REP. 753. What does this provision of the statute mean? Can there be any reason to suppose that congress intended anything else than to make or continue the navigable waters of the state, by virtue of its power to regulate commerce, practical free highways, and to take away the power of the state to destroy or wholly obstruct their navigability? Had nothing been said upon the subject in the act of admission, but subsequently, after the admission of California into the Union "on an equal footing with the original states in all respects whatever," congress had passed a separate, independent act, with no other provision in it, providing "that all the navigable waters within the state of California shall be common highways, and forever free, as well to the inhabitants of said state as to the citizens of the United States, without any tax, impost, or duty therefor," would anybody suppose that congress, by the passage of such an act, under the circumstances indicated, could have any other purpose than to take control of the navigable waters of the state for the purpose of preventing any interference with, or obstruction to, their navigability, or "so far as might be necessary to insure their free navigation?"

Or would it be seriously doubted that congress had acted upon the subject-matter within the meaning of the terms of the decisions in the *Blackbird Creek* and *Schuylkill Bridge Cases* mentioned? If such would be the construction in an independent act passed subsequently to the admission of the state, it must be the construction of the same language as found in the act of admission. If such is not the purpose of this provision, it would be difficult, I think, to determine what the purpose is. Following the direct decision upon this point in the *Wheeling Bridge Case*, 13 How. 565, I had no difficulty in concurring with the district judge in the ruling that a similar provision in the act admitting Oregon into the Union constituted legislative action by congress upon the subject-matter, of such a character as to withdraw it from the jurisdiction of state legislation.

In the *Chicago Bridge Case*, *supra*, the court still recognizes the power of the national government to control the navigable waters of the several states. It says:

"The power vested in the general government to regulate interstate and foreign commerce involves the control of the waters of the United States, which are navigable in fact, so far as it may be necessary to insure free navigation, where, by themselves or their connection with other waters, they form a continuous channel for commerce among the states or with foreign countries." 107 U. S. 682; S. C. 2 Sup. Ct. Rep. 185.

The question, then, is whether the provision quoted from the act of admission is legislation by which congress takes control of the navigable waters of the state, "so far as it may be necessary to insure their free navigation;" and whether there can be a "common highway," or "free navigation," where the passage of steamers or other vessels is absolutely obstructed by impassable barriers thrown across the channels of waters otherwise navigable, in fact. In the case of the state of Illinois, neither the act authorizing the inhabitants to form a state government, (3 St. 428,) nor the resolution admitting the state into the Union, (Id. 526,) contains the provision, or any provision of a character similar to that, found in the acts admitting California and Oregon into the Union. Both the act and the resolution relating to Illinois are silent upon the subject, and I am not aware that there is any subsequent legislation on the subject affecting the status of Illinois. In the *Chicago Bridge Case*, the supreme court seems to regard the provision of the ordinance of 1787 as inoperative after the admission of Illinois as a state. Says the court:

"Whatever limitation upon its powers as a government, while in a territorial condition, whether from the ordinance of 1787 or the legislation of congress, it ceased to have any operative force, except as voluntarily adopted by her, after she became a state of the Union. On her admission she became entitled to and possessed all the rights and dominion and sovereignty which belonged to the original states. She was admitted, and could be admitted, only on the same footing with them. The language of the resolution admitting her is 'on an equal footing with the original states in all respects whatever.' 3 St. 535. Equality of constitutional right and power is a condition of all the states of the Union, old and new. Illinois, therefore, as was well ob-

served by counsel, could afterwards exercise the same power over rivers within her limits that Delaware exercised over Blackbird creek, and Pennsylvania over the Schuylkill river." 107 U. S. 688, 689; S. C. 2 Sup. Ct. Rep. 185.

There being no legislation by congress, then, assuming the control of the navigable waters of Illinois, there was nothing more to prevent legislation by the state in regard to the navigable waters of Illinois than there was to prevent legislation by the states of Delaware and Pennsylvania. But I do not understand it to be held, or intimated, that congress cannot, by legislation in the interest of interstate commerce, take control of any one, or all, of the navigable waters, either of Illinois, Delaware, or Pennsylvania. Only it has not yet done so. I suppose congress might take control of any one navigable river by name, as the Sacramento, for the purpose of facilitating interstate commerce, or it might take control, generally, of all the navigable waters of any particular state, without reference to the waters of other states, and there might well be special reasons, making it desirable with reference to some particular waters, or some particular states, which are not applicable to other waters, or other states. I do not understand that special legislation as to particular rivers or particular states, not applicable to others, would affect the "constitutional right or power," or the equality, of the states in any particular. All of the states are alike equally subject, at any and all times, when congress sees fit to act, to the power of congress to "regulate commerce among the states" and with foreign nations, and the power to "establish post-roads" within their several borders and over their several navigable waters. But the regulation of commerce on the waters of, and establishment of post-roads in, some states, before it is done on the waters of or in other states, does not affect their constitutional *status* of equality. Congress may take its own time and occasion to regulate the navigable waters of a state without affecting its constitutional condition of equality. I suppose congress might now, by an act duly passed, apply the provision in the acts of admission of Oregon and California to Illinois, Delaware, and Pennsylvania—to any one or all of them; and if it should do so, it would seem that there ought not to be any doubt that the object would be to take exclusive control for the benefit of commerce, and to suspend the power of regulation, or at least of obstruction and destruction, by the states. But until some legislation of the kind is had, those states concerning whose waters congress has not legislated, under the decisions referred to, may themselves legislate upon the subject. If the provision in the California act of admission is legislation taking control of the navigable waters of the state for the benefit of commerce, then congress has legislated in reference to the navigable waters of California, while it has not done so with reference to the navigable waters of Delaware, Pennsylvania, and Illinois; and, in this respect, California and Oregon stand upon a footing

entirely different from that of those states, and the decisions as to them are inapplicable. The foregoing observations indicate the distinction, if any sound distinction there be, and it seems to me that there is, between this case, the *Wallamet Iron Bridge Case*, and the *Wheeling Bridge Case*, and those other cases cited, already decided by the supreme court. If the distinction is not sound, then it appears to me that the *Wheeling Bridge Case* must also be regarded as overruled, although the supreme court does not expressly indicate any intention to overrule it.

There is an intimation, however, in the opinion of the *Chicago Bridge Case*, not necessary to the decision of the case upon the other views expressed by the court, that the provision of the ordinance of 1787, corresponding to the provision in question in the acts of admission of California and Oregon, if in force, would not affect the question. 107 U. S. 689; S. C. 2 Sup. Ct. Rep. 185. If this be so, then the distinction referred to is of no practical consequence. But the bridges, and other obstructions referred to as illustrations following this intimation, were all *draw-bridges*, or other *partial* obstructions, while the bridge now in question is an absolute, unqualified, entire obstruction to the navigation of the river. In view of these intimations, and other general observation in the opinion of the court, and not feeling quite certain as to how far the supreme court intended to go on these questions, and not wishing even to seem to disregard the decisions of the supreme court, I shall, for the purposes of this case, sustain the demurrer and dismiss the bill. The bill presents the case fully, and it will be much better for all parties to have the effect of the provision of the act of admission determined now before going to the expense of a trial. As the complainant has already submitted to the obstruction for many years, the right, I think, should be finally determined on appeal, before an injunction should be decreed. The supreme court does not appear to me to have considered carefully, or finally determined, what the purpose and effect of the provision in question in the act of admission is. It must have some object, and if that object be not to protect and preserve the navigability of those waters against obstructions equivalent to destruction by authority of the state, what was the purpose? The fact that the provision is in the act of admission, instead of in subsequent independent legislation, cannot affect its construction, or its force and effect. But for the observations in the *Chicago Bridge Case*, which I think unnecessary to the decision, and believing that congress had acted upon the subject, I should have followed the ruling of the circuit court in the *Wallamet Bridge Case*, and what I understand to be the decision in the *Wheeling Bridge Case*, and overruled the demurrer. I do not wish to be regarded as having changed my own views upon the rulings in the *Wallamet Bridge Case*. I still think it similar to the *Wheeling Bridge Case*, and distinguishable from any other cases hitherto decided by the supreme court brought to my attention. I

still think the decree in that case correct, on the ground that congress has acted upon the subject, also on other grounds than the point discussed in this case. But the case will be appealed, and if the circuit court was wrong, the rights of the parties will be finally settled by the supreme court. I only write this opinion to indicate upon what distinction, if any, the case I suppose should be taken out of the decision of the *Chicago Bridge Case*, with the hope that the attention of the supreme court will be specially directed to that supposed distinction.

UNITED STATES v. O'NEILL and others.

(Circuit Court, E. D. Wisconsin. February 5, 1884.)

1. SURETYSHIP—ALTERATION OF INSTRUMENT—DISCHARGE.

When, after a bond had been signed by two sureties with the understanding between them and the obligor and obligee that it was to be signed by a third surety whose name was written in the bond, the name of the third surety was altered in the body of the instrument, with the knowledge of the obligee, by the substitution of a different surety, who then signed the bond, *held*, that the two sureties were discharged.

2. INTERNAL REVENUE—CONSTRUCTION OF REV. ST. § 3182.

Under section 3182 of the Revised Statutes, the commissioner, in making a re-assessment upon distilled spirits for the purpose of rectifying an error, is not confined to a period of 15 months last past.

3. STATUTE—TIME OF TAKING EFFECT—ASSESSMENT—VALIDITY.

A statute took effect March 3d, changing the rate of duty upon spirituous liquors from 70 cents to 90 cents. An assessment was made for a period previous to and including March 3d at 70 cents. *Held*, that though the statute was in force during the whole of March 3d, so that the rate for that day should have been 90 cents, the tax-payer could not on that account dispute the validity of the assessment.

4. ASSESSMENTS FOR SAME PERIOD—VALIDITY PRESUMED.

Two assessments, covering partially the same period, will be presumed to be for different liquors till the contrary is shown.

5. ACTION UPON BOND—ALLEGATIONS OF COMPLAINT.

An action upon a bond, conditioned upon the payment of an assessment, will not fail because the complaint does not set forth the whole of the assessment.

This was a suit on a distiller's bond. The bond was executed by the defendant O'Neill as principal, and by two of the other defendants as sureties, April 30, 1874, and covered the period from May 1, 1874, to May 1, 1875. The complaint set out the conditions of the bond, and then alleged that these conditions were broken, in this: that O'Neill failed to pay the internal revenue tax due and payable on 15,344 gallons of distilled spirits, distilled by him at his distillery from the first day of May, 1874, to and including the thirty-first day of December, 1874, amounting to \$10,740.80, and on 29,440.40 gallons of distilled spirits distilled by him from December 1, 1874, to and including March 3, 1875, amounting to \$20,608.28, and also on 30,873.36 gallons of distilled spirits, distilled from March 4, 1875, to

and including June 30, 1875, amounting to \$27,786.02, making an aggregate sum alleged to be due to the United States of \$59,135.10. The complaint further alleged that the commissioner of internal revenue assessed on the monthly list of November, 1875, against O'Neill a tax for the several amounts aforesaid, which assessment was duly returned to the collector, who demanded payment, which was refused. Judgment was therefore asked against the several defendants for the amount of the penalty of the bond, namely, \$25,000. The case was tried by the court without a jury. The proofs, oral and documentary, were voluminous, and numerous points bearing upon the validity of the assessment and the alleged liability of the defendants were discussed at the bar. The defendants Stowell and Walsh, as sureties on the bond, made a special defense solely applicable to them, and which, if maintained, would still not relieve the defendant O'Neill, nor the surety, John B. Reynolds, if O'Neill's liability as the principal in the bond was established. That part of the opinion of the court which covers the questions of law involved in the case is as follows:

G. W. Hazelton, for the United States.

N. S. Murphey, for defendants.

DYER, J. The bond was prepared April 30, 1874, in the office of the collector of internal revenue. The written part of the instrument is in the handwriting of one Sherman, who at that time was a deputy in the office. As originally drawn, the names of John M. Stowell, Patrick Walsh, and Hugh P. Reynolds, with their respective residences, were written in the body of the bond. This makes it manifest that the collector understood that Hugh P. Reynolds was to sign the bond as one of the sureties. The bond was signed, as thus drawn, by O'Neill, Stowell, and Walsh, in the collector's office, on the day of its date. The testimony satisfactorily shows that it was the distinct understanding between O'Neill, Stowell, and Walsh that Hugh P. Reynolds should be a co-surety on the bond; and I think it was competent for the defense to show this, in view of the fact that the face of the bond as drawn by the collector indicated that Hugh P. Reynolds was to sign the bond as one of the sureties, and that this must have been so understood by the collector. There is a dispute upon the question whether the bond, after its execution by O'Neill, Stowell, and Walsh, remained in the custody of the collector, in expectation that Hugh P. Reynolds would come in and sign it, or whether O'Neill was permitted to take the bond away for the purpose of getting Reynolds' signature thereto. It seems most probable that the collector retained the custody of the bond; but whether this be so or not, is not in my opinion very material. At all events, there was such delay in procuring the signature of Hugh P. Reynolds—in consequence, as the testimony tends to show, of his absence—that the collector became urgent in his requirement that the execution of the bond by a third surety should be completed. Thereupon O'Neill proposed to the col-

lector that John B. Reynolds should be substituted as a surety in place of Hugh P.; and upon the representation of O'Neill that John B. Reynolds was as responsible, pecuniarily, as Hugh P., and that the other sureties would be satisfied with the proposed substitution, the collector caused the word and letter "Hugh P.," where they occurred in the body of the bond before the name Reynolds, and the residence of that person as written in the bond, to be erased, and substituted therefor the name of John B. Reynolds, and a description of his residence. Thereupon John B. Reynolds signed the bond as the third surety, and the testimony tends to show that this was done on the twenty-fifth day of June, 1874. Of this erasure in the bond, and substitution of John B. Reynolds for Hugh P. Reynolds, the proofs positively show the defendants Stowell and Walsh knew nothing until this suit was begun in 1876. Thus it appears that when Stowell and Walsh signed the bond they understood and expected that Hugh P. Reynolds was to be a co-surety with them; that it must have been also so understood by the collector, because he had drawn the bond accordingly; that subsequently, without consulting Stowell and Walsh, and without their knowledge, the collector, by arrangement with O'Neill, made the change in the bond and permitted the substitution of sureties, which have been stated. Was not this such an alteration of the bond, and such an unauthorized deviation from the original understanding of all the parties, as precludes a recovery against Stowell and Walsh? I am of the opinion that it was.

On the back of the bond there purports to be an acknowledgment of the execution of the bond by all the parties,—O'Neill, Stowell, Walsh, and John B. Reynolds,—dated June 25, 1874, before Sherman, deputy collector. If this acknowledgment was in fact taken, it must have been after John B. Reynolds signed the bond, and in that case Stowell and Walsh would be clearly precluded from objecting to the substitution of John B. Reynolds for Hugh P., and to the change in the body of the bond, because it would then be a conclusive presumption that they knew or ought to have known at the time of the acknowledgment of such substitution and change. But both Stowell and Walsh testify with great positiveness that they never acknowledged the execution of the bond. Their testimony upon that point is not overcome by any proof to the contrary on the part of the government. Sherman cannot be sworn because of mental incapacity. The testimony of the collector, so far as it was thought competent for him to speak upon the subject, is not adequate to meet the positive affirmations of Stowell and Walsh.

The certificate of acknowledgment is not conclusive, but only *prima facie* evidence of what it states. It may be shown to be untrue. Of course, the evidence to overcome it should be strong and convincing. "While a certificate of acknowledgment to a conveyance establishes a *prima facie* case that the signature of the person purporting to have executed the conveyance is genuine, this presumption will not prevail

against positive evidence to the contrary." *Borland v. Walrath*, 33 Iowa, 130. See, also, *Paxton v. Marshall*, 18 FED. REP. 361.

The general proposition of law in relation to the liability of sureties laid down by Mr. Justice STORRY, in *Miller v. Stewart*, 9 Wheat. 703, is elementary. He says:

"Nothing can be clearer, both upon principle and authority, than the doctrine that the liability of a surety is not to be extended by implication beyond the terms of his contract. To the extent, and in the manner, and under the circumstances pointed out in his obligation, he is bound, and no further. It is not sufficient that he may sustain no injury by a change in the contract, or that it may even be for his benefit. He has a right to stand upon the very terms of his contract, and if he does not assent to any variation of it, and a variation is made, it is fatal."

There is a class of cases, many of which have been cited by the learned counsel for the government, in which it is held that a bond, perfect on its face, apparently duly executed by all whose names appear thereto, purporting to be signed and delivered, and actually delivered without a stipulation, cannot be avoided by the sureties upon the ground that they signed it on a condition that it should not be delivered unless it was executed by other persons who did not execute it, where it appears that the obligee had no notice of such condition, and there was nothing to put him upon inquiry as to the manner of its execution, and that he had been induced upon the faith of such bond to act to his own prejudice. *Dair v. U. S.* 16 Wall. 1; *Tidball v. Halley*, 48 Cal. 610; *State v. Peck*, 53 Me. 284; *Cutler v. Roberts*, 7 Neb. 4; *Nash v. Fugate*, 24 Grat. 202; *Millett v. Parker*, 2 Metc. (Ky.) 608; *State ex rel. v. Pepper*, 31 Ind. 76. Then there are other cases in which it has been decided that if a bond be written as if to be executed by two or three or more sureties, and it is in fact executed by only one, and is then delivered to the obligee, it is valid and effectual against that one. *Cutter v. Whittemore*, 10 Mass. 442. In *Russell v. Freer*, 56 N. Y. 67, M., plaintiff's intestate, held the office of collector of internal revenue. Proposing to appoint C. as his deputy, he required security that C. would pay over all moneys collected, etc. For this purpose a bond was prepared, which was executed by H. and F., and delivered to C. When they signed it the name of J. appeared as obligor in the bond, and they were told by C. before signing that J. would sign it also, and they signed with this expectation. The name of J. was subsequently stricken out of the bond without their knowledge or consent, and it was delivered to M., who had no knowledge of the facts, and who thereupon appointed C. deputy. In an action on the bond, held that H. and F., having placed it in the power of C. to deliver the bond as a valid and complete instrument, it having been so delivered, and M., having incurred responsibility relying thereon, it was valid and binding.

As will be seen, none of the cases cited meet the facts of the case at bar. Here the conclusion must be, from the manner in which the transaction took place, that it was the understanding of all parties,

the collector included, when Stowell and Walsh signed the bond, that Hugh P. Reynolds should sign it as a co-surety. As before observed, the bond was so prepared in the collector's office, and such was the expectation when Stowell and Walsh signed it, and left it with the collector. The collector had notice of the understanding of the parties. It was not the case of a delivery of the bond with a private agreement between the obligor and the sureties that others should sign it,—an agreement unknown to the obligee. It was not the case of a bond in the hands of an obligor with other names written therein, and then delivered by him absolutely to the obligee, signed by some and not by others. It is not like the case in 56 N. Y. Here the bond was confessedly yet incomplete after Stowell and Walsh signed it, and while it was in the hands of the collector; and through the active instrumentality of that officer or his deputy, and by agreement between him and the obligor, without the knowledge or consent of Stowell and Walsh, the erasure was made in the bond, and a new surety substituted for the one whose name was originally written therein, and whom all parties originally expected and understood would sign it as a co-surety. Upon this state of facts I feel obliged to conclude that the bond is not an obligation binding upon Stowell and Walsh.

In *Smith v. U. S.* 2 Wall. 219, Mr. Justice CLIFFORD states the rule to be that any variation in the agreement to which the surety has subscribed, which is made without the surety's knowledge or consent, and which *may prejudice* him, or which may amount to a substitution of a new agreement for the one he has subscribed, will discharge the surety, upon the principle of the maxim *non hæc in fœdera veni*. And of this case it may be observed that in its facts and upon the law it is highly instructive as bearing upon the kindred question involved in the case at bar.

Several points are made impugning the validity of the assessment described in the complaint, and offered in evidence. The assessment list was for the month of November, 1875, and bears date December 18th of that year. It is contended that in making the assessment the commissioner exceeded his authority in this: that by section 3182 of the Revised Statutes he was limited in making an assessment against the defendant O'Neill to a period 15 months anterior to the date of assessment; that therefore he could not go back of September 18, 1874; whereas, he did in fact extend the assessment back to May 1, 1874. I do not understand section 3182 as thus limiting the time for making the assessment here in question. By that section the commissioner is first given general power to make the inquiries, determinations, and assessments of all taxes and penalties imposed by title 35 of the statutes relating to internal revenues, and he is required to "certify a list of such assessments when made to the proper collectors, respectively, who shall proceed to collect and account for the taxes and penalties so cer-

tified." Then the section provides that whenever it is ascertained that any list which has been or shall be delivered to any collector—that is, any list of assessments already made and certified by the commissioner to a collector, and such as is just before-spoken of—is imperfect or incomplete in consequence of the omission, etc., the commissioner may, at any time within 15 months from the time of the delivery of the list to the collector as aforesaid,—that is, within 15 months *after* the delivery of the list by the commissioner to the collector,—enter on any monthly or special list the name of such person omitted, etc., and he shall certify and return such list to the collector as required by law. It is observable that this statute does not forbid a reassessment for a period 15 months back of the time when such reassessment is made, but when an assessment has been made on discovery of an omission, etc., the commissioner may, within 15 months after such assessment, enter on *any* monthly or special list the name of the person previously omitted. This is what I understand the statute to mean, and the court cannot say, upon the facts before it, that the special taxes against O'Neill here in question, and appearing on the monthly list of November, 1875, or any part of them, were assessed at a time more than 15 months subsequent to any previous list or assessment that may have been imperfect or incomplete from any cause mentioned in the statute. But it is immaterial, for the purposes of this case, whether I am correct in my interpretation of this provision of the statute or not; for the assessments in question were undoubtedly made under the provisions of section 3253, Rev. St., which declares that "the tax upon any distilled spirits removed from the place where they were distilled, and not deposited in bonded warehouse as required by law, shall, at any time when knowledge of such fact is obtained by the commissioner of internal revenue, be assessed by him upon the distiller of the same," etc.

The validity of the assessment is further questioned on the ground that an erroneous rate was adopted by the commissioner in imposing the tax of \$20,608.28 on 29,440.40 gallons of distilled spirits from December 1, 1874, to and including March 3, 1875. The tax imposed was at the rate of 70 cents per gallon. On the third day of March, 1875, an act was approved and became the law, changing the rate of tax on distilled spirits to 90 cents per gallon. 18 St. at Large, 618, pt. 3, c. 127. The argument is that this act took effect at midnight of March 2d, and therefore that a tax imposed on spirits distilled March 3d at the rate of 70 cents per gallon was illegal, and that this illegality as to spirits made on that day vitiates the entire assessment. The point thus made is not without force. The question respecting the *punctum temporis* when a statute takes effect is often one of difficulty; but it would seem that the act of March 3, 1875, changing the rate of the tax from 70 cents to 90 cents per gallon, took effect and was in force from the first moment of that day. *Arnold v. U. S.* 9 Cranch, 104; *In re Welman*, 20 Vt. 653; *In re*

Howes, 21 Vt. 619. So that, as to spirits produced on the third day of March, the assessment should have been at the rate of 90 cents, instead of 70 cents, per gallon. Nevertheless, I am not prepared to hold that this vitiated the entire assessment which extended back to December 1, 1874. The defendant O'Neill was not prejudiced by the fact that for one day he was not assessed at as high a rate as the law in force on that day authorized. I do not, therefore, see how he can complain of the alleged irregularity. If liable at all, he was liable to pay 90 cents per gallon on account of spirits produced March 3d, and he was required by the assessment to pay only 70 cents for that day's production. At most, there was an omission on the part of the commissioner to comply with the full requirement of the law, so far as his act embraced the single day in question, but his action in that respect was not wholly *ultra vires*. I cannot, therefore, hold that the assessment was invalidated by the act of the commissioner complained of.

The validity of the assessment is further attacked on the ground that a tax of \$10,740.80 was imposed on spirits distilled between May 1 and December 31, 1874, and that another tax of \$20,608.28 was imposed on spirits produced between December 1, 1874, and March 3, 1875, thus, as it is claimed, making a double tax on the same spirits for the month of December, 1874. But this objection is untenable, because the court cannot say that the two assessments for the month of December covered the same spirits. Presumably they did not, and if it is a case of double assessment, it is for the defendant affirmatively to show it. The court can by no means presume, in the absence of proof, that the two assessments for the month of December covered the same spirits. It was said on the argument that it was impossible to separate from the property assessed the second time that which had been already assessed once, and which was therefore exempt from taxation. But this assumes, in the absence of proof, that the same spirits were assessed twice, and this assumption is not, in the opinion of the court maintainable.

Concerning that part of the assessment which embraces spirits alleged to have been produced between March 4, 1875, and June 30th of that year, and amounting to \$27,786.02, the court does not see how it can be included here as part of the basis of liability upon the bond in suit. The bond expired May 1, 1875. Of course, it only covered transactions occurring between May 1, 1874, and May 1, 1875. The assessment just spoken of, as will be seen, covers a period extending beyond the life of the bond, namely, May and June, 1875. That assessment, covering the period from March 4 to June 30, 1875, is not under the proofs before the court, separable. That is, it is impossible, upon any facts shown here, to correctly and justly determine what, if any, proportion of the spirits produced during that period was so produced and removed during the life of the bond. Perhaps some proportion could be mathematically ascertained on the

basis of the whole amount alleged to have been produced in a number of months and days embraced in the period covered by the assessment. But that would be a calculation in its nature arbitrary and might be wholly incorrect, and therefore very unjust. Liability on the bond in suit cannot, therefore, be based upon that assessment.

In the assessment list in evidence, which embraces the items of special tax before enumerated, the non-payment of which is alleged to constitute a breach of the bond in suit, is included another special tax on 1,752½ gallons of spirits, entered as produced in March and April, 1874, which tax amounts to \$1,226.75. This tax or assessment is not set out in the complaint as any part of the plaintiff's demand against O'Neill, and so it is insisted that there is a substantial and fatal variance between the allegations of the pleadings and the facts proved. It is argued that this is an action of debt on the assessment; that the defendant's answer is in effect a plea of non-assessment on record; that the assessment, embracing all the items of special tax named therein, must be treated as an entirety, and as a single cause of action; that the items of this cause of action cannot be divided into separate suits maintained on each; and that since the assessment as an entirety, and as proven, does not conform in amount to the aggregate of the items of tax contained in the assessment described in the complaint, there is a variance fatal to the maintenance of the action. The answer to this is, that the suit is not, strictly speaking, upon the assessment. It is upon the bond. It is alleged that the conditions of the bond have been broken, in this, that the defendant O'Neill has not paid certain taxes assessed against him, and these taxes are shown in the assessment offered in evidence. In fact, the assessment only constitutes the evidence in part, of the alleged breach; and it is the breach of the condition of the bond which constitutes the cause of action. The failure to pay either of the items of tax contained in the assessment, if the tax was legally and justly imposed, would be a breach of the bond, and that would be the basis of liability. Suppose the defendant O'Neill had paid one or more of the items of tax embraced in the assessment, but neglected to pay the other items, would not an action lie on the bond on account of such default? Clearly it would, and so it cannot be necessary in order to maintain the action to allege and to show that there has been a default upon the entire assessment, but defaults may arise upon either of the items of tax, and thereupon an action may be maintained on such default, based upon the conditions of the bond, may be maintained.

It is in proof that on a special assessment list of the date of November 30, 1875, there had been previously assessed against the defendant O'Neill a tax on 5,117 gallons of spirits, claimed to have been distilled between July 1, 1874, and March 1, 1875; that sumptively this assessment covered all the spirits manufactured and removed by the defendant during that period, and that therefore

assessment in evidence, which is made the foundation of liability on the bond in suit, was unauthorized. In maintaining this contention, everything depends upon the fact whether or not the different assessments cover the same spirits. It is not shown that they do. It cannot be presumed that they do. The exercise of authority in making the earlier assessment did not exhaust the power of the commissioner to make another assessment, embracing the whole or a part of the same period, if the two assessments did not cover the same spirits; nor does the first assessment raise such a presumption that it covered all the spirits manufactured and removed during the period named therein, as to invalidate the second and later assessment. It is, after all, a question of fact whether the two assessments cover the same spirits, and, as just remarked, it is not proven that they do.

On further review of the merits of the case, the court held that the proofs on the part of the defendant O'Neill, attacking the assessment, were not sufficient to overcome the force and effect of the assessment and the proofs adduced in its support on the part of the government, and ordered judgment against the defendant O'Neill, and the surety, John B. Reynolds, for the sum of \$25,000, the amount of the penalty of the bond.

STEVENSON v. WOODHULL BROS.

(Circuit Court, W. D. Texas. 1884.)

PROMISSORY NOTE—TRANSFER TO ONE PARTNER—PAYMENT TO ANOTHER.

When a note payable to a partnership firm is indorsed by the firm in blank and transferred to one of the partners before maturity, the maker, if he has notice of the transfer, is not discharged of his liability to the transferee by payment of the amount of the note to another member of the firm.

TURNER, J. This suit is upon a promissory note made and executed by the defendants June 24, 1878, payable to Priest & Severance, or order, for the sum of \$1,000, and due the fifteenth of November, 1878. This note was indorsed upon the back in blank by Priest & Severance. The legal effect of this blank indorsement is and was to make the note payable to the legal holder of the same; it transferred the interest of the firm of Priest & Severance to the legal holder. The note is not shown to have had any vice in it at the date of its execution; on the contrary, the evidence shows the same to have been given for a valuable consideration. Therefore, no defense could beset up against this note, either as against the original payees or any subsequent holder, except the one made here, viz., payment in whole or in part. It is not pretended that the indorsement was not made by one of the firm of Priest & Severance, nor is there any

evidence showing when the blank indorsement was made, as matter of fact. In the absence of any proof, the law presumes the indorsement to have been made before maturity. If partners see fit to transfer their partnership property to an individual member of the firm, they have an undoubted right so to do, and certainly, as between themselves, they are bound by that act. The legal effect of this indorsement was to change the ownership of the same from Priest & Severance to the legal holder of the note, wherever that might be, and if it be true that Priest was the holder, and that the same was placed in his possession, the legal presumption would be that the firm had transferred their interest in the note to the individual member, who thus became the bearer or holder of the note. The law will not presume that an act that may lawfully be done was unlawful in the absence of proof. There is no evidence here that repels the legal presumption arising from the facts established that this note was transferred by the firm to Mr. Priest, when it is shown that Priest was the holder of the instrument. Severance is not produced as a witness, nor is there any evidence which shows that this legal presumption is not in accordance with the real facts of the case; in fact, the evidence shows that all the money that was paid, was paid to Priest, and no objection was made at the time, so far as the evidence shows. As I have stated, the partners may, if in the course of their business, transfer partnership property to an individual member of the firm, and none but the creditors of the firm have a right to complain of such act. The effect of such transfer is to divest all the other members of the firm of any property in the thing so conveyed, so far as the partners are concerned, and the title thereto actually passes to the individual member.

The question next arises, how does such a transfer of a promissory note, as in this case, affect the debtor? If the fact of such transfer were unknown to the debtor, and he paid to one of the members of the firm, who had transferred his interest to his copartner, such payment would unquestionably be a good payment. But suppose the debtor knew at the time he paid to the member who had sold that he had parted with all his interest in the note, and consequently knew that he had no more right to the money than a stranger, can it be insisted for a moment that such a transaction would deprive the true owner of his right to recover against the maker, such a rule would open the door to the grossest fraud. The legal presumption then must be (and there is no proof to rebut it) that the firm had sold this note to Priest. As Priest is shown to have had possession, use, and control of the same, it follows, admitting all that is claimed by the defendant to be true, from all that appears, if the payment was made to Severance, and at the time of the payment Woodhull Bros. had notice that the note was transferred either to Priest or any body else, the Woodhulls paid with their eyes open, because they had notice that the note had been transferred. The Woodhulls, as the

evidence shows, were cautious enough to take a bond of indemnity, protecting them against any recovery upon the note. The note was here in the bank, and Severance could not get control of the same. The bond taken by the defendants is not produced in evidence, and the presumption arises that if produced it would militate against them; but the fact that they took the bond shows that they were put upon their guard. Further than this, the defendant pleads that the payment was made by the delivery of sheep, and produces a receipt from O. Severance, dated October 30, 1878, which recites that defendants had paid that day to O. Severance the note in suit, and further shows that defendants received from Severance a bond of indemnity, to protect them in case the payment should turn out invalid at this time. October 30th there was a suit pending in the state court, and the defendants were garnishees; the writ of garnishment was served upon them the twenty-fourth of October, 1878, six days before they answered the same. On the first day of November, 1878, the next day after the date of the receipt, these defendants, or one of them, made answer that they had not paid this note, or any part thereof, and, further, that Priest had notified him by letter of the transfer of the note. It is a little strange, if they had paid this note after the garnishment was served, and but the day before the answer in garnishment was made, that he should have forgotten so important a transaction; such a presumption cannot be indulged in. He is not here to make any explanation, and I conclude that he preferred to let the case rest as it is, rather than state here that he had in fact made the payment to Severance, allowing that Severance had a right to collect the note. If he thought Severance had a right to collect the note, he knew also that he had the right to control the note, and defendants had the right to have the same surrendered up to them. The note was not lost; on the contrary, it was in the bank here, and defendants knew it, and Severance could not control it. Defendants therefore acted at their peril, and it is a matter of no consequence whether J. E. Severance or O. Severance was the real partner with Priest. They had, however, notice in the most impressive form that J. E. Severance was the real partner, as they had been made parties to a suit wherein J. E. Severance sued Priest, claiming that he, J. E. Severance, was the partner of Priest, to whom the note was given. And the very note in question was a part of the matter in litigation, and if they then had any doubt about who it was that comprised the firm of Priest & Severance, to whom they had executed this very note, it does not appear here, and yet it seems that upon floating rumor and general understanding that O. Severance was the real partner, they took the hazard, as they say, of paying this very note to O. Severance.

The judgment is for the plaintiff, for the note and interest, cost of protest, and cost of suit, and defendants must look to their bond of indemnity for redress, if any they have.

BALFOUR and others v. SULLIVAN, Collector, etc.

(Circuit Court, D. California. March 10, 1884.)

CUSTOMS DUTIES—GRAIN BAGS—RE-ENTRY FREE OF DUTY—POWERS OF SECRETARY.

The customs and revenue laws provide that "grain bags, the manufacture of the United States, when exported filled with American products, may be returned to the United States free of duty, under such rules and regulations as shall be prescribed by the secretary of the treasury." Grain bags manufactured in this country from imported materials were exported full of California wheat. The exporter demanded and received according to law, out of the public treasury, the drawback due him on account of the duty formerly collected upon the materials of which the bags were made. Upon the return of the grain bags, *held*, that they were entitled to pass free of duty. The power of the secretary to prescribe rules and regulations does not authorize him to impose a duty, not provided for by congress, in repayment of the drawback.

At Law.

Page & Eells and Milton Andros, for plaintiffs.

S. G. Hilborn, U. S. Atty., and *Ward McAllister*, Asst. U. S. Atty., for defendant.

SAWYER, J. This is a suit to recover of defendant the sum of \$180, collected as duties on 11,850 grain bags, which collection of duties is claimed to be unlawful. The grain bags had been manufactured by Detrick & Co., manufacturers of bags, at San Francisco, out of material of foreign production, upon which the importers had paid the proper duties. The bags were stamped, "Detrick—Drawback Right Reserved," and sold to grain producers of the state of California. These bags having been purchased by the grain growers, and filled with wheat produced in California, were, with their contents, afterwards sold to plaintiffs, in the ordinary course of business in the grain market, who shipped the wheat in the bags, as so purchased of the producers, to Liverpool, England, where the wheat was sold, and emptied from the bags, and the bags were afterwards brought back to San Francisco, whence they had been shipped by plaintiffs, the ownership of the bags remaining in the plaintiffs from the time of their purchase, filled with California wheat, till their return to San Francisco empty. Upon their leaving San Francisco, filled with wheat, Detrick & Co. claimed the drawback of duties paid on the material used in the manufacture of the bags, and the drawback was paid to them in assumed pursuance of the provisions of section 3019 of the Revised Statutes of the United States, and the regulations of the secretary of the treasury for carrying those provisions into effect. On the return of the bags the plaintiffs claimed, upon various grounds, that they were entitled to bring the bags to San Francisco and receive them free of duty. The collector took the ground that the drawback having been paid on exportation, in pursuance of section 3019, and the regulations of the secretary of the treasury, duties must be paid; and plaintiffs were compelled to pay the duties claimed in order

to obtain the bags. The action of the collector, in collecting the duties, was affirmed by the secretary of the treasury, and this action is brought to recover the duties so collected.

Section 9 of the act of congress of February 8, 1875, "To amend existing customs and internal revenue laws, and for other purposes," (Supp. Rev. St. 130,) provides that "*grain bags, the manufacture of the United States, when exported, filled with American products, may be returned to the United States free of duty, under such rules and regulations as shall be prescribed by the secretary of the treasury.*" There is no exception to these provisions. The *bags*, whatever may be said of the *material*, were "the manufacture of the United States," and they were exported *filled with American products*, and being such were entitled under this act to "be returned to the United States *free of duty.*" It does not appear to me that this explicit language is open to construction. The only exception is that they shall be returned "under such rules and regulations as shall be prescribed by the secretary of the treasury." The authority of the secretary only extends to the *modus operandi*—the course to be pursued in identifying and returning the "grain bags;" and that power does not extend to an imposition of a duty in the face of the provision of the statute that they "may be returned * * * free of duty." The statute in no sense authorizes the imposition of a duty, as a part of the rules and regulations to be prescribed by him. The omission to provide for a repayment of the drawback in such cases may be an oversight on the part of congress. But whether so or not, to require by regulation the collection of the regular duties upon bags manufactured in the United States, because the bags, when exported, paid a "drawback" for duties on the material of which they were manufactured, is to ingraft an exception on the provisions of the act, authorizing the bags which were "exported filled with American products," "to be returned * * * free of duty," which congress either did not see fit or omitted to adopt. The secretary of the treasury was not authorized to make any such exception. *Morrill v. Jones*, 106 U. S. 466; S. C. 1 Sup. Ct. Rep. 423; *Merritt v. Welsh*, 104 U. S. 702; *Balfour v. Sullivan*, 8 Sawy. 648; S. C. 17 FED. REP. 231.

Under the provision of the act cited the bags in question were entitled to re-enter the United States "free of duty," and the duties on that ground were illegally demanded and collected. None of the other provisions of the statute cited affect this ground relied on for a recovery, and they therefore need not be discussed.

There must be a judgment for plaintiffs for the amount of duties unlawfully collected, and it is so ordered.

KENNEDY v. CITY OF SACRAMENTO.

(Circuit Court, D. California. February 18, 1884.)

1. MUNICIPAL BONDS—SACRAMENTO CITY—NO ACTION MAINTAINABLE.

The legislature of California in 1858 enacted that thereafter no action should be brought against the city of Sacramento by its creditors; that the city should issue its bonds for the purpose of funding its debt, and should levy an annual tax of 1 per cent., of which a specified portion should be set aside for the payment of the bonds. Those who held claims against the city surrendered their evidences of indebtedness, and took the bonds instead. *Held*, that no action would lie upon the bonds, but that the remedy of the bondholders was by *damus* against the proper officers to compel them to carry out the terms of the statute. The creditors, by accepting the bonds, contracted that the city should not be liable to be sued.

2. STATUTE PERMITTING PERFORMANCE OF A DUTY CONSTRUED AS MANDAMUS.

In 1863 the legislature revised the act of 1858, re-enacted its provisions regarding to the payment of the bonds, except that the terms of the re-enacted clause, sanctioning a tax of 1 per cent., was permissive instead of mandatory. But, *held*, that the provision was still compulsory, since words in a statute permitting officers to discharge a public duty are to be construed as mandatory. If the act were susceptible of any other construction it would impair the obligation of contracts.

3. WAIVER OF CONSTITUTIONAL RIGHT.

The constitution of the state provided that all corporations should be sued to be sued like natural persons. *Held*, that (even supposing the clause to apply to municipal corporations) the bondholders had by their contract divested themselves of their constitutional right.

At Law.

J. W. Winans, for plaintiff.

J. H. McKune, A. P. Catlin, and W. A. Anderson, for defendant.

SAWYER, J., (orally.) This is an action brought to recover \$90,000 due on coupons of the Sacramento city bonds. It is an ordinary action upon the instruments, not a *mandamus* against the officers of the city, but an action against the city of Sacramento to recover on the coupons as upon a contract. Under the charter of Sacramento of 1851, a large amount of indebtedness had accrued, for which bonds were issued. In 1858 the city and county of Sacramento were consolidated into a municipal corporation, like the city and county of San Francisco; the boundaries of the city and county being co-extensive with the former boundaries of the county. In that act consolidating the city and county, provision was made for funding the existing debt of the city and of the county of Sacramento, and provision was made in the act for the purpose of liquidating, funding and paying the claims against the city and county of Sacramento hereinafter specified. "The treasurer shall cause to be prepared suitable bonds for the county of Sacramento, not exceeding the sum of six hundred thousand dollars, and for the city of Sacramento not exceeding one million six hundred thousand dollars, bearing interest at the rate of six per cent. per annum, from the first day of January 1859." St. 1858, p. 280, § 37. Then it provides for raising a tax for the payment of the interest, and ultimate extinguishment, of

prior indebtedness of the city of Sacramento so funded. In the last clause of the section it provides that "*none of the claims herein specified shall be liquidated or paid except in the manner herein provided.*"

The act also provides that "the city and county shall not be sued in any action whatever, nor shall any of its lands, buildings, improvements, property, franchises, taxes, revenues, actions, choses in action, and effects, be subject to any attachment, levy, or sale, or any process whatever, either mesne or final," (Id. p. 268, § 1,) thereby cutting off all right of suit, and providing that none of the funds, or revenues from taxation, or otherwise, shall be reached, on account of this indebtedness, otherwise than as provided in the act.

Section 34 provides that the board of supervisors shall not have power to levy any greater taxes than as follows, viz.: "On the real and personal estate, except such as is exempt by law throughout the city and county, a tax of one hundred cents on the one hundred dollars," shall be levied, and the amount is limited to that sum annually, except for state and special purposes. But it provides further, that "they shall levy for municipal purposes, on all real and personal property within the city, except such as is exempt by law, a tax of one hundred cents on one hundred dollars."

Section 35 provides that "the revenue derived from and within the city limits for municipal purposes,—namely, taxes, licenses, harbor dues, water-rents, and fines collected in the mayor's court, or otherwise,—when paid into the treasury, shall be set apart and appropriated as follows: *Fifty-five per cent. to an interest and sinking fund, which shall be applied to the payment of the annual interest and the final redemption of bonds issued for city indebtedness, in accordance with the provisions of this act,*" referring to the bonds which were to be issued in liquidation of the prior indebtedness of the city in pursuance of the terms of the act.

Section 38 provides: "*The annual interest and principal of all bonds issued for claims against the city shall be paid from the interest and sinking fund provided in section 35, and in the manner otherwise provided in this act.*"

There is, then, a provision for funding the prior indebtedness of the city to the amount of \$1,600,000, and provision that 55 per cent. of the taxes and other revenues of the city shall be set apart to pay the interest, and to secure the ultimate extinguishment, of the bonds; and it is provided that "*none of the claims herein specified shall be liquidated or paid, except in the manner herein provided;*" and it is further provided that there shall be no suit against the city on these or any other claims, and that no execution or other process shall issue by which any of the property or revenues or moneys or other resources of the city shall be reached.

The rate of interest was 6 per cent. per annum, to be paid upon the indebtedness. The parties who surrendered their prior evidences of indebtedness and took these bonds, took them under the provis-

ions of this act, which was a contract made between the city and them; that the bonds should be collected only in that particular manner, and paid in that particular mode, and no other; that there should be no other remedy for them; that the city should not be sued. The advantages which they obtained are subject to the provisions made for their payment—to the limitations put upon their remedy. The advantage to the city was that it should not be harassed by any other kind of suit; an extension of the time for payment; and the reduction of the rate of interest. The advantage to the holders was the specific, certain, and permanent provision made for prompt payment in future. This was a fair contract, entered into between the city on the one hand and its creditors on the other, in virtue of the provisions of this act. There were advantages gained and rights surrendered by each, and a valuable consideration moving from and to both contracting parties. In 1863 that charter was repealed and another one passed. The city and county were restored by the charter of 1863. In that charter it is provided that the city of Sacramento may be sued upon bonds or covenants, etc., "provided, however, that such bond, covenant, agreement, contract, matter, or thing, that was the cause of action, has been made or entered into after the passage of this act," (St. 1863, p. 415, § 1;) so that, by implication, in providing the kinds of bonds upon which suit might be brought, it was limited to the covenants or bonds or liabilities accruing after the passage of the act. Thus, as to these bonds in question, there is no change in the law with reference to the liability of the city to be sued. And in that act it is also "provided further that none of the lands, tenements, hereditaments, taxes, revenues, franchises, action, choses in action, property, or effects of any kind or nature whatsoever, of said city or of either or any of its trusts or uses, shall be attached, levied upon, or sold, on any process whatever, either original, mesne, or final," thereby continuing, as to *all* demands against the city, that provision of the charter of 1858 having reference to the inability to execute a judgment when obtained, by virtue of any process, mesne or final, against the city itself. With reference to the city of Sacramento, therefore, and with reference to these bonds, in both of these particulars, the law as laid down in the act of 1858 is continued.

The third clause of section 2 of the the act of 1863 also provides that the board of trustees shall have power "to levy and collect taxes and assessments on all property within the city, both real and personal, made taxable by law for state or county purposes, which taxes shall not exceed 1 per cent. per annum upon the assessed value of all property." St. 1863, p. 416. That is the same amount that they could levy under the old charter. Section 26 continues the provision for the payment of the bonds in question with one exception in language. In this act the words "*net water rents*" are used instead of "water rents." This is the only change. The provision is as follows, viz.:

"The revenue derived from and within the city limits for municipal purposes, viz., taxes, licenses, harbor dues, net water rents, and fines collected in the police courts or otherwise, except as hereinafter provided, when paid into the treasury, shall be appropriated and divided as follows: *Fifty-five per cent. to an interest and sinking fund, which shall be applied to the payment of the annual interest upon the bonds legally issued for city indebtedness, issued under the act of 1858; the excess of said fund, after the payment of said interest, shall be applied to the redemption of said bonds, in such manner as the board of trustees may determine.*" Id. p. 426, § 26.

Thus in the act of 1863 the same provision for the payment of these bonds is continued that was made in the act of 1858, and the same limitations upon the remedy are continued by providing that no suit shall be maintained against the city, and that none of its property, or revenues, or funds, shall be reached under any process, mesne or final.

With reference to the amount levied, one word is changed only, the positive provision in the old act that 100 cents on the \$100 shall be raised each year for the purposes of revenue is made permissive in form instead of mandatory in the new act. This is the only change in the act in that particular, the same provision otherwise continuing as provided in the other act. But words permissive in form, when a public duty is involved, are construed as mandatory. Under the provisions of these acts, in my judgment, the city is not liable to be sued on these bonds or coupons. It is one of the terms of the contract between the city and the bondholders, and a part of the consideration upon which the bonds were issued, that the city shall not be sued on them. The remedy alone is to compel the treasurer, by *mandamus*, to pay any money in the sinking fund upon the coupons. If the board of trustees refuse to provide that fund, the remedy is to compel them to provide a fund by a *mandamus*, in accordance with the duty imposed upon them by law. These are proceedings personally against the officers to compel them to perform a duty enjoined by law, in respect to which they have no discretion. Both of these remedies are remedies against officers to compel the performance of duties required by these express provisions of the act for the payment of these bonds, and not a suit against the city. Those remedies, the supreme court of California has held, are available.

In the case of *Meyer v. Brown*, decided on September 28, 1883, the supreme court held that the board of trustees is subject to be compelled to perform its duty to provide this fund by *mandamus*. On page 157 of the Pacific Coast Law Journal, the court says:

"Having thus made provision for the payment annually of the interest on the bonds, and ultimately for their redemption, the legislature offered them in payment of the legal claims against the old city government. The offer was accepted, and the holders of the latter surrendered their claims, in consideration of which the consolidated government issued to them its bonds, pursuant to the provisions of the act. The bonds carried with them the pledge of an annual tax for municipal purposes on all real and personal property within the city limits, except such as is exempt by law, of one hundred cents

on the one hundred dollars, fifty-five per cent. of which to be set apart appropriated to an interest and sinking fund to be applied to the payment of the annual interest upon the bonds and to their final redemption. The chief security offered the creditors as an inducement to accept the bonds in payment of their claims. When the bonds, for whose payment interest provision was thus made, were issued and accepted by the creditors of the old city government, a contract was made as solemn and binding, and much beyond subsequent legislation, as it would have been if made between private persons. These views will be found sustained and amplified in an opinion recently rendered by the supreme court of the United States in a case entitled *Louisiana v. Pilsbury*. 105 U. S. 278."

I have examined that case, and it fully sustains this proposition. It is a similar case. The contract was enforced by *mandamus* against the officers. "It is well occasionally," added the court, "to recall the fact that there is no more reason to permit a municipal government to repudiate its solemn obligations entered into for value than there is to permit an individual to do so. Good faith and fair dealing should be exacted of the one equally with the other." In that case, then, it was held that the board of trustees was bound to go on and levy this tax in pursuance of the old law, if that was more advantageous to the parties than the new one. It is incompetent for the legislature to repeal the old statute, so far as it affected the right of these bondholders; and in a recent case, decided February 13, 1884, (the case of *Meyer v. Porter*, 2 Pac. Rep. 884,) the supreme court of California again takes a similar view. The question was whether the treasurer may be compelled to pay the interest out of the fund provided; the supreme court holds in this case that the treasurer may be compelled to pay out of the moneys which are in that sinking fund the interest due upon coupons that are presented, irrespective of the fact that only one party presents his coupons. Under this decision, so long as there is any money in the fund, the holder of coupons due is entitled to his money on their presentation, and it is not necessary to file a bill in equity to enforce a trust, making all the holders of the bonds and coupons parties, for the purpose of distributing the fund *pro rata*, but that any man having overdue coupons may by *mandamus* compel the treasurer to pay out the funds upon such coupons, so long as there are funds. Under those decisions of the supreme court of the state, supported by the authority of the supreme court of the United States, the holders of bonds and coupons have the exact remedy which the provision of the charter of 1858 provided for the payment of those bonds, and which the act of 1863 continued, and if the latter act does not in all respects continue the remedy of the particulars wherein the former act was repealed, the latter is void, and the old act in force.

The plaintiff insists that the provisions of the charter of Sacramento of 1858, that the city shall not be sued, and continued in force with respect to the bonds and coupons in question in the act of 1863, are void under the provision of the state constitution that "all corporations

tions shall have the right to sue, and shall be subject to be sued, in all courts in cases like natural persons." Old Const. art. 4, § 38. It may well be doubted whether this provision applies to municipal corporations and counties made corporations. But if it be otherwise, the contract in this case takes the bonds in question out of the provision. It was one of the conditions upon which the bonds were issued by the city and accepted by the bondholders that there should be no suit on the bonds, and no other remedy than that provided by the charter. This was a part of the benefit to inure to the city by the arrangement, and an important and valuable part of the consideration for its action in issuing the bonds and making the extraordinary and permanent provision and appropriation for payment beneficial to the bondholders. This part of the contract is as important and as binding as any other. The provisions are that the city shall not be sued, and that none of its property, revenue, or funds shall be taken upon any mesne or final process, and that none of the claims herein specified shall be liquidated or paid except in the manner herein provided. Also, that "the annual interest and principal of all bonds issued for claims against the said city shall be paid from the interest and sinking fund provided by section 35, and in the manner otherwise provided in this act." The action brought against the city, therefore, in the face of these provisions of the contract, cannot, in my judgment, be maintained, for the reasons and upon the grounds stated. The only remedy is to proceed by *mandamus* against the officers personally, to compel them to perform their respective duties, as prescribed by the act of 1858, and under the act of 1863, also, so far as that act is in accord with the act of 1858. The supreme court, as we have seen, has held that it was incompetent for the legislature to repeal the provisions of the charter of 1858, so far as they affect the means provided for liquidation of these bonds. Consequently, that the board of trustees could be compelled by *mandamus* to provide the funds in accordance with the requirements of the charter of 1858; and, when so provided, that the treasurer, having the custody of the funds, could be compelled in like manner to pay the coupons as presented out of the funds provided.

There must be judgment for defendant on the grounds indicated, viz., that a suit against the city is not the proper remedy, and cannot be maintained in the face of the contract entered into under the statute; and it is so ordered.

Ex parte WORLEY.*(District Court, W. D. North Carolina. 1884.)***POWERS AND DUTIES OF A MARSHAL AS TO PRECEPTS IN HIS HANDS AT THE EXPIRATION OF HIS TERM OF OFFICE.**

In North Carolina a marshal, whose term of office has expired, may be required so to amend his return upon an execution as to furnish his successor with a description of the land levied upon, sufficiently accurate to enable him to execute a valid deed to the purchaser at the execution sale.

A Petition for Orders to perfect title to lands sold on execution sale.

P. A. Cummings, for petitioner.

DICK, J. The petitioner, Henry Worley, alleges that he is a purchaser at a sale made by a deputy of R. M. Douglas, late marshal of this district, under a writ of execution founded upon a regular judgment of this court; and levied upon the lands of the judgment debtor, Solomon Davis; that the purchase money has been paid by him to said deputy, and has been returned into court in part satisfaction of said judgment; that the term of office of the late marshal has expired, and a deed has not been executed, and the levy indorsed upon the execution is defective in not describing the land sold with sufficient certainty. The relief prayed for is an order to the late marshal, directing him to amend his levy so as to set forth a description of the land sold with more certainty as to location and boundaries. The petitioner also prays for an order to the present marshal, Thomas B. Keogh, directing him to perfect title and execute a deed to said lands, in conformity with section 994 of the Revised Statutes.

Upon hearing the petition, the suggestions of counsel, and the evidence presented, it is considered that the petitioner is entitled to the relief he seeks. A court has the power to direct writs of execution to be amended at any time, so as to set forth necessary facts for the purpose of supporting proceedings under them. This power is indispensable to the administration of justice and the due regulation of the officers of the court. Under section 788 of the Revised Statutes, marshals and their deputies possess in each state the same powers in executing the laws of the United States as the sheriffs and their deputies in such state have in executing state laws. Section 790, among other things, provides that marshals and their deputies, when the term of office expires, shall have power to execute all such precepts as may, at the time, be in their hands. We will, therefore, consider the laws of this state in determining some of the questions presented in this proceeding.

It is well settled in this state that a sheriff may be directed or permitted by the proper court to make a return on a writ of execution, or to amend the same, at any time, so as to make it conform to the truth, even in cases where important consequences as to the rights of

parties are produced by such amendments. *Cody v. Quinn*, 6 Ired. Law, 191, and cases cited. This power cannot be exercised by a court so as to affect the rights of third persons, who are not parties to the record, and innocent purchasers for value without notice. *Williams v. Sharpe*, 70 N. C. 582; *Phillips v. Holland*, 78 N. C. 81. It does not appear that the right of third persons are in any way involved in this matter; and as this is an *ex parte* proceeding, such rights—if any exist—cannot be affected, as such persons will not be prevented from asserting such rights by an order made in a case in which they are not parties and have no notice. If the marshal who made the sale was still in office, the amendment asked for would not be necessary, as he could make a deed with full description as to boundaries, even if there had been no levy of the execution. In this state there is no necessity for a sheriff to make a levy on real property. A judgment creates a lien on all such property belonging to the judgment debtor in every county in which the judgment may be docketed. The writ of execution operates as an authority and order of sale. The only effect of a previous levy is the specific appropriation of the property on which it is made; and this may be a matter of importance where there are other lands and other judgment creditors of a common debtor. *Surratt v. Crawford*, 87 N. C. 376. It is well settled by many decisions that the rights as to real property are largely regulated by local state laws, and it is the duty of federal courts—having acquired jurisdiction—to administer those laws under the same modes of procedure as if they were local courts in the state in which they are held. *Spear*, Fed. Jud. 641, 662. In accordance with the laws of this state a docketed judgment in a federal court of this district is a lien upon all real property within its jurisdictional limits, and may be enforced by such modes of procedure as are provided by the laws of this state. As section 994 of Revised Statutes provides that a deed to a purchaser at execution sale, in cases like the one before us, shall be executed by the present marshal, it is necessary that he should derive information from his predecessor as to the location and boundaries of the lands sold; or from evidence passed upon by the court. If he obtained information upon this subject from other persons, their statements, set forth in a deed executed by him, would in no way be operative against either parties or strangers. The return upon process made by a duly qualified officer of the law is *prima facie* evidence of what it states, and cannot be collaterally impeached, although it may be corrected so as to speak the truth with more completeness and certainty, under the direction of the court to which the return is made. *Edwards v. Tipton*, 77 N. C. 222. From the return of the late marshal it appears that the lands of the judgment debtor were duly sold to the petitioner, and the purchase money has been received and paid into office, and the levy indorsed on the execution does not specify the location and boundaries.

The only question which remains to be considered is whether the late marshal—since the expiration of his term of office—can be legally directed or permitted by this court to make an amendment to his return on the writ of execution under which he acted in making sale of said lands. We have heretofore referred to section 790, which, among other things, provides that a marshal or his deputy, after the expiration of his term of office, shall have power to execute all such precepts as may be in his hands at the time of such expiration of office. As to such precepts, until they are executed, he is still marshal, and subject to all official duties and responsibilities imposed upon him by law. The statute, in conferring the power, imposed the duty of exercising that power as far as required by law; and within such limits, the marshal, by necessary implication, is entitled to have and enjoy the rights and privileges incident to such official position; and is also invested with the authority to use all legal means which may be appropriate and necessary to enable him to execute the power conferred, and perform the duties imposed by law; and he must, in such matters, obey the proper orders and directions of the court to which such precepts are returnable. *Bump, Fed. Proc. 482.* In making sale of land under a writ of execution, the marshal acts under a power conferred by law, and when this power is properly exercised by a sale, the title of the judgment debtor passes to the purchaser, but it is not perfected until a deed is executed which has relation to the date of sale. *McArtan v. McLaughlin*, 88 N. C. 391. As the deed in this case cannot be made properly until the late marshal, by an amended return, furnishes a more complete description of the land sold by him, the process may be regarded as still in his hands unexecuted, and he may be directed by this court to amend his return so as to furnish information to the present marshal by which he may finish the execution of a power and perfect title by making a proper deed. The petitioner is clearly entitled to the *prima facie* evidence of the location of said lands, which will be afforded by the return of the officer who made the sale.

It is therefore ordered that the clerk of this court send said writ of execution to the late marshal, R. M. Douglas, with instructions to direct his deputy to amend the return so as to set forth a more specific description of the boundaries of the lands sold by him. If the said marshal fail to give such directions, he is hereby ordered to show cause at the next term of this court why the amendment should not be made. If the amendment should be made as directed, then the present marshal, Thomas B. Keogh, is ordered to perfect the title of the petitioner by executing a deed for such lands, as required by section 994, Rev. St.

In re LOWE, Bankrupt.

(District Court, D. Indiana. 1884.)

1. BANKRUPTCY—FRAUDULENT CONVEYANCE BY BANKRUPT—WHEN JUDGMENT BECOMES LIEN.

A judgment recovered, defendant having meantime made a fraudulent conveyance of his property, is deemed to have attached at the date of its rendition as if the fraudulent conveyance had never been made.

2. SAME—WHO TO BRING SUIT TO ANNUL.

An action to annul a fraudulent conveyance by a bankrupt can be brought only in the name of the assignee. Failure, therefore, on the part of a creditor to anticipate the assignee in bringing such action cannot be deemed a lack of diligence.

3. SAME—PRIORITY OF JUDGMENTS AS LIENS—PARTNERSHIP AND INDIVIDUAL CLAIMS.

Under the statutes of Indiana a judgment against a fraudulent grantor is made a lien, and accordingly he who obtains the first judgment is first in diligence, and, except as against innocent purchasers of the fraudulent grantee, first in right. But this rule is subject to the priorities, respectively, of partnership and individual creditors in and to partnership and individual property.

4. SAME—ASSIGNEE REPRESENTS ALL CREDITORS ALIKE.

Assignee represents all creditors alike, and his recovery of property wrongfully conveyed must redound to the benefit of all interested, according to their several interests.

On Exceptions to Master's Report.

Taylor, Rand & Taylor, for themselves.

McMaster & Boice, for assignee.

WOODS, J. The facts shown by the report of the master are to the effect that on the second day of January, 1877, Taylor, Rand & Taylor recovered, in the superior court of Marion county, a judgment against Nahum H. Lowe. Lowe owned real estate in Marion county which, before the rendition of that judgment, he had conveyed to another with intent to cheat his creditors, the grantee not being a good-faith purchaser. After the rendition of this judgment Lowe was adjudged a bankrupt. The assignee afterwards obtained a decree against the grantee in said conveyance, declaring the same void; and Taylor, Rand & Taylor having presented a claim that their judgment constituted a lien upon the property from the date of rendition, the court ordered that the assignee sell the property and report the proceeds, and that all liens be transferred to the fund. Upon these facts the master reports that Taylor, Rand & Taylor have a lien as claimed which should be first satisfied. The assignee insists that this is not so; that the judgment did not constitute a lien so long as the title remained in the fraudulent grantee; and that the decree setting aside that sale, rendered at the suit of the assignee, inured to the benefit of the estate—that is to say, to the benefit of all creditors alike. This conclusion is based mainly upon the proposition that the assignee, having been first to institute suit to set the fraudulent conveyance aside, became entitled, by virtue of his superior diligence, to prefer-

ence over a judgment creditor who had failed to bring any such suit.

It seems clear, under the Indiana Statutes, (Rev. St. 1881, §§ 751, 752,) that the judgment of Taylor, Rand & Taylor became at once, upon rendition, a lien upon the real estate in question. Section 751 declares that such judgments "shall be a lien upon real estate and chattels real, liable to execution;" and by section 752 it is enacted that "lands fraudulently conveyed with intent to delay or defraud creditors" shall be liable to all judgments and attachments, and may be sold on execution against the debtor. It has been determined, too, that the sale upon execution may precede any suit or proceedings to set aside or annul the fraudulent conveyance. *Frazer v. Brown*, 2 Blackf. 295. It is not deemed necessary now to determine whether or not there may be a race of diligence between owners of different judgments in such a case, or whether or not, when the conveyance has been set aside at the suit of any of the creditors, the lien of each judgment must be deemed to have attached at the date of its rendition, as if the fraudulent conveyance had never been made. The latter would seem to be the logical conclusion. The complaint to set the conveyance aside must aver the facts which show that the property is subject to the lien of judgments already rendered against the fraudulent grantor, and the complainant cannot well disclaim or escape the result; certainly not on the pretext that he had, in ignorance of the facts or of the legal consequence, put forth effort or incurred costs which should not be turned to the benefit of another. Indeed, the very doctrine of superior diligence would seem to lead to the same conclusion, when properly applied.

Under the statute a judgment against the fraudulent grantor creates a lien, and consequently he who obtains the first judgment made first in diligence, and thereafter, except as against innocent purchasers of the fraudulent grantee, should be deemed to be first in right, unless by actual neglect or abandonment of his claim, or by other affirmative act, he lose his preference. If this is not so, a judgment creditor, who delayed for a day in procuring the issue and levy of execution, or in commencing proceedings to annul the fraudulent transfer, might find himself postponed to another, who had no judgment, but, in the mean time, had brought a single suit (as may be done in this state) to obtain a judgment and to avoid the fraudulent deed. On this subject see *Hardy v. Mitchell*, 67 Ind. 485; *Hanna v. Aebker*, 84 Ind. 411. But, however this may be, I think it quite clear that the doctrine proposed cannot apply when the fraudulent conveyance has been annulled at the instance of the assignee in bankruptcy of the fraudulent grantor. By express provision of the bankrupt law all property of the bankrupt, conveyed in fraud of his creditors, is, by virtue of the adjudication, and by the appointment of an assignee, vested in the assignee, to whom also the power and authority are given "to manage, dispose of, sue for, and recover all his property, real estate, real or personal, debts or effects, and to defend all suits at law

or in equity pending against the bankrupt." 14 St. 525. Accordingly it has been held, and is well settled, that after the appointment of an assignee in bankruptcy, an action by a creditor to set aside a fraudulent conveyance of the bankrupt or to reach, in any way, property fraudulently transferred, cannot be maintained, and that the remedy must be had in a suit or action by or in the name of the assignee. *Glenny v. Langdon*, 98 U. S. 20; *Trimble v. Woodhead*, 102 U. S. 647; *Moyer v. Dewey*, 103 U. S. 301. The bankrupt law, moreover, provides for the protection of existing liens upon all property vested in the assignee. It follows clearly that the assignee is the representative of all creditors alike, and if he obtains a decree for the recovery of property fraudulently conveyed, it is for the benefit of all interested, according to their respective interests. There is certainly no room for the proposition that the judgment creditor, by failing to sue in his own name, (when forbidden so to do by the law which gave the assignee the right to sue,) lost any right which he had, and by superior diligence might have saved.

Another objection to the report is that the judgment of Taylor, Rand & Taylor is not in fact the oldest, and therefore not entitled to preference. It is in fact not the oldest unsatisfied judgment; but the older judgments against *Lowe* were all rendered against him as one of a firm, and in favor of partnership creditors; while the judgment of Taylor, Rand & Taylor is for the individual debt of *Lowe*, and therefore properly first payable out of this fund which was derived wholly from *Lowe's* individual property. *Hardy v. Mitchell*, *supra*; *Weyer v. Thornburgh*, 15 Ind. 125; *Dean v. Phillips*, 17 Ind. 406; *Bond v. Nave*, 62 Ind. 505; *Nat. Bank v. Locke*, 89 Ind. 428.

Judgment liens, except in Indiana, as against innocent purchasers, are subject to prior equities in the property. Freem. Judgm. §§ 356, 357; *Glidewell v. Spaugh*, 26 Ind. 319; *Jones v. Rhoads*, 74 Ind. 510; *Huffman v. Copeland*, 86 Ind. 224, and cases cited.

It follows that the remainder due upon the judgment of Taylor, Rand & Taylor should be first paid. So ordered.

UNITED STATES v. RUSSELL.

(District Court, W. D. Texas. 1884.)

1. EVIDENCE—SIMILAR BUT UNCONNECTED TRANSACTIONS—GUILTY KNOWLEDGE.

In an indictment for the falsification of an account, other false accounts made by the defendant at about the same time may be introduced in evidence for the purpose of proving guilty knowledge.

2. FALSE ACCOUNT.

An account including items for services not actually rendered or moneys not actually paid is a false account.

3. SAME—BY MEANS OF AN AGENT.

An officer who conspires with others to obtain money by false accounts is guilty of falsification though he may be ignorant of the items of any particular account.

TURNER, J., (*charging jury.*) The law of the land is that every man is presumed to be innocent until his guilt is established by the evidence in the case beyond a reasonable doubt. By a reasonable doubt is not meant a hypothetical, speculative doubt, but a doubt arising from a want of sufficient evidence to satisfy the judgment and reason of the jury that the defendant is really guilty as charged. In order to convict the defendant you should be satisfied from the evidence (1) that the account set out in the indictment is a false account; (2) that defendant made, or caused the same to be made, if not actually made by defendant, but by some other person acting for him and under his direction and authority, then he caused it to be made; (3) you must find that the same was made with the view and purpose of presenting the same to the first auditor of accounts of the treasury of the United States for approval; and (4) you must find that the defendant *knew* the account to be false.

You must resolve each of these propositions in the affirmative before you should return a verdict of guilty. The three first propositions you must determine from the evidence which relates to the particular account mentioned in the indictment. When you come to the consideration of the fourth proposition, *then*, and not till *then*, you may consider the other accounts that have been introduced in evidence. You may ask why were these accounts put in evidence at all? The answer is, the law has made guilty knowledge an indispensable ingredient in the offense, and you are required to pass upon this element. The difficulty of proving by direct evidence what another man knows you will readily discover. The law requires the best evidence that the nature of the case admits of. And the idea being, as applied to this case, that the defendant would be more likely to make out *one* false account by accident, mistake, or otherwise, than he would to make several. In other words, the likelihood that the defendant knew the true character of the account would be strengthened in proportion to the number of acts of a similar character done at or about the same time. To illustrate, suppose you lose your horse; you find it in the possession of A.; he asserts that he took the horse by mistake; but you find that about the same time he took horses belonging to several others; would not the fact that he took others about the same time be proper evidence to be considered in determining the question whether the particular taking was or not by mistake? The chances of mistake decrease in proportion as the alleged mistakes increase.

I have tried by this branch of the charge to lay down the rule and also to give you an idea of the reason upon which it is based, and upon this point it is for you to determine from all the evidence whether defendant knew the account to be false, if false it is. There

is no conflict in the evidence as to the character of the Jones account. It is shown that the defendant verified the account mentioned in the indictment, together with others, by his oath, stating that the same were *just*; that the services charged for had been actually rendered; and that the expenditures therein stated were actually paid in lawful money, as he believed, etc. This oath came properly in the line of his official duty, and it is upon the faith of this oath in a great measure the authorities act in approving and paying these accounts. The defendant has been upon the witness stand, and he states that, as a matter of fact, he did not know that the account mentioned in the indictment was and is a false account. The law has given to defendants the privilege of testifying in their own behalf. The weight to be given to his testimony is left with the jury to determine just as they determine the weight of the evidence of any other witness. If the jury believe him, they act upon his evidence accordingly. If, however, there is a conflict between his evidence and other evidence in the case, and the facts and circumstances in evidence which they do believe are inconsistent with the defendant's testimony, then, of course, the jury disregard his evidence. The jury being the exclusive judges of the weight of the evidence, and in the exercise of this function juries are not to lay aside their powers of reason and discrimination or their common sense.

What is a false account, within the meaning of the statute, as the same applies to marshals' accounts? Upon this point I charge you that if an account is made out for services that have not been rendered, it is to that extent a false account. If an account is made out for money actually paid out and expended, which, in fact, had not been paid and expended, the account is to that extent a false account. The mode of keeping marshals' accounts, as stated, is this: The marshal makes an estimate of moneys needed by him to defray expenses in serving process and in holding courts, and he makes a requisition for such amount. A draft is drawn upon the proper officer in favor of the marshal for the amount furnished, and the marshal is charged with that amount. To balance this or these charges, the marshal makes out his verified accounts, showing the actual services rendered and moneys actually paid out, for which he is credited, and when the supply is exhausted he makes another requisition, the government proceeding upon the pay-as-you-go system. When a man seeks and obtains a public office of confidence and trust he undertakes to bring to the discharge of the duties of that office care, caution, skill, and diligence proportionate to a full and fair discharge of the duties imposed, and if he knowingly shuts his eyes to passing events pertaining to a faithful discharge of the duties imposed he is guilty of negligence and dereliction of duty in case the confidence and trust reposed is thereby violated. While this is true, the law makes knowledge of the falsity of an account that is made out by the marshal, or by his direction, a necessary element in the offense,

which must be proven to the satisfaction of the jury before conviction. Still, it is proper for the jury to consider the nature of the trust, the duties thereby imposed, the intelligence of the party, the likelihood of knowledge upon a given point in issue, together with all the evidence before them upon the question of actual notice.

It is urged by the government that the evidence establishes as a fact that the defendant entered into a conspiracy with his clerks or deputies, or both, to the end that accounts should be made out, not for the actual services rendered, not for the actual expenses incurred, but for all such amounts as could be gotten through the departments at Washington and paid. If from the evidence you find that there was such an understanding between the defendant and any one or more of his clerks or deputies, and you further find that the account mentioned in the indictment is a false account, and was made in pursuance of the understanding that accounts were to be made out that should be false, then in that event I charge you that the law holds defendant guilty, the same as if he had made out the account himself, and he cannot protect himself by saying that he did not know the real character of the account. The rule of law being that when persons combine to do an unlawful act, the act of one is the act of all, and notice to one is notice to all, so far as it relates to acts done in furtherance of the common design and purpose. This question you will determine from all the facts and circumstances in evidence before you touching this particular question. It is insisted here by the able counsel for the defendant that the wrong, if any there be, is chargeable to the clerks and deputies of the defendant. In regard to that, I have this to say: The United States marshal has the absolute control of the business, as well as of the accounts of his office, and if from the evidence you believe that his clerks and deputies made out false accounts, but that the same was done with his knowledge and consent, then, as he had control over them, it would be unjust to cast reproach and obloquy upon them, they being but the instruments in the hands of the defendants to do the bidding of their principal, and in that event the consequences should be visited upon the defendant, and not upon those who had simply carried out the will and direction of their superior, as that would be making a scapegoat for the defendant of the agents he had employed to do his bidding in the matter, and for which he more than they should be held responsible, if responsibility there be. As I have said, the accounts in evidence, save and except the one set out in the indictment, are permitted to go to you only to aid you in determining the question whether the defendant knew the account mentioned in the indictment to be a false account, and further than that they have nothing to do with your deliberations. But it is proper for you to ask, could all these things that have been detailed by the evidence be done, and the defendant be ignorant thereof? for the evidence you have listened to, if true, shows a fearful condition of things, and you have a right to inquire for whose

interest have all these things been done. From an honest, actual expense account, no money could legitimately be realized by the defendant, or any one else. You have heard and seen that a large per cent. of the accounts in evidence are what is called actual-expense accounts, and you have been told what disposition was made of the money, as well as how those accounts were made up, and I charge you that if an actual-expense account is made out, and verified as such, when in fact the amount of moneys therein mentioned as expended were not in fact actually paid, the same is to that extent a false account.

It is urged that, as Sheely and McFarland had in fact spent time in endeavoring to arrest Smith and other persons that were accused of mail robbery, that the account is not false, because the same character of service had been performed by Sheely and McFarland for the government. The accounts should show just who rendered the service, and just what the services were, and just what was actually paid, and to whom. The accounts of Sheely and McFarland are before you, and if you shall find that they have been paid, or have been charged in their individual accounts for services rendered on other process, covering the same period as charged in the Jones account, it would follow that both cannot be true. One deputy may be allowed a *per diem* for endeavoring to make an arrest, but if his own account shows that he has charged for a given day or days, it would be a false charge to put a charge for *per diem* for the same days in somebody else's account, so as to reap the benefit thereof and get double or treble *per diem* pay. In other words, one deputy cannot have his own *per diem* and that of another for the same time. The accounts other than the Jones account, that have been given in evidence before you, are not for your consideration, except so far as they are shown to be false, and then for the purpose only, as I have heretofore stated.

It is urged that marshals could not make anything by charging only their fees as allowed by law. If it be true that the government is a hard taskmaster, it must also be admitted that no man is compelled to hold office, and a marshal is at liberty at any time to resign; so that the hardship, if hardship it be, is not a forced one.

As to the plea of a former conviction, I have this to say to you; That the record introduced by the defendant disproves the plea, and that matter constitutes no defense here, and you will not consider it. The case, so far as it relates to Mr. Wolf, has been dismissed, and with him as a defendant you have nothing to do.

I am not unmindful of the unrest that you have felt at what may have seemed to you as unnecessary delays in reaching a final determination of the case. But you must remember that from the first Tuesday of last month until the close of the term in Austin next July, this court may be in almost constant session, and that the district attorney, as well as myself, constantly employed, and that the mind as well as the body cannot stand a constant strain, and that therefore some little relaxation may be the best economy of time. I do not say

this because I have discovered any want of attention; quite the contrary; but I am conscious of your desire to return to your homes and to your families, and to your daily avocations. Justice demands a patient and careful investigation in order to arrive at a just conclusion. The case is of great interest both to the government and to the defendant, and the responsibility now rests with you to ascertain the truth, and when you shall have done so, it will be your bounden duty to declare it without reference to consequences. And your verdict will simply be, "We, the jury, find the defendant, Stillwell H. Russell, guilty as charged in the indictment;" or that "We, the jury, find the defendant, Stillwell H. Russell, not guilty." The question as to whether the defendant intended to defraud is not in the case, as that is not made an element in the offense charged.

¹ Verdict of guilty, April 4, 1883. Defendant sentenced to two years' confinement in penitentiary at Chester, Illinois.

MORGAN and others v. ROGERS.

(Circuit Court, D. Rhode Island. February 12, 1884.)

TRADE-MARK—TRANSFER BY GENERAL CONVEYANCE.

A trade-mark will pass under a general conveyance of all the assets and effects of a firm, though not specifically designated.

In Equity.

Nathan F. Dixon, J. Van Santvoord, and A. Chester, for complainants.

Benj. F. Thurston and J. C. B. Woods, for defendant.

COLT, J. It appears by the bill and evidence that the complainants had, from time to time, advanced large sums of money to the firm of J. Miller & Sons, who were carrying on the business in Providence, Rhode Island, of the manufacture and sale of certain proprietary medicines, notably the compound known as Dr. Haynes' Arabian Balsam. To secure the complainants, Miller & Sons executed a chattel mortgage to them, dated June 1, 1875. On or about March 22, 1876, the complainants took possession under the mortgage and proceeded, through an agent, to carry on the business of the manufacture and sale of these medicines. Subsequently, on February 13, 1877, Miller & Sons conveyed to the defendant, Rogers, the exclusive right to use their trade-marks, and to make and sell their medicinal compounds. The present suit is brought to restrain the defendant from using these trade-marks. The main question in the case turns upon the meaning of the following clause in the mortgage:

"The following articles of personal property, now in our possession, and now in and upon the premises known and designated as numbers (8) eight, and (12) twelve High street, in said city of Providence, viz.: The entire property, stock, furniture, and fixtures, and other articles, now in and upon said premises, together with all debts and book accounts, assets, and effects of every kind and nature, belonging to said firm of J. Miller & Sons."

The complainants contend that the above recital includes all trade-marks then owned and used by Miller & Sons in their business on High street, and that such was the intention of the contracting parties. The defendant claims that this description does not cover any trade-mark, but only the property, stock, accounts, etc., belonging to the firm; that such was the intention of the parties; and that the proof shows that at most, and independent of the mortgage, the complainants have a parol license to use the trade-marks until reimbursed for their advances to Miller & Sons. The clause of conveyance in the mortgage is very broad in its terms. Clearly the language bears the construction, and will bear no other than that the whole property of Miller & Sons, upon the premises occupied by them, together with their assets of every kind, passed by way of mortgage to the complainants. The description plainly identifies the property and states what is conveyed. It is not a case where there is an ambiguity by reason of two inconsistent descriptions in the same instrument, nor is it a case where the instrument fails to point out the subject-matter so that a stranger, after examination, might be deceived, but in plain and unequivocal language, and for the large consideration of \$48,500, the entire property of the firm of Miller & Sons, at their place of business, and all the firm assets, are conveyed by way of mortgage to the complainants. There is no reason why a trade-mark cannot be conveyed with the property with which it is associated. As an abstract right, apart from the article manufactured, a trade-mark cannot be sold, the reason being that such transfer would be productive of fraud upon the public. In this respect it differs from a patent or a copyright. But in connection with the article produced, it may be bought and sold like other property. It constitutes a part of partnership assets, and is properly sold with the firm property. *Browne, Trade M.* §§ 360, 361; *Hall v. Barrows*, 10 Jur. (N. S.) 55; *Ainsworth v. Walmsley*, 35 Law J. Ch. 352; *Kidd v. Johnson*, 100 U. S. 617; *Walton v. Crowley*, 3 Blatchf. 440; *Congress & Empire Spring Co. v. High Rock Congress Spring Co.* 57 Barb. 526, and 4 Amer. L. T. Rep. 168; *Dixon Crucible Co. v. Guggenheim*, 2 Brewst. 321. For a trade-mark to pass under a bill of sale it is not necessary that it should be specifically mentioned. In *Shipwright v. Clements*, 19 Weekly Rep. 599, there was a sale by one partner to the other of all his interest in the partnership, stock in trade, goods, chattels and effects, book debts, moneys in the bank, and all other property not being on the premises, the defendant covenanting that he would not carry on the trade within one mile of the premises, or in any way affect the business to

be thereafter carried on by the purchaser. The court held that this was a sale of the business, and that a trade-mark passed under such a sale, whether specially mentioned or not. If a trade-mark is an asset, as it is, there is no reason why it should not pass under the term assets, in an instrument which conveys the entire partnership property. To hold that the trade-mark is not included in this mortgage, is to say that the most valuable part of the partnership property is not covered by the words assets and effects of every kind and nature.

The evidence, in our opinion, strongly confirms the construction we have put upon the instrument, and shows that such was the intent of the parties. The complainants proceeded to take possession under the mortgage of the entire property and assets of the firm, to use the trade-marks, and to manufacture and sell the medicinal compounds. At the time possession was taken, one of the Millers sent for Mr. Morgan, and surrendered the keys. Two of the Millers for months after this continued to sell the medicines under the direction of the agent who was carrying on the business for the complainants. The annual royalty due Dr. Haynes the complainants assumed and paid. The defendant, Rogers, as shown by his letters, understood that the complainants had succeeded to all the rights of Miller & Sons, and were running the business. He says, however, that in the fall of 1876, after a consultation with the Millers, and after what they said, he took legal advice, and found that the complainants had title under the mortgage only to the goods and effects of Miller & Sons. But that his mind was not clear on the question of the trade-marks is shown by the fact that subsequently, in his conveyance from Miller & Sons, of February 13, 1877, under which he now claims the right to use these trade-marks, there is a provision that if, at the expiration of two years, he should not be in the exclusive enjoyment of the trade-marks in consequence of any act done by the Millers in *conveying* or *incumbering* them, then, at his option, the annuities to be paid to the Millers under the agreement were to cease. The fact that the complainants agreed to turn over the property to the Millers after they had been paid cannot operate to divest them of the exclusive right to the trade-marks if they had acquired such under the mortgage. With such exclusive right they, as well as Miller & Sons, might hope the debt would soon be extinguished, but without such exclusive right such a result would be most improbable.

Upon a proper construction of the clause of conveyance in the mortgage, and upon the evidence showing the intent of the parties, we are satisfied that the relief prayed for should be granted, and that the defendant should be enjoined from the use of the trade-marks.

TUTTLE, Trustee, etc., v. OLAFLEN and others.

(Circuit Court, S. D. New York. March 10, 1884.)

1. PATENTS—CRIMPING-MACHINE—PATENT No. 37,033.

The first claim of patent No. 37,033, for an improvement in frilling and crimping machines, being limited by its terms to a combination in which the blade acts to space the crimps as well as to form them, is not infringed by a crimper which does not space the crimps.

2. SAME—CRIMPER AND SMOOTHER—SECOND CLAIM.

The specifications for the second claim of the same patent, describing a combined crimper and smoother, point out the method in which the parts can operate without spacing the crimps, and the claim is infringed by a machine which crimps and smooths the cloth by a similar device.

C. B. Stoughton, for complainant.

Vanderpoel, Green & Cuming, for defendants.

WALLACE, J. The complainant's patent, (No. 37,033, Crosby & Kellogg, patentees, granted December 2, 1882,) for an improvement in frilling and crimping machines, describes and claims devices which constitute distinct inventions residing in the same machine. The devices for forming and spacing the frill or crimp, and those for securing them in place after it is formed, accomplish distinct results, both of which are useful, and either of which would support a patent. The devices also co-operate to make the stitched plait. The sewing mechanism is essential only for making the complete or stitched plait. The claims of the patent cover all the devices in combination, and also the sub-combinations, which are operative only in forming and spacing the frills or plaits. The first claim covers the crimping devices with and without the stitching mechanism. It is limited, however, by its terms to a combination in which the blade or crimper acts to space the crimps as well as to form them. The defendants' crimper does not act to space the crimps, and they do not therefore infringe this claim. The second claim is as follows: "In combination, a crimper and a smoother, substantially such as described, and acting substantially as specified, to fold the crimps to an edge." The crimper described in the specification is a blade actuated by a cam and spring, and its mode of operation is to engage the cloth, advance and make a crimp of the cloth lying between it and the holder, and shove the cloth along under the holder; it then retreats for another advance. While it moves forward to crimp it acts as a crimper. After the crimp is formed it acts as a spacer to space the crimps apart, and as a pusher to force the goods through the machine. The space between the crimps depends upon the length of advance of the crimper after the crimp is formed, which is determined and made adjustable by other mechanism. The crimper which is included in this claim is one which is to operate in combination with the other necessary co-operative parts substantially in the manner thus pointed out. It may operate effectively to fold the crimp to an edge without

spacing them regularly, and in this regard may be an improvement upon the Singer, or Arnold, or Magic ruffle contrivance. In describing their invention, the patentees state that the invention "consists essentially of two parts,—the one for forming the crimps, and the other for securing them in place after they are formed;" and they then proceed to say that "the mechanism for forming the crimps consists of a crimper which both forms and spaces them." The specification plainly describes how the parts can operate to fold the crimps to an edge without spacing them. The language of the claim is apt and precise to cover such a combination, and clearly distinguishes the functions of the operative parts from those assigned to the parts in the first claim.

While the defendants' machines do not employ a crimper which operates independently to space the crimps, their crimper and smoother effect the operation of folding the crimps to an edge, and their devices in this behalf are the substantial equivalents of those in the combination described in the second claim. In their machines the spacing is done by revolving rolls or holder, which, after each crimp is formed, advances the cloth, while the blade is retreating through a distance equal to the space between the successive crimps.

The second claim and the fourth claim of the patent are infringed. The fifth claim is not infringed, as the defendants have no auxiliary smoother such as is described in the patent.

The decree is ordered for the complainant, adjudging infringement of the second and fourth claims of the patent.

Taft v. STEERE and others.

(Circuit Court, D. Rhode Island. February 9, 1884.)

1. PATENTS—IMPROVEMENT IN LOOMS—SHUTTLE-RACE.

The characteristic feature of the second claim, patented by letters No. 63,853, for improvements in looms, is the vertical spring adjusted over each end of the shuttle-race; and a contrivance for checking the flight of the shuttle by other means is not an infringement.

2. SAME—ADJUSTABLE NOSE-PIECE.

The third claim of the same patent, if valid at all, is not infringed without the use of an adjustable nose-piece upon the cam.

In Equity.

A. J. P. Joy, for complainant.

Eugene F. Warner and Walter B. Vincent, for defendants.

Before LOWELL and COLT, JJ.

COLT, J. The complainant in his bill charges the defendants with the infringement of certain letters patent for improvements in looms, dated March 26, 1867, No. 63,853, issued to James J. Walworth and

Gustavus E. Buschick, assignees of Caspar Zwicky, the inventor. By subsequent assignments the plaintiff became the owner of the patent. The alleged infringements relate to the second and third claims. The second claim is as follows:

"In combination with the shuttle-race the springs, H, at either end, arranged over the top of the shuttle-path, and provided with means for vertical adjustment substantially as described."

The specification says:

"Above each end of the shuttle-race, E, are springs, H, each fastened to holding-pieces, e, on the side of the race, so that they can be adjusted in a vertical direction, and provided with a set, or thumb-screw, at f, for the purpose of further adjustment of the free end of said spring, H, in a vertical direction. The function of these springs, H, is to stop the shuttle gradually, and without recoil, and to keep it in its proper position on the shuttle-race to receive the blows of the picker staffs, T."

The essence of this claim is a spring, capable of vertical adjustment, over each end of the shuttle-race, to check the flight of the shuttle, and keep it in its place. The defendants do not use this. Their looms have no spring over the top of the shuttle-race, and no means of vertical adjustment. They use a piece of wood screwed on to the top of the shuttle-race, or a narrow piece of wood screwed on to the inside of the top, and the evidence goes to show that these have been in use for a period of 35 years. The side of the shuttle-box in the defendants' looms is of such shape that it operates to check the flight of the shuttle, and it also appears to be adjustable, but the important element in the plaintiff's claim is a spring on the top of the shuttle-box, capable of vertical adjustment, and this we do not find, nor any equivalent therefor, in the defendants' machine, and so there is no infringement.

The third claim is as follows:

"In combination with the picker staff of a loom, the cam, N, when provided with the adjustable piece, o, substantially as described."

It is not contended that Zwicky was the first to make a cam with a nose, in two pieces, instead of being solid, but the adjustable character of the nose-piece upon the cam is claimed as an improvement.

After carefully examining the evidence and exhibits, we are satisfied that the cams used by the defendants are not adjustable for any practicable purpose, that such adjustment is not attempted in their use; and that it is doubtful, at least, whether there is any utility in this feature of the patent, supposing the nose-piece to be attached to the cam exactly as shown in the model. It does not appear that any looms embodying the improvements claimed in this patent have ever been put in operation.

These conclusions dispose of the two main questions raised in this case, and we therefore deem it unnecessary to consider any others.

The bill should be dismissed.

SMITH v. HALKYARD and others.

(Circuit Court, D. Rhode Island. February 9, 1884.)

MOTION FOR CONTEMPT—PLAIN EVIDENCE REQUIRED.

To sustain a motion for contempt on account of the violation of an injunction issued to restrain the infringement of a patent, it must appear clearly and indisputably that the infringement continues.

In Equity. Motion for contempt.

John L. S. Roberts and George L. Roberts, for complainant.

Wilmarth H. Thurston and Benj. F. Thurston, for defendants.

Before LOWELL and COLT, JJ.

COLT, J. The defendants contend that they are not violating the injunction recently granted by this court by reason of certain changes made in their machine. The plaintiff claims that the defendants still infringe the first and seventh claims of the lacing-hook patent, as well as the patent for lacing-hook stock. The lacing-hook patent is for a combination. One of the elements of the feeding device mentioned in the first and seventh claims is a spring inserted in the groove along which the stock is fed, which operates to raise the stock and clear it from the dies. In their present machine the defendants use no spring. The inclines in the groove of the feeding mechanism are not, in our opinion, the equivalents of the spring, and do not perform the same function, and, as shown in the affidavit of Mr. Renwick, may be dispensed with altogether. By leaving out one element of the combination a serious doubt is raised as to the defendants' infringement.

As to the lacing-hook stock patent the position is strongly urged by the defendants that the patent is for stock with a series of alternate necks and indentations, and that in their present machine they only use a single neck and indentation at the end of the stock strip, and not a series. The plaintiff contends that, while at no moment of time a series exists, this is due to the fact that each neck and indentation is cut out as soon as formed, and that a series does exist in order of time or successively, as is shown by the successive holes in the waste strip. It is clear, from the specification and drawing, that the patentee contemplated the co-existence of a series of alternate necks and indentations. It is from stock so specially prepared in a series from which the blanks for the formation of lacing-hooks were to be cut. It may well be doubted whether, in view of the terms of the patent and the prior state of the art, the patent can be held to extend to a single neck and indentation.

Motions of this character are not granted unless the violation of the injunction is plain and free from doubt. *Walk. Pat.* 481; *Birdsall v. Hagerstown Manuf'g Co.* 2 Ban. & A. 519; *Liddle v. Cory*, 7 Blatchf. 1; *Welling v. Trimming Co.* 2 Ban. & A. 1; *Bute Refrig. Co. v. Eastman*, 11 FED. REP. 902.

Motion denied

THE C. D. BRYANT.

(District Court, D. Oregon. March 18, 1884.)

1. SALVAGE BY PILOT.

Under the Oregon pilot act of 1882, (Sess. Laws, 15,) a pilot is bound to render aid to a vessel "in stress of weather or in case of disaster," and he is not entitled to salvage for such service unless he is thereby involved in "extraordinary danger and risk."

2. CASE IN JUDGMENT.

The libellant in a smooth sea and calm weather boarded the Bryant in a thick fog, while she lay aground at low tide on the outer edge of the middle sand of the Columbia river, and at the next flood sailed her over into deep water in the south channel, and, after drifting out to sea in the night, brought her into port the next morning. *Held*, that the service of the libellant did not involve any "extraordinary danger or risk," and that he was only entitled to a pilot's compensation therefor.

In Admiralty.

Frederick R. Strong, for libellant.

M. W. Fechheimer, for claimant.

DEADY, J. The libellant, Henry Olsen, brings this suit to obtain a decree for salvage against the American bark C. D. Bryant and her cargo, for services rendered her at the mouth of the Columbia river on September 4 and 5, 1883. The master of the Bryant, James P. Butman, intervening for his interest and that of his co-owners in the vessel, as well as the owners and consignees of the cargo, answers the libel, denying that the libellant performed any salvage service on the occasion in question, and alleging that he acted as bar pilot merely, for which service he was duly paid. The evidence is very voluminous, and, as usual in such cases, is largely irrelevant, immaterial, and repetitious. The material facts appear to be that on September 4, 1883, the Bryant being bound on a voyage from Hong Kong to Portland, drawing about 19 feet of water, was off the mouth of the Columbia river, when, about 2:30 p. m., and near high water, she grounded on the outer edge of the middle sand in 12 to 15 feet of water at low tide, and about three miles south-west of Cape Disappointment light—the sea being smooth, the weather calm, and a thick fog or smoke on the bar; that about 5 o'clock she was boarded by the libellant, a bar pilot from the pilot-schooner Cousins, who thereupon took charge of her; that the vessel lay quietly in her bed in the sand after the libellant took charge, until the flood tide began to make, and the wind freshened from the north-west, when with the aid of her sails and the swell of the sea she rubbed across the sand some time before 3 o'clock on the morning of the 5th, in a south-easterly direction, into deep water, and was afterwards carried by the ebb tide and an easterly wind in a south-westerly direction to sea, where she laid off until daylight, and then came in over the bar with a light breeze and the flood tide, and was taken in tow by a tug, and brought to Astoria and beached with three or four feet of water in her

hold; that the vessel commenced to leak before 9 o'clock in the evening of the 4th, and continued to do so until beached in the mud at Astoria, both pumps being worked continuously in the mean time, which leak was wholly caused by the displacement of 30 or 40 feet of the after-part of the keel, while on the sand as aforesaid; and that the vessel is worth \$15,000, and her cargo, which consists of rice and China goods, is worth about \$50,000.

Much of the testimony and controversy in the case relates to the question whether the conduct of the libelant, while in charge of the vessel, was that of a skillful and diligent pilot or not. For instance, it appears that soon after boarding the vessel, while the tide was ebbing to the south-west and a light breeze was blowing from the north-west, the libelant caused the port anchor to be dropped from the cat-head and went below to change his clothes, which were wet, and take some rest, where he remained until near 9 o'clock, when, at the suggestion of the master, he came on deck and had the anchor taken up, because the master insisted that the vessel was surging ahead—taking chain—and would soon be on the anchor, all of which the libelant denied at the time and since. Upon the vessel being brought to Portland and hove down, it was found there were some bruises and indentations well forward on her port side, which were thought to have been made by the vessel coming in contact with the fluke of the anchor while she lay on the sand. All of them were mere surface bruises, the wood in the worst one not being bruised more than three inches deep, and were all repaired by cutting out the bruised portions and letting in a scarf-piece in its place at a comparatively small cost, and did not at all affect the tightness of the vessel or cause her to leak. So far as appears, the dropping of this anchor was a useless act. It might prevent the vessel from going off as she went on, of which there was not the least probability at that time, if ever; and it was impossible for her to go further on until the tide flooded. At the same time it was certainly a harmless act, provided it was taken up, as it was, before the flood-tide commenced to make; and even then, with the heave of the sea and the wind, both from the north-west or thereabout, the vessel would be driven, not upon the anchor, but to the southeast of it.

But the management of this anchor, whether skillful or unskillful, does not affect the libelant's right to salvage. If any damage was caused to the vessel by the neglect or want of skill on the part of the libelant in this respect, at most, the amount thereof could only be deducted from the salvage to which the libelant might otherwise be entitled. But no claim is made in the pleadings for any damage on this account, and it is doubtful if any was sustained. If, under the circumstances, the act was bad seamanship, it is a matter for the consideration of the pilot commissioners, and not a defense to this suit. Salvage service is a meritorious one, and it has always been the policy of the law to reward liberally those who successfully engage

in it, according to the skill, danger, and property involved in the undertaking. But the drift of American legislation and decision is against the policy of allowing pilots to act as salvors on their own pilot grounds. It has been thought or found that the temptation to become a salvor might induce a pilot to make or allow an occasion for such service that he might profit by the distress of the ship which he is bound to navigate. *Hobart v. Drogan*, 10 Pet. 120; *The Wave*, 2 Paine, 136; 2 Pars. Ship. & Adm. 271. A pilot is a public officer whose duties and compensation are prescribed by law; and when acting in the line of his duty he is not entitled to any other compensation. As was said by Mr. Justice WASHINGTON, in the *Case of Le Tigre*, 3 Wash. C. C. 571, while considering the question whether official duty could be compensated by salvage:

"Of this class of cases is that of the pilot who safely conducts into port a vessel in distress at sea. He acts in the performance of an ordinary duty, imposed upon him by the law and the nature of his employment, and he is therefore not entitled to salvage, unless in a case where he goes beyond the ordinary duties attached to his employment."

The pilot laws of the several states generally require pilots to render aid to vessels, if possible, on their cruising ground whenever needed; and in cases when extraordinary risk and danger is thereby incurred, provision is made for extra compensation. The duties and compensation of an Oregon Columbia river bar pilot are prescribed by the pilot act of 1882. Sess. Laws, 15. The act (section 27) gives the pilot so much a foot draft of the vessel for his service; and (section 21) provides that he must keep a suitable pilot-boat, on which he shall cruise outside the bar "unless prevented by tempestuous weather," and he "must at all times promptly extend aid to vessels in stress of weather or in case of disaster: * * * provided, that this section shall not affect any claim for salvage arising out of services involving extraordinary danger and risk." Under this section 21 it was the duty of the libellant to extend to the Bryant whatever aid she might need and he, as pilot, could give, and in so doing he did not entitle himself to salvage or other compensation than that prescribed by law, unless he thereby incurred "extraordinary danger and risk." Neither the value of the vessel nor the benefit she receives from the service enter into the question of compensation. Unless the pilot incurs more than ordinary "danger and risk in the discharge of his duty, he is only entitled to the ordinary compensation. Whether this section includes the case of a wreck, properly speaking,—that is, a vessel abandoned at sea, or stranded and abandoned,—is a question not necessary to decide in this case. If it does, as it well may, the pilot must render what aid he can, as such, and if in so doing he does not incur extraordinary "danger or risk" he must be content with the ordinary compensation.

The Bryant was not a wreck in any sense of the word. She had just gone easily on to a sand-bank, where, if the weather had con-

tinued as calm as it then was, she might have remained for weeks without any serious injury. Her master and crew were on board, with reason to believe that the vessel could be floated off at the next tide, as she was; and, in any event, that the tugs would come to her assistance and pull her off as she went on. There is a conflict in the testimony as to whether the libelant boarded the vessel and took charge of her as a pilot or not. But there is not much room for doubt about the matter. He boarded her from a pilot schooner, saying he was a pilot, and did nothing while on board but a pilot's duty. It is true that the libelant testifies that he told the master after he got on board that his vessel was aground, and that he would not take charge as a pilot until she was afloat. But this, under the circumstances, is a very improbable statement, and was not remembered by the libelant on his examination in chief, nor until he was pressed on cross-examination; and it is absolutely denied by the master of the bark. But, be this as it may, the law did not authorize the libelant to go on board and take charge of the vessel, without the master's consent, in any other capacity than that of pilot. *The Dodge Healy*, 4 Wash. C. C. 656. This was not a case for a salvor, but a pilot, unless the former had a tug or other means external to the vessel at his command wherewith to pull her off the sand, with or without the aid of the wind and tide. But the libelant could be of no aid to the vessel personally, otherwise than from his knowledge of the tides, channels, and shoals in the vicinity, and his skill in handling her by means of her sails, rudder, and anchors, and all this he was bound to know and do as a pilot. If the master had possessed this local knowledge he could have sailed the Bryant over the sand into deep water as well as the libelant. Indeed, nothing was done by the latter except to set the sails and wait for the wind and tide, which fortunately—I may say providentially—came and pushed her over into the south channel. But even then, but for the local knowledge of the libelant, she might, in the darkness and fog, have gone on to Clatsop spit. The services rendered by the libelant were those of a pilot; and unless in boarding her, or while on her, he personally incurred "extraordinary danger and risk," he is not entitled to anything more than a pilot's compensation therefor; and this is so whether or not his services saved the vessel from a great peril or imminent danger of destruction.

I hardly know how to discuss the question of the "danger and risk" incurred by the libelant personally. I suppose that a bar pilot, when on duty, is always involved in more or less danger. He is bound to cruise outside the bar, and board and render aid to vessels, unless the weather is so "tempestuous" as to prevent it—as to make it absolutely unsafe to do so. In this case, in my judgment, the libelant did not incur even the ordinary danger of a pilot service in that locality. It was a remarkably calm time—not wind enough to clear the bar of the smoke and fog incident to that season of the year.

There was a light breeze from the north-west, and the ebb tide made a ripple on the sand where the vessel lay aground. On sighting the Bryant, the Cousins ran down from the windward and hove-to some distance astern and south of the former, from whence the libellant, with the aid of another oarsman, undertook to pull up to the Bryant in a small boat, but on account of the wind and tide, particularly the latter, was unable to do so, and had to return to the schooner, which by this time had drifted further to the southwest. The schooner then beat up into the vicinity of the Bryant and hove-to again under the lee of the latter, in comparatively still water, from whence the libellant, with the aid of the oarsman, boarded her without any trouble; the latter taking the boat back to the schooner, which then, by the libellant's direction, stood out to sea. In all this there was some time and labor spent, and much of it because of the libellant's mistake in not bringing his schooner around under the lee of the Bryant in the first instance, but certainly no "extraordinary danger or risk." And while on the vessel the libellant incurred no such danger or risk; for if there was any immediate prospect or probability of her going to pieces on the sand or sinking in the deep water, as there was not the least, all hands could safely have taken to the boats. But the libellant has himself furnished very satisfactory evidence that he did not, at the time, regard this service as dangerous, or otherwise than an ordinary pilot service. On September 6th, it appears that he made out a bill against the Bryant for "pilotage" at the prescribed rates, amounting to the sum of \$136, and delivered the same to the agent of the schooner for collection, and as his report of the transaction, which was paid accordingly. Nothing then appears to have been said or thought of any claim for salvage on account of any unusual danger or risk incurred by the libellant in this service.

There must be a decree for the claimant dismissing the libel, and for costs

THE PRIDE OF AMERICA.

(*District Court, N. D. New York. January, 1884.*)

MARITIME LIEN--DRAFT RECOGNIZING THE LIEN.

Where a maritime lien attaches to a vessel, and her owner gives a draft for the debt, the draft in terms recognizing, confirming, and continuing the lien, an assignee of the draft and claim can enforce the lien against the vessel.

In Admiralty.

George N. Burt, for intervenor.

Webb & Benedict, for owner.

COXE, J. In September, 1881, the schooner *Pride of America* was lying in the harbor of Cheboygan, Michigan, in a disabled condition.

As it was not possible to proceed under sail, an agreement was made with the tug George W. Wood to tow her to Milwaukee for \$700. The journey was safely accomplished and the master and owner of the schooner—James McDonnell—executed a draft for the amount. Indorsed thereon was a memorandum, signed by him as follows: "It is understood this draft takes the place of a receipted tow bill, and is good against the within-named vessel her owner and underwriters, until paid." The draft was not paid. Its holder, who is also the assignee of the claim, now seeks to enforce his demand against the remnants in the registry of the court, the vessel having been heretofore sold upon a decree in favor of seamen. That the intervenor has a valid lien there can be little doubt. The vessel was bound to the owner of the tug, the towage contract was executed and the maritime lien fully established. *The Queen of the East*, 12 FED. REP. 165. The services rendered were meritorious and satisfactory. It must have been the intention of all concerned that the lien should be continued. It is hardly conceivable that the tug would have consented to release the vessel and give a credit of 60 days, upon any other terms. That a sane man would thus surrender ample security and take in lieu thereof the personal obligation of a stranger, an alien and a sailor, of whose responsibility he could know but little, is not within the limits of reasonable conjecture. The draft, with the indorsement, was given for a debt for which the vessel was liable, and it was given by her master and owner. The lien was not thereby divested, but continues till the draft is paid. *The Woodland*, 104 U. S. 180. It was the evident purpose of the owner in executing a negotiable instrument, that the lien should be recognized, confirmed, and continued, in the hands of all *bona fide* holders.

The reasons for the rule which discharges the lien in cases where there has been an assignment of claims for mariners' wages, etc., has little pertinency to the present inquiry. *The Norfolk and Union*, 2 Hughes, 123. Here the owner of the vessel to which the lien attached, in consideration of the credit given, expressly consented that the security should remain unimpaired. How can he now escape the consequences of his own act, especially when he is seeking to avoid the payment of a valid claim the justice of which he has repeatedly recognized? The court should not permit merely technical defenses to prevail against a meritorious claim. Such considerations may be entertained in aid of equity, but not to defeat it.

The intervenor is entitled to a decree for \$700 and interest from December 5, 1881, besides costs. The commissioner's fees amounting to \$18 should first be paid from the fund.

UNITED STATES v. CITY OF ALEXANDRIA and another.

(Circuit Court, E. D. Virginia. October 6, 1882.)

1. LIMITATION—GOVERNMENT.

Time does not run against the sovereign government.

2. LACHES—AGENTS OF GOVERNMENT.

The government is not chargeable with laches by reason of the procrastination of its officers.

3. LAPSE OF TIME—PUBLIC CORPORATIONS.

Equity will not refuse to enforce an obligation merely because of the lapse of time, unless evidence has been lost, or the rights of third parties have become involved, or the personal relations between the parties have been so much altered as to change the essential character of the obligation. Governments and municipal corporations are of such a permanent nature that their mutual relations are presumably unaffected by the lapse of years.

4. SPECIFIC PERFORMANCE—AFTER-ACQUIRED TITLE.

A party agreeing to transfer property which he does not own at the time, cannot refuse to perform his contract after acquiring title.

5. SAME—ONLY PART PERFORMANCE POSSIBLE.

One who, by his own fault, is unable to perform a part of his contract, cannot upon that account resist a bill for the specific performance of the rest.

6. SAME—PECUNIARY DAMAGES REFUSED.

Where congress authorized an advance of money to a city upon the surrender to the government of stock which it held, and the money was advanced but the stock was not transferred, *held* that, though specific performance of the obligation to transfer the stock would be decreed, no pecuniary damages could be awarded.

In Equity.

H. H. Wells, for plaintiff.

Kemper, Johnson & Stewart, for defendants.

HUGHES, J. The cities of Georgetown, Washington, and Alexandria united their corporate credit and resources with the United States, Virginia, and Maryland in the construction of the Chesapeake & Ohio canal. About the year 1836 they had exhausted themselves in this behalf, and the canal was unfinished. They applied to congress for relief. The form in which this relief should be given was not definitely settled upon in the first instance. But it finally took the form indicated in the "Act for the relief of the several corporate cities of the District of Columbia," passed May 20, 1836. 5 St. at Large, 32. The act provided that the three cities should convey the legal and equitable title in their stock to the secretary of the treasury, to be held in trust for the United States, with power in the secretary of the treasury "at such times, within ten years, as may be most favorable for the sale of the said stock, to dispose thereof at public sale, and reimburse to the United States such sums as may have been paid under the provisions of this act;" and "if any surplus remain after such reimbursement, he shall pay over such surplus to said cities." The plan was that the United States should pay certain debts of the three several cities, incurred on account of the canal, taking in lieu of them the shares they respectively held in the canal company. It was stated in argument at bar that the debts thus paid

v.19,no.9—39

by the United States in cash amounted to about 85 cents on the dollar of the par value of the stock received in exchange. While this measure was pending before congress, the city of Alexandria brought to the attention of that body, by an elaborately-drawn memorial, her embarrassment and urgent need of relief in respect to the Alexandria canal, which was an extension of the Chesapeake & Ohio canal from Georgetown into her own corporate limits. This memorial was presented in January, 1836. It simply asked relief, and did not suggest any form in which it should be given. In May the act for the relief of the three cities on account of the Chesapeake & Ohio canal was passed; and in December, 1836, Alexandria filed an additional memorial, suggesting that the relief which she separately asked should be in the form in which the three cities had received it in the act of May preceding, in respect to their indebtedness for the main canal. Alexandria's claim for relief in respect to her branch canal rested upon the same equities and considerations of public justice and policy on which that of the three cities had rested in respect to the main work. She then owned 3,500 shares of the stock of the Alexandria Canal Company, though it seems now that she had as yet completed paying for only 1,500 shares. There is nothing to show that congress was informed at this time of the fact that she had not yet paid up her subscription for part of her shares in the stock of the branch canal, and could not deliver them.

Congress responded favorably to Alexandria's separate and additional claim to relief in respect to her separate and branch canal. Congress voted \$300,000 out of the treasury to Alexandria, which was almost precisely 85 per cent. of the par value of her 3,500 shares. The act by which this payment was authorized was passed on the third of March, 1837. See section 2 of chapter 44 of the acts of 1836-37, (5 St. at Large, 190.) The act provided—

"That when the corporate authorities of the town of Alexandria shall deposit the stock held by them in the Alexandria Canal Company in the hands of the secretary of the treasury, with proper and competent instruments and conveyances in law, to vest the same in the secretary of the treasury and his successors in office, for and on behalf of the United States, to be held in trust upon the same terms and conditions in all respects as the stock held in the Chesapeake & Ohio canal by the several cities of the district were required to be held in and by virtue of the act approved on the seventh day of June, eighteen hundred and thirty-six, entitled 'An act for the relief of the several corporate cities of the District of Columbia;' that the secretary of the treasury be and he is hereby authorized and empowered to advance, out of any moneys in the treasury not otherwise appropriated, to the canal company, from time to time, as the progress of the work may require the same, such sums of money, not exceeding three hundred thousand dollars, as may be necessary to complete the said canal to the town and harbor of Alexandria."

That act simply repeated, in respect to the branch canal, the policy and purpose of the act of the preceding May already mentioned, respecting the main work, and I cannot entertain a doubt that it was in the contemplation of congress that all the 3,500 shares which Al-

alexandria had thus subscribed to the stock of the Alexandria Canal Company should be turned over to the secretary of the treasury on his payment to her of the \$300,000 of cash appropriated by the act of March 3, 1837. To contend otherwise seems to me to be contrary to reason and all probability. Shortly after the act last mentioned, the authorities of Alexandria turned over to the secretary of the treasury, upon a payment then made by that officer of part of the sum that had been appropriated for the city, 1,500 shares of canal stock, which was all that she could then deliver. The secretary went on at different times to pay other installments of the appropriated \$300,000 until all was paid. With this money Alexandria presumably completed the payment of her subscriptions on her remaining 2,000 shares of stock; but these shares were never delivered to the secretary of the treasury, nor never called for. I regard this omission as an act of sheer inadvertence. The stock became or had become absolutely valueless in the market; and it never seems to have occurred to the mind of any secretary of the treasury to call upon Alexandria for the undelivered 2,000 shares still due. The city afterwards subscribed for 1,500 additional shares of this stock in the Alexandria canal, making in all, with that delivered to the secretary of the treasury, 5,000 shares. Ten years after the act of congress which has been mentioned, she made an exchange of 2,720 of her shares with the state of Virginia for an equivalent amount of state bonds at par value, and has now only 780 left at her disposal.

The bill in this case is filed to require a specific performance by Alexandria of her obligation under the act of congress of March 3, 1837. I think that nothing could well be more clear than the obligation of Alexandria to comply with the prayer of the bill, by delivering to the secretary of the treasury the 2,000 additional shares of the stock of the Alexandria Canal Company still due. It is objected by her counsel that the lapse of time has been so great, and the laches of the United States so signal, that it would be inequitable now for Alexandria to be called upon to perform this obligation. But time does not run against the United States, and public policy forbids that the negligence of the officers of an immense government like ours should be held to create laches on the part of the government, except, probably, as to third persons who are strangers to transactions as to which the negligence may occur.

In *U. S. v. Kirkpatrick*, 9 Wheat. 720, the supreme court say:

"The general principle is that laches is not imputable to the government. The utmost vigilance would not save the public from the most serious losses if the doctrine of laches could be applied to its transactions. It would, in effect, work a repeal of all its securities."

In *U. S. v. Vanzandt*, 11 Wheat. 190, the court say:

"The neglect in the one case and the other imputes laches to the officer whose duty it was to perform the acts which the law required; but, in a legal point of view, the rights of the government cannot be affected by these laches."

"A claim of the United States is not released by the laches of an officer to whom the assertion of that claim was intrusted." *U. S. v. Postmaster General*, 1 Pet. 325. "Statutes of limitation do not bind the United States unless it is specially named therein." *Linda Lessee of Miller*, 6 Pet. 666; *U. S. v. Hoar*, 2 Mason, 311. "An unauthorized act of the officer of the United States (in the matter of a claim for or against it) cannot bind the United States." *Fitzgerald v. U. S.* 9 Wall. 49.

If, indeed, there could be any rational doubt entertained in relation to the reason why not more than 1,500 shares of the canal stock were delivered in 1837, or any reasonable pretension that such delivery was, in fact, accepted by the United States as completing the obligation of Alexandria, and if this doubt could not be cleared up because of the death of witnesses who were cognizant of the transaction, or loss of evidence touching it, this court, as a court of equity, might hesitate to enforce the specific performance of a contract thus rendered obscure by a long lapse of time. But, as already said, I do not think there can be any reasonable doubt of the facts of the original transaction, or of the intention of congress or of Alexandria in entering into it. Where an obligation is clear, equity will not refuse to enforce it because of mere lapse of time since its origin. True, in cases where the rights of third persons have become involved, equity will often refuse to enforce a long-standing obligation to the injury or prejudice of such persons. So, where the terms or nature of a long-standing obligation have become uncertain, in consequence of the lapse of time, the loss of evidence, or the death of witnesses, equity will sometimes refuse to enforce it in consequence of this uncertainty; it will not make a decree, apparently just, where there is danger, in making it, of doing real injustice. Such are some of the considerations which equity will refuse to enforce an old obligation. But where an obligation is clear, and its essential character has not been affected by the lapse of time, equity will enforce a claim of long standing as readily as one of recent origin; certainly as between the immediate parties to the transaction. See the case of *Etting v. Marx*, 4 Hug. 312, S. C. 4 FED. REP. 673, where the doctrine of limitations in equity is very elaborately discussed as to suits between private individuals.

But the parties to the present transaction are, on one side, the government of permanent stability, and on the other, a municipal corporation older than the government. They are not like natural persons, whose relations and obligations are all more or less affected by mere lapse of time. The reason which induces equity to look with disfavor upon old and stale claims, as between natural persons, ceases when applied to governments and public corporations. Forty years in the life of such bodies are but as so many days or months in the life-time of individuals. Obligations between them are just as binding during. I must hold that, as between the United States and Alexandria, time has not released the city from the obligation to deliver

to the secretary of the treasury the 3,500 shares which she had in March, 1837.

It cannot be necessary to answer at length the wholly untenable pretension that the corporation of Alexandria, when it delivered the certificates for 1,500 shares, was absolved from further obligation because it did not own the remaining 2,000 shares; for it is a familiar doctrine that if one undertakes to grant property not yet in his possession or paid for, but which he subsequently does acquire and pay for, the title inures to his first grantee.

It is no objection to a decree being made for specific performance of a part of a contract when the performance of the remainder has been made impossible by the act of the defendant. To permit such an objection to prevail would be to violate the maxim that no man shall take advantage of his own wrong. See Fry, Spec. Perf. § 294, citing Lord ELDON, who, in speaking of one who had undertaken to convey a greater interest than he possessed, says:

"For the purpose of this jurisdiction, the person contracting under these circumstances is bound by the assertion in his contract, and if the vendee chooses to take as much as he can have, he has a right to that, * * * and the court will not hear the objection, by the vendor, that the purchaser cannot have the whole."

See, also, *Morss v. Elmendorf*, 11 Paige, 287; *Hatch v. Cobb*, 4 Johns. Ch. 559; *Kempshall v. Stone*, 5 Johns. Ch. 193; Fry, Spec. Perf. §§ 554, 258.

The latter is to this point, that where a hardship has been brought upon the defendant by himself, it shall not be allowed to furnish any defense against the specific performance of the contract, at least whenever the thing he has contracted to do is reasonably possible.

In *Bennett v. Abrams*, 41 Barb. 619, it is said, where specific performance of a contract is impossible, the plaintiff may have approximate relief in some other form which will secure him the substantial advantage of the agreement.

The state of Virginia is not a party to this suit, and could not be required to return any part of the 2,720 shares which she obtained from Alexandria if she were. It is not shown that she was made cognizant of the fact that Alexandria had not an equitable right to deliver to her as many of the shares of the canal company as she did deliver. The evidence does not show that this fact was brought home to the mind of the Virginia legislature when that body passed the act authorizing the exchange of state bonds for these shares, though it does show that Alexandria, in the person of her agents, was informed that she was violating her obligations to the United States in soliciting and making that exchange.

As to the damages claimed by the bill against the city, from the non-delivery of the 2,000 shares to which the United States are still entitled, I do not think it would be equitable for this court to do more than require these missing shares to be delivered. It was not intended

by the United States, in the act of March 3, 1837, to create a money demand directly or indirectly against the city, and I am not disposed to make a money decree against the city. I do not think the measure of damages in this particular case is the highest price which the shares of the canal company have commanded in the market since the delinquency, as contended by counsel for plaintiffs. What steps should be taken in this suit to enforce the full performance of the obligation of the city must be hereafter determined. I will at once make a decree requiring the city to transfer to the secretary of the treasury the 780 shares still held by her, and to make up the remainder of the 2,000 shares yet due.

See *U. S. v. Southern Colorado Coal & Town Co.* 18 FED. REP. 273; *U. S. v. Beebe*, 17 FED. REP. 36.

UNITED STATES v. CITY OF ALEXANDRIA and another.

(Circuit Court, E. D. Virginia. February 7, 1884.)

1. PUBLIC STATUTES—CONSTRUCTIVE NOTICE OF PROVISIONS.

Public statutes affect, with constructive notice of their provisions, all the world, including domestic states as well as individuals.

2. SAME—ACT OF CONGRESS—CERTAINTY—STATUTE OF LIMITATIONS.

But where an act of congress provided that all the shares held in a canal company by a city (A.) should be delivered to the secretary of treasury, not naming the number of shares intended, and that within 10 years the secretary should sell the shares to satisfy a trust defined by the act, and the city did deliver 1,500 shares, all that she held at the date of the act, though she had subscribed, but had not paid, for, and did not actually hold, a greater number, and after 10 years the city sold to the state of Virginia a large block of shares, including some of the shares it had subscribed for but did not hold when the act of congress was passed, *held*, that the act was not sufficiently certain in its terms to convey constructive notice to Virginia of any equity the United States might have in a greater number of shares than 1,500, and that Virginia had a right after 10 years to purchase in good faith from A. any shares then owned by that city. *Held, also*, that although time does not run against the United States, and they are not prejudiced by the *laches* of public officers, yet equity will be unwilling to enforce the doctrine of constructive notice more than 40 years after the passage of a public statute in a case where stock purchased *bona fide*, claimed to be affected by the notice, has been held for more than 30 years.

By an act of May 20, 1836, (5 St. at Large, 32,) congress, after authorizing the secretary of treasury to assume the payment of certain bonds, respectively, of Georgetown, Washington, and Alexandria, which those cities had issued in aid of the canal which had been constructed from Georgetown to the town of Cumberland, in Maryland, provided that before the secretary should execute this duty "the corporate authorities of said cities should deposit in the hands of the said secretary the stock in the Chesapeake & Ohio Canal Company, held by them respectively; and that the secretary might, at such time within

ten years as should be most favorable for the sale of said stock, dispose thereof at public sale, and reimburse to the United States such sums as might have been paid under the provisions of this act, and if any surplus remained after said reimbursement, he should pay over said surplus to said cities in proportion to the amount of stock now held by them respectively." This was in reference to the stock of the three cities in the canal between Cumberland and Georgetown. In its river and harbor bill, passed on the third of March, 1837, congress inserted a section which enacted, in respect to the canal, extending the other from Georgetown to Alexandria, (5 St. at Large, 190,)—

"That when the corporate authorities of the town of Alexandria should deposit the stock held by them in the Alexandria Canal Company in the hands of the secretary of treasury, with proper and competent instruments and conveyances in law to vest the same in the secretary for and on behalf of the United States,—to be held in trust upon the same terms and conditions in all respects as the stocks held in the Chesapeake & Ohio canal by the several cities of this district were required to be held in and by virtue of the act of May 20, 1836, (above cited,)—then the secretary should be and he is hereby empowered and authorized to advance to the Alexandria Canal Company, from time to time, as the progress of the work might require the same, such sums of money, not exceeding \$300,000, as might be necessary to complete the canal to the town of Alexandria."

This case requires only the latter act to be considered. At the time of its passage Alexandria held only 1,500 shares of the stock of the Alexandria Canal Company, and, upon a strict reading of the act, a deposit by the city of that number of shares was such a compliance with its literal terms as to entitle the canal company to receive the whole appropriation of \$300,000. Alexandria had indeed at that time subscribed for a total of 3,500 shares, but she had paid for but 1,500 of them, and actually "held" only the latter number. Doubtless congress had contemplated the deposit of 3,500 shares, but the act did not expressly require the deposit of any other shares than those which Alexandria "held" at the passage of the act. Sometime afterwards that city subscribed for an additional 1,500 shares of the canal stock, thereby running up her total subscription to 5,000 shares. Soon after the passage of the act of March 3, 1837, Alexandria deposited with the secretary of treasury the 1,500 shares of canal stock which she then held; whereupon an installment of the \$300,000 was paid to the canal company; and afterwards, from time to time, the secretary of treasury paid over to the canal company the residue of the appropriation, without requiring of the city of Alexandria any further deposit of stock. Probably this was done in conformity with the literal terms of the act which failed to define the number of shares contemplated, and instead of requiring payments to be made *pari passu* with deliveries of stock by the city, required payments to be made to the canal company "as the progress of the work should require the same." All this transpired in the year 1837. The secretary did not call upon Alexandria to deposit, nor did the

city deposit, any other shares of the canal stock than the original 1,500 shares. Nor did the secretary, during the period of the ensuing 10 years, sell the stock which he had of the Alexandria Canal Company, to satisfy the trust for which he held it, as defined in the act first above referred to, of May 20, 1836, defining the purposes for which the stock should be sold. As before said, Alexandria, after March 3, 1837, acquired 3,500 shares of the canal stock, in addition to the 1,500 shares which she had deposited with the secretary of treasury. And no call having been made upon her within the period of 10 years within which the secretary was empowered to sell the stock in satisfaction of her indebtedness to the United States, she, in 1847, under an act of the general assembly of Virginia, (acts of assembly for 1846-47, p. 93,) passed March 1, 1847, exchanged 2,720 of the 3,500 shares of canal stock then held by her, with the state of Virginia, for bonds of the state to the amount of \$272,000, the canal stock going into the custody and possession of the board of public works of Virginia, where it now is.

In 1881 a bill was exhibited by the United States in this court, against the city of Alexandria and the Alexandria Canal Company, demanding, among other things, a specific performance of what was alleged to have been the contract between Alexandria and the United States embodied in the act of March 3, 1837, which has been quoted above. The present proceeding is part of that suit. On all the proofs taken in the progress of that suit it was held, on final hearing, that congress in the act mentioned had contemplated the surrender of 3,500 shares of canal stock by Alexandria to the secretary of treasury, and it was decreed October 6, 1882, that the city was bound to deliver that number of shares. But it had been developed in that suit that Alexandria then held but 780 shares, having assigned and transferred the rest—2,720 shares—to the state of Virginia for valuable consideration. The 1,500 shares deposited in 1837 with the secretary of treasury, and these 780 shares delivered under the said decree of October, 1882, made up only 2,280 shares, leaving still due from Alexandria to the United States 1,220 shares. Her total subscription of 5,000 shares had gone,—first 1,500 shares, and afterwards 780, under decree, to the secretary of treasury, and 2,720 to the state of Virginia; making in all, 5,000 shares, and leaving none in her possession with which to supply the additional claim of the United States for 1,220 shares. Since the decree for specific performance entered October 6, 1882, the United States has filed its petition in this cause against the board of public works of Virginia, asking that that corporation, which has possession of the 2,720 shares of canal stock which it received from Alexandria in 1847, should be made party defendant in this suit, and required by this court to deliver 1,220 shares of the same to the secretary of treasury of the United States; the petition maintaining that the act of congress of March 3, 1837, affected the state of Virginia with notice of the trust

which bound that stock as defined in the act of May 20, 1836, and that the state, in equity and good conscience, should surrender the same to the secretary of treasury.

Edmund Waddill, U. S. Atty., and *H. H. Wells*, for the United States.

Frank S. Blair, Atty. Gen., for Board of Public Works.

HUGHES, J. I am now to pass upon the question of constructive notice as affecting the state of Virginia. I refer to my opinion delivered on the original hearing of this cause on October, 6, 1882, filed in the papers of the cause, and reported in 4 Hughes, 545; S. C. ante, 609, as showing the grounds on which I held that Alexandria was bound to deliver 3,500 shares of the canal stock in all, 2,000 in addition to those formerly deposited, to the United States. It will be seen that one of the questions at issue in that litigation was whether Alexandria, by depositing all the stock which she owned on the third of March, 1837, and at the time of the deposit, had not fully complied with the requirements of the statute? This was a pretension strongly supported by the fact that the secretary of treasury, by not having demanded a deposit of more than 1,500 shares, had seemed to adopt and act upon that view of the subject. But I held, on all the proofs, that the act had contemplated the deposit of 3,500 shares, and therefore that Alexandria was bound to make further deposit of the remaining 2,000 shares due. I also declared in that case, which declaration, however, was then but a *dictum*, that Virginia could not be required, even if she were a party to the suit, to return any part of the 2,720 shares which she had purchased from Alexandria in 1847. The ground of this declaration was stated to be that Virginia was not made cognizant of the fact of Alexandria not having an equitable right to dispose of as many as 2,720 shares of the canal stock as she did dispose of; that fact not having been brought home to the mind of the legislature of Virginia when it passed the act authorizing the exchange of state bonds for these shares, which was made.

Now that Virginia, in the corporate person of her board of public works, has been made a party to this suit, and that point is especially under litigation, and has been argued, I find no cause to change that opinion. Conceding, for the sake of argument, that the act of congress of March 3, 1837, being part of a public act, did affect Virginia with constructive notice that the shares then held by Alexandria in the canal company, when delivered to the secretary of treasury, would be liable to the trust defined in the previous act of May 20, 1836; yet it is certain that such notice only embraced the express contents of the act, and such other facts as, upon reasonable inquiry, were suggested or implied by the act. As an instrument of constructive notification, interfering with the freedom of commercial dealing, the act was to be strictly construed. Third persons could not be expected to know all its history,—all the considerations which inspired its passage,—and its relations to all the bonds of Alexandria Canal

Company, which at any time, however remote in the future, Alexandria might own; nor were third persons bound to look through a period of 44 subsequent years, and to anticipate the litigation instituted in this court in 1881, to determine how many shares of canal stock congress had intended that Alexandria should deposit with the secretary of treasury. The act gave notice that the stock then held by Alexandria should be deposited; inquiry would have developed that the number of shares then held was 1,500, and that these were deposited. The act gave notice that within 10 years from its date the secretary should sell all the stock which the act had required to be deposited; inquiry would have disclosed that after the expiration of the 10 years Alexandria held 3,500 shares, more or less of it possibly repurchased at the secretary's sale. The reasonable inference was that stock held after March 3, 1847, was not affected by the act of 10 years previous, nor by the trust which it defined and imposed. In short, it is plain to me that the act of March 3, 1837, was not such in terms, nor the proceedings of the secretary such, under it, as to convey notice to Virginia that any part of the 2,720 shares which she purchased in 1847 from Alexandria was affected by a trust which could invalidate her title. Indeed, as before suggested, that question was not actually settled, even as against Alexandria herself, until the decree in this cause, before mentioned as having been entered on October 6, 1882. Such being the state of things as to constructive notice, there is no proof that the legislature of Virginia, or her board of public works, had actual notice of the *status* of the stock which she purchased from Alexandria, in its relation to the congressional act of March 3, 1837. I believe it is not pretended by counsel that there was actual notice in any degree or form. Virginia is therefore an innocent and *bona fide* holder, for full consideration paid, of the whole 2,720 shares of canal stock now held by her board of public works. She has equitable title to it, and she has, besides, the legal title in and lawful possession of it.

Besides the foregoing consideration, it may be added that the deposit of stock provided for in the congressional act of March 3, 1837, was an executory contract. The trust established upon the stock was not to attach until it had been actually deposited, "with proper and competent instruments and conveyances in law to vest the same in the secretary of the treasury." Until so deposited and legally transferred, Alexandria, though bound in equity to deliver a certain portion of it to the United States, was in law at liberty to transfer and sell it, and make good title to it to any *bona fide* purchaser for valuable consideration who was not cognizant of her obligations respecting it. As the case stands, the United States has an equity to have 1,220 shares of the canal stock once owned by Alexandria transferred to the secretary of treasury, unless they have lost their equity by sleeping for more than 40 years upon their rights. On the other hand, Virginia has an equity to have the whole 2,720

shares of the stock which she purchased in good faith and without adverse notice, from Alexandria, and has also the legal title derived by legal transfer, and by quiet possession of more than 30 years. Her right therefore must prevail.

Entertaining these views on the merits of the case, it was useless for me to go into the question of jurisdiction raised at bar, or into the question how far governments and states are bound by the *laches* of their public offices, or by the lapse of time.

The petition of the United States must be dismissed.

DILLARD and another v. PATON and others.

(Circuit Court, W. D. Tennessee. March 15, 1884.)

1. CONTRACTS—SALE—EXCHANGE ASSOCIATIONS—RULES AND REGULATIONS—EFFECT OF NON-OBSERVANCE.

Where merchants form voluntary associations "to establish just and equitable principles, uniform usages, rules, and regulations, which shall govern all transactions" between the members, parties dealing with each other, who are members, make the rules and regulations a part of their contract, and the courts will enforce them as such; but this only when they are observed by the members involved in the controversy; for the habitual non-observance by them in their dealings with each other will abrogate the particular rule violated, and relegate the contract to the ordinary rules of law governing it.

2. SAME—COTTON EXCHANGE OF MEMPHIS—RULE 9—RISK OF LOSS BY FIRE.

Where two members of the Cotton Exchange of Memphis, in their dealings with each other, for a series of years paid no attention on either side to a rule of the exchange which provided that delivery of cotton should not be considered final until the cotton was paid for, the contract involved in this suit should not be governed by the rule of the exchange, but by the general law. Where, therefore, a sale of 270 bales was made by sample, an order given by the seller to the warehouseman to deliver to the buyer, the warehouseman and the buyer weighed the cotton, the buyer sampled it, approved 268 bales, and rejected two, put his "class" and "shipping" marks upon it, and gave written directions to his drayman to remove it from the shed, *held*, that the title passed to the buyer when these things were done, and a loss by fire before removal from the warehouse was his loss, although the cotton had not, at the time of the fire, been actually paid for.

3. SAME—CONSTRUCTION OF THE RULE—WAIVER.

Where the rule of the Cotton Exchange of Memphis provided "all cotton shall be received within five working days from date of sale. The weighing and examining of cotton shall constitute a confirmation of sale, but delivery shall not be considered final until paid for,—the factor's policy of insurance to cover until delivered and paid for; payment being considered final act of delivery,"—*it seems* that a transaction under this rule is not an executory agreement to sell when payment is made, but that it is mere stipulation for the security of the seller, which enables him at his option to refuse to part with the possession until payment is made. But, whatever be the proper construction of the rule, where parties by an habitual course of dealing with each other had wholly disregarded it on both sides, and the seller in the particular transaction, as in all others, delivered unconditionally, and without restraint as to possession and use, and manifested no concern about securing payment through the rule, *held*, that this amounts to waiver by the seller of a stipulation solely for his benefit, and the risk of loss by fire passed with the title to the buyer on actual delivery to him. This waiver by the seller need not be in express terms, but may be fairly inferred from his conduct and acts.

FINDING OF FACTS.

This case, by stipulation of the parties under the statute, was submitted to the court without a jury. The court found the following to be the material facts:

I. The plaintiffs and defendants are members of the Memphis Cotton Exchange, an incorporated association, the purposes of which are thus described by its constitution:

"ARTICLE II.—PURPOSES.

"Section 1. The purposes of this association shall be to provide and maintain suitable rooms for a cotton exchange in the city of Memphis; to adjust controversies between members; to establish just and equitable principles, uniform usages, rules, and regulations, and standards for classifications, which shall govern all transactions connected with the cotton trade; to acquire, preserve, and disseminate information connected therewith; to decrease the risks incident thereto; and, generally, to promote the interests of the trade, and increase the facilities and the amount of the cotton business in the city of Memphis."

II. Among other things, not necessary to mention, the constitution also contains the following:

"ARTICLE VIII.—DUTIES OF MEMBERS.

"Section 1. Every member, upon admission, pledges himself to abide by the constitution, and also by all by-laws, rules, and regulations of the exchange."

III. The rules and regulations for the sale and transfer of cotton prescribed by the association are as follows:

"1. All resampling, or examination by boring, shall be performed after cotton shall have been weighed.

"2. All cotton must be examined and received by the purchaser before removal from its place of storage.

"3. The seller of cotton is entitled to his samples, but, when required by the buyer, shall allow him to take them to his office for the purpose of comparison, and when that is done shall return them, and a failure to do so will forfeit his right in the future to remove them from the office of the seller.

"4. Three hundred pounds shall constitute the minimum weight of a merchantable bale of cotton, and the buyer shall have the right to reject all bales below that weight; but if received an allowance of four dollars per bale shall be made to the buyer.

"5. Six ties only shall be permitted on each bale, unless an allowance is made of two pounds for every tie above that number.

"6. All seedy, mixed, fraudulently packed, and damaged cotton may be rejected, and must be done at its relative value in the list purchased; but the grade of the cotton by marks shall be given to the buyer at the time of sale, or before the day of delivery, if required by him, and cotton sold by samples must be delivered accordingly, unless rejected for causes above stated.

"7. The practice of examination by boring cotton, which prevails in this market, before passing of same, is understood to be the rule as to the manner of receiving, and relieves the seller from any liability for reclamation on mixed, fraudulently packed, or damaged cotton.

"8. All cotton shall be understood to be in good order; but if not, it shall be repaired within twenty-four hours from the time of delivery, and if not done within that time the necessary repairs may be made by the buyer at

the expense of the seller. No claims for repairs shall be allowed after the removal of cotton from its place of storage.

"9. All cotton shall be received within five working days from date of sale. The weighing and examining of cotton shall constitute a confirmation of sale, but delivery shall not be considered final until paid for. The factor's policy of insurance to cover until delivered and paid for; payment being considered final act of delivery.

"10. No order for the delivery of cotton is transferable without the knowledge and consent of the seller."

IV. When rule 9 of the cotton exchange was under consideration by the association it did not contain the last clause, viz., "payment being considered the final act of delivery." But a resolution was adopted appointing a committee to confer with the board of underwriters "to gain information regarding the insurance of cotton under process of delivery," and upon such conference a report was made that "after a lengthy discussion as to the indorsement and acceptance of rule 9 by the board of underwriters," a committee was appointed by that body to meet the directory of the exchange, "in order that rule 9 may be so amended, if thought proper, as to harmonize the different views." Whereupon the matter was discussed between the directors and the underwriters' committee, and resulted in adding the above clause to the rule, its acceptance by the underwriters, and at the same time the adoption by them of the following resolution: "Resolved, that our policies on cotton in sheds as now written provide all the security to the assured which they require, therefore additional legislation on the subject is superfluous."

V. The plaintiffs are cotton factors, and the defendants cotton brokers or buyers, doing business in the city of Memphis; and at the time of the transaction in controversy in this suit were members of the cotton exchange, while the above provisions of the constitution and by-laws were in force.

VI. The plaintiffs and defendants bargained with each other for the sale and purchase of 270 bales of cotton, selected by sample, and identified by certain marks upon the bales and samples. The cotton was at the time, with other cotton of the plaintiffs', stored in a public warehouse in Memphis. The date of this bargaining was on the seventeenth and eighteenth of October, 1882.

VII. The plaintiffs, as soon as the bargain was made, sent to the warehouseman, according to the usual course of business, written orders for its delivery to the defendants, specifying the lots and marks corresponding to those upon the samples, of which orders the following is a specimen: "MEMPHIS, TENN., Oct. 17, 1882. Merchants' Cotton Compress & Storage Co. will please deliver to A. A. Paton & Co. nineteen bales of cotton, of the following marks and numbers. DILLARD & COFFIN."

VIII. Upon the receipt of these orders the warehousemen turned out the lots of cotton specified, and aligned them in the yard of the shed for convenience of examination, weighing, and marking. On Saturday, October 21, 1882, the agents of the defendants appeared at the shed, and the weigher of the warehouse, jointly with the weigher of the defendants, weighed this cotton, each taking down the weights and agreeing as to the weight of each bale; whereupon the borers of the defendants examined each bale by boring with the auger, and the "classer" of defendants sampled and classed it, two of the bales being rejected and discarded from the lot. These agents of the defendants then marked the cotton with the "class" and "shipping" marks of the defendants, and, according to the usual course of business, placed upon a hook, kept for the purpose outside the warehouse office, a written direction to defendants' drayman to remove the cotton to the place designated therein. It was the habit of defendants' drayman to come to the shed whenever, in the

course of the business, he could, and to take this order from the hook and move the cotton. The plaintiffs and the warehousemen had done everything required of either in the usual course of business to place the cotton in session of the defendants, and nothing remained to be done by either to complete the transaction, so far as the right of removal of the cotton by the defendants was involved. About noon this part of the business was completed and the defendants' agents left the shed, taking with them, as usual, borings or loose cotton. They reported their weights, etc., to the defendants' office, but at what precise time does not appear by the proof, though it appears that, in the usual course of business, this was done the same day that night, or next morning.

IX. The warehouseman, according to his custom, promptly reported the weights and the rejections to the plaintiff's office, and thereupon, during the afternoon of Saturday, October 21, 1882, they sent their bill or account on cotton to defendants for \$14,945.56, the price agreed upon for the 268 bales which was not paid. The messenger was instructed to deliver the bill and bring back the check, if paid, but not to insist on payment. The bill was handed to some one in defendants' office, and left there by the messenger. It was the usual custom of defendants to pay for cotton purchased by them about 2 o'clock P. M., on the day following the examination and weighing, after comparison of the factor's bill as rendered with their own report of weights and rejections. It was also their custom to have cotton hauled to the compress, and, on receipt of the dray tickets showing its delivery there, to take the tickets to their transportation agent, receive bills of lading, attach them to drafts on their correspondents at Liverpool, or elsewhere, and negotiate them in their bank at Memphis, and pay factors by checks on the bank. It was also their custom to remove cotton promptly after examination and weighing, but pressure of business, bad weather, and like circumstances, sometimes delayed removals, so that there was no fixed business custom in that matter, except to remove as speedily as possible in all cases.

X. The defendants were and are entirely solvent, and paid promptly for their purchases, never asking indulgence of plaintiffs.

XI. The plaintiffs never insisted that defendants should pay for their purchases of cotton before its removal from the warehouse or before they took session, and it was their custom to present their bills to defendants as soon as they received reports of weights, and sometimes, when their bank account was not easy, to ask payment on account before the bills were made out, but not to press for payment on the same day of receiving reports of acceptance by defendants.

XII. The defendants, in a very large proportion of their dealings with plaintiffs, which dealings covered many years prior and subsequent to the organization of the Cotton Exchange, removed the cotton purchased before paying for it. In the same season of this transaction there were given in evidence 17 other transactions between them of like character, and in 15 of them the cotton was removed before payment; in one instance how this was does not appear, and in two of them the cotton was removed and paid for the same day, but which preceded the other, does not appear; and in the remaining transaction the largest part of the lot was removed and paid for the same day, but whether removal or payment first took place does not appear, while a few bales of the lot were paid for before removal. Or, to state these facts somewhat differently, there were covered by these 17 transactions 2,294 bales of cotton, of which 1,720 were removed by the defendants before payment, 531 were removed and paid for on the same day, but whether removal or payment first does not appear; as to 30 bales no showing was ever made by the proof, and 13 bales were paid for before removal.

XIII. About 7 o'clock Saturday evening, October 21, 1882, the cotton in the warehouse caught fire, including the 268 bales involved in this con-

versy and was almost entirely consumed, one bale only of this lot being saved without damage. There were besides this lot of 268 bales in dispute between the parties, 618 bales belonging to the plaintiffs burned in the fire, this disputed lot being in the yard of the shed in the same place it was left at the time of the weighing, examination, and marking above mentioned.

XIV. One of the defendants was at the fire for a short time and knew that their agents had weighed and examined this cotton on that day at this shed, but supposed it was in the compress building, which was separated from the shed by a wall between the two; and on the following morning plaintiffs sent a message to defendants' manager that the cotton could be partially saved, and invoked the assistance of defendants to that end, but he declined to have anything to do with it, and denied the defendants had any interest in the cotton. The plaintiffs did all that could be done towards saving this 268 bales with theirs, and, it having become indistinguishable from the other cotton by the destruction of the marks, the whole was sold in a mass as damaged cotton, and plaintiffs did then and now offer to give defendants credit for their share of the proceeds, amounting to \$1,110.74, about which estimate there is no dispute; nor is there any dispute about the weights and price of the entire lot of 139,388 pounds for \$14,945.56.

XV. The plaintiffs have frequently demanded payment of the defendants, which has been refused.

CONCLUSIONS OF LAW.

The court found the following conclusions of law, arising upon the foregoing facts :

1. The delivery of the cotton was complete and sufficient to pass the title to defendants before the fire, and the risk of loss was theirs.

2. The plaintiffs are entitled to judgment against the defendants for the sum of \$13,834.82, and interest thereon at 6 per cent. per annum from the twenty-first day of October, 1882, to this date, and the amount of the judgment should therefore be \$14,996.95, and costs.

Wright, Folkes & Wright and Metcalf & Walker, for plaintiffs.

Gantt & Patterson and Dyer, Lee & Ellis, for defendants.

HAMMOND, J. Outside of the rules of the cotton exchange there could be no possible doubt about this case. The delivery was as complete as it was possible to be, and under the general law the title passed to the defendants from the moment they examined, approved, and marked the cotton, and the risk of loss by fire was theirs. *Leonard v. Davis*, 1 Black, 476, 483; *Hatch v. Oil Co.* 100 U. S. 124, 128; *Tome v. Dubois*, 6 Wall. 548, 554; *Williams v. Adams*, 3 Sneed, 358; *Bush v. Barfield*, 1 Cold. 93; *Porter v. Coward*, Meigs, 25; 1 Amer. Law Rev. 413, and authorities cited. The defendants concede this; but they say that under these cotton-exchange rules the contract of the parties was "not a sale, but a mere executory agreement to sell," by the terms of which contract the sale was not completed by the agreement as to quantity, quality, and price, or by that agreement accompanied by delivery, but only by the actual payment of the price, until which payment the title remained with the plaintiffs, and the risk of loss by fire was theirs. And it is as frankly conceded by these plaintiffs that if this case falls within the rules of the cotton

exchange, and this be the proper and legal construction of the contract, the defendants are not liable.

The first inquiry then is, does this contract come within rule 9 of the exchange? It cannot be denied that parties may contract as they please, no matter how injudiciously, in the light of subsequent events, the contract may appear to have been made, or how absurd it may seem in the relation of the parties to it. Nor can it be denied that merchants may voluntarily associate together, and prescribe for themselves regulations to establish, define, and control the usages or customs that shall prevail in their dealings with each other. These are useful institutions, and the courts recognize their value and enforce their rules whenever parties deal under them, in which case the regulations become, undoubtedly, a part of the contract. *Thorne v. Prentiss*, 83 Ill. 99; *Goddard v. Merchants' Exchange*, 9 Mo. App. 290. But they have not, any more than other customs and usages, the force and effect of positive statutes nor of the rules of the common law, and the courts do not particularly favor them. *The Reeside*, 2 Sumn. 568; *The Illinois*, 2 Flippin, 422. Parties are not bound to contract under them if they choose to disregard them, and they may, and often do, observe part and discard part, as the plaintiffs and defendants here have evidently done. In all the dealings between these parties during that season, exclusive of this, amounting to more than 2,000 bales, only 13 were actually paid for before they were in fact delivered to defendants and by them removed, so far as we can certainly see how that fact was, while more than 1,700 bales were permitted by the plaintiffs to pass into the hands of defendants without payment. And yet, we are asked, as to these 268 bales, to reverse, on the strength of this rule, such a course of dealing, and adhere to its literalism in order to throw this loss on the plaintiffs. Take the rule for all it is worth and it amounts only to this: The plaintiffs and defendants have voluntarily agreed to be bound by it, and, by the same volition, have in all their dealings hitherto paid no attention to it. They have thus established, for themselves and as between each other, a different and special custom to which this rule has had no application, and in direct contravention of it; and this they can always do. *Thorne v. Prentiss*, *supra*. Nor is it necessary to expressly stipulate for such exclusion of the operation of the rules, usage, or custom.

"And not only," says Mr. Parsons, "is a custom inadmissible which the parties have expressly excluded, but it is equally so if the parties have excluded it by a necessary implication, as by providing that the thing shall be done in a different way. For a custom can no more be set up against the clear intention of the parties than against their express agreement." 2 Pars. Cont. 59; *Id.* (6th Ed.) 546, which was approved in *Ins. Cos. v. Wright*, 1 Wall. 456, 471. The supreme court says the usage or custom, when the contract is made with reference to it, becomes a part of the contract, and may not improperly

be considered the law of the contract. *Renner v. Bank of Columbia*, 9 Wheat. 581, 588. And the actual custom or usage of the parties in dealing with each other is as much a part of the contract under this rule as a general custom prevailing in the trade. *Bliven v. New England Screw Co.* 23 How. 420, 431. "A general usage may be proved in proper cases to remove ambiguities and uncertainties in a contract, or to annex incidents, but it cannot destroy, contradict, or modify what is otherwise manifest. Where the intent and meaning of the parties are clear, evidence of a usage to the contrary is irrelevant and unavailing." *Nat. Bank v. Burkhardt*, 100 U. S. 686, 692. Here the intention of the parties to deal with each other, without reference to this custom or rule established for them by the cotton exchange, is manifested in the clearest way by their habitual and uniform dealings with each other for a long series of years prior and subsequent to the organization of the exchange. Neither party has thought it necessary to be governed by it, and like many other rules, usages, and customs it has become, by their voluntary disregard of it, a dead letter. And the explanation of this is found in the fact that the plaintiffs, for whose protection it was evidently intended, did not deem it necessary to enforce it against the defendants, who are so amply solvent that it is their boast in the proof that they never asked indulgence.

If it be conceded that the defendants had an interest in this rule, by reason of the provisions in reference to insurance, the principle is not changed. It would be, then, a stipulation collateral to the contract of sale, and wholly so. Whether the plaintiffs or defendants should, under this rule, have insured the cotton is immaterial and unimportant to the issues in this case. Its insurance or non-insurance by either could not affect the title, or change the risk of loss by fire which always follows the title in the absence of any agreement to the contrary. Either or both might have insured their respective interests in the cotton; and whether one or the other did insure, or omitted to insure, would only tend to show, if they did not intend to assume their own risk, that in their opinion they had an interest, or did not have an interest, as the case might be. But such an opinion by either would not bind the other as to which of them the cotton belonged, in a controversy about the title, as this is. The title must depend on the facts about the contract of sale, and wholly on them. Nor, if we treat it as a question of evidence, does the existence of any supposed interest of the defendants in rule 9 change the result. It is perfectly plain to my mind, in view of the history of this rule in its relation to the underwriters, as shown by the proof, that this last clause was added by the underwriters to make more clear the requirement that the factor's policy should terminate with payment for the cotton; and it may be a proper construction of the rule, as between a factor and his underwriters, if it be true that the policy be written

by this rule, that his policy shall cover his interest in the cotton until it is paid for, no matter how long payment may be delayed, or where the cotton may be, whether in the shed or at Liverpool, or *en route* to that or some other destination. But what interest does this give the buyer in that question, or how can it affect his obligation to pay? Not in the least, it seems to me. Suppose the factor has no insurance,—and he need have none,—of what concern is that to the buyer, and how can it affect his obligation to pay, after he has taken the cotton into his possession and, it may be, consumed it in the mills? Insured or uninsured, as the factor may be, the contract of sale between him and the buyer is independent of the fact, and must stand upon its own bottom, and be determined on its own facts. This rule is clearly not a stipulation by the factor to keep the cotton insured for the *buyer's* benefit; but if it were, the remedy would be a suit by the buyer against the factor for a breach of that stipulation, if it had not been complied with, and not to withhold the purchase money on the theory that there had been no sale. He might set off his claim for damages in a suit for the price, but this case presents no feature of that kind. The provision in this rule about insurance, then, if not one wholly relating to the factor and his underwriter, with whom the buyer has no concern, as it manifestly is, can only be a collateral contract between the factor and the buyer, and in no sense does it afford any solution to the question we have in hand. All evidence whether either plaintiffs or defendants were insured as to this cotton was therefore properly excluded as irrelevant and immaterial.

Looking, then, as we must, beyond and outside of all questions of insurance or supposed insurance, and we are brought back to the fact that, in all their dealings with each other, notwithstanding the pledge contained in article 8 of the constitution of the cotton exchange, the plaintiffs and defendants have, in violation of their constitutional pledges, dealt with each other without regard to the stipulation of rule 9, that "delivery shall not be considered final until paid for;" that is, until the cotton is paid for. The plaintiffs have never refused delivery or retained the cotton until paid for, but have almost always delivered before payment, while the defendants have never been careful to pay before taking possession of and removing the cotton, nor at all scrupulous in regard to it. Perhaps, in the usual order of business, they would prefer to get the cotton, put it under bills of lading, assign them *and the cotton* to their bank in negotiation of bills of exchange with which to supply the funds, and thereby make each shipment or purchase of cotton pay for itself. This is not according to rule 9, for when they have put their bills in bank they have not only had "delivery," but have likewise "delivered" the cotton to another. There is nothing very sacred about the constitutional pledge or rule 9 when the parties mutually agree to the violation, and they need not do this by *express* agreement, as I have already shown. On this subject the supreme court of Illinois says:

"We do not entertain a doubt but that all contracts of sales within the contemplation of these rules must be construed as if the rules were expressly made a part of the contract; but there is nothing to which our attention has been directed, in the charter of the board of trade, and certainly nothing in the general law which prohibits members of that board from contracting 'on change,' or elsewhere, so as to bind themselves to obligations beyond and independently of these rules. The only difficulty that can arise in this respect must be in determining whether the parties intended their contract should be construed with reference to the rules of the board of trade, or that obligations were assumed outside of those rules." *Thorne v. Prentiss*, 83 Ill. 99, 100.

We may add that the presumption of the law is that merchants deal with each other under the wise provisions and protection of the general law that governs all men in their dealings, unless the contrary clearly appears; and if they expect the courts to observe their rules and enforce them they must themselves observe them. Otherwise, they are neither a custom or usage to control the contract.

This view of the case disposes of it, and, strictly, we need take no further notice of rule 9, but might leave it until its perplexities appear in some dispute between a factor and an insolvent buyer or his attaching creditors, or between a dishonest factor and conflicting buyers, or between some factor and his insurance company,—all of which situations have been suggested in aid of its interpretation. But the learned argument of the defendants' counsel in favor of their contention that this was an executory agreement to sell, and not a sale, under rule 9, should receive from the court that attention it deserves, particularly since this may not be a final disposition of the case, and another court may, possibly, think it necessary to construe this rule as a part of the contract. But I must be permitted to say that the real contention of the defendants is that their risk on cotton purchased by them does not attach until they actually remove it from the warehouse; but there being no such rule among these regulations, they have seized on this contrivance of an executory agreement to sell in order to effectuate the same result. Yet it needs only a little analysis to show that this construction of rule 9 goes further than this and leads to some very absurd consequences, so far, at least, as it concerns the factor—so very absurd that the wonder is sane men should ever have adopted a rule to be so construed.

If the title does not pass to place the risk of loss by fire on the buyer until the buyer pays for the cotton, why draw the line at the cottonshed? When it reaches the compress, if not yet paid for, the risk of loss by fire is still with the factor. So it is, if not paid for, on the rail or river, at a sea-port, on the ocean, in Liverpool, at the mills, in the store where the cotton goods are on display, and when they have been sold to consumers. Until paid for there is no sale of the cotton, say defendants, and by withholding payment we need not insure at all, but leave the risk with the factor or his insurance company under his

ninth-rule policy; and if burned at sea or elsewhere, not having him, he cannot make us pay, and must lose the cotton.

Again, why draw any line at a loss by fire, or at any loss at all? The defense is just as effective were the cotton still in existence. *Dillard & Coffin*, when sued for the price of the cotton, say to the plaintiff: "We have not yet paid you, and until it suits your pleasure to pay no title passes, and there has been no sale—only an executory agreement to sell; wherefore, your suit must fail and be dismissed." The result is they keep the cotton and never pay for it. This is as good an answer to every suit for the price until payment has been made *in fact*, (when there is no longer any need of a sale at all,) as it is here. This is little short of the case put as an illustration by Mr. Justice GRIER, where a man sued by his tailor for the price of a suit of clothes comes into court with the clothes on his back and sets up that the goods were smuggled by the tailor. *Randon v. Randon*, 11 How. 480, 521. Indeed, the defense is not so good, for here there is no fault of the plaintiffs alleged,—absolutely none,—but only that the defendants themselves have not paid what they had agreed to pay. Is it not apparent that the accident of a loss by fire does not change the merits of the defense? It is equally available with or without the loss, for it in no way depends on that accidental circumstance. It is as good with the cotton in Liverpool as it is with its ashes in the Liverpool cotton-shed, and no better or worse in either place. So stated, the broad proposition is, "This was a conditional sale, an executory agreement to sell when I pay for the cotton; and, although I have appropriated it to my own use, so long as I do not pay there is no obligation on me to pay, and no suit for the price will lie."

"Was such a thing ever heard of," asks THOMPSON, J., in the Missouri court of appeals, "as that a creditor loses his remedy against his debtor by not demanding payment on the day when the debt is due?" (*Beveridge v. Richmond*, 16 Chi. Leg. N. 93;) and we, paraphrasing the question, ask, "Was ever it heard that a creditor can refuse payment for the sole reason that he has not paid?" It must be confessed this may be a possible inference from the literalism of the rule, but it does not certainly appear that it was ever intended to have such a construction as that by the men who made it, nor does the case of *Leigh v. M. & O. R. Co.* 58 Ala. 165, justify such a construction of it. Nor does the case clearly fall within the third rule of Mr. Justice BLACKBURN, so much relied upon by the defendants. 1 Benj. Sales, (4th Amer. Ed.) p. 359, § 366; *Id.* p. 391-393; *Id.* p. 396, §§ 425-426. And for the reason that the authorities all show that where delivery has been actually made to the buyer, the intention to reserve the title to the seller and consequent risk of loss by accident, must plainly appear from the terms of the contract. Now, this rule does not say, in terms, that the title is reserved to the seller, but, on the contrary, says that "weighing

examining the cotton shall be a confirmation of the sale," (whatever that may mean,) but that "*delivery* shall not be considered final until paid for." The construction contended for by defendants is merely inference from this language, and it is susceptible of different and antagonistic constructions. The implications of the parties' dealings and surroundings are not favorable to this construction, and the nature of the trade and property is against it. It is not to be presumed that the seller assumes such peril in the cotton trade without an express or clearly-implied intention to do so. Occasional and exceptional circumstances might prompt a merchant to make such a contract to secure his price, but he would hardly desire it as a business usage in the cotton trade.

The more reasonable construction is that it was intended as a security of a different character, for the sole benefit of the factor against insolvent buyers, and to enable him, in a case where his interest requires, to keep the cotton in his possession, and refuse to surrender that possession until payment is made. It may be the courts would, possibly, in favor of the factor, extend the construction to cover a case where the purchaser was in actual possession and refused to pay, by holding that it was a conditional sale, and that the title remained, as between these two, with the factor until payment actually made,—or as between the factor and creditors of the purchaser,—but it is hardly possible the courts would, in favor of the buyer after he had taken absolute dominion, construe the rule to be only an executory agreement to sell when payment was made. If so, as to either construction, without a stipulation to the contrary, the risk of loss by fire would, undoubtedly, remain with the factor. These are, however, perplexities about this construction, as between the factor and those claiming against him, it is best to leave for decision when the cases arise. But as between the factor and the buyer, no matter what the proper construction of the rule may be, the factor may always waive this security in his favor, deliver the cotton unconditionally, and collect his money. Whenever he delivers the cotton absolutely, without any manifestation of an intention to claim his security, or, rather, with an expressed or plainly implied relinquishment of it,—whatever be its legal characteristics,—from that moment the title passes to the buyer, the risk of loss by fire is his, and he can never defend a suit for the price by refusing to perform the condition or carry out his part of the executory agreement. As to him the contract becomes executed whenever the seller chooses to so deliver and he accepts. The seller may, under such a contract, always waive the stipulation in his favor, and he does this whenever he delivers with the intention of not claiming it. That the plaintiffs did this here is abundantly shown by the proof. The waiver need not be express, but may be by implication resulting from acts and conduct. 2 Benj. Sales, p. 742, § 858. Of course, I need not say that plaintiffs here would not be permitted to exercise their right of waiver

after a loss by fire, so as to change the risk. They did not do so, but waived their security under this rule by delivery prior to the fire, without insisting on payment under the rule before delivery, as they had often done before. Neither will the defendants, after accepting this waiver by taking the cotton, be permitted to change the rule by refusing a payment which they were under legal obligation to make on Saturday, before the fire. I do not think either the plaintiffs or defendants had any intention of making the kind of contract the defendants now pretend to have made, by distorting the language of this rule; but if they ever did intend to trade under the rule, they never carried out that intention, so far as this proof shows. This is a waiver of it. The proposed usage of rule 9 has never become a usage at all as to these two members, and this by their own act.

Judgment for the plaintiffs.

BROWN and others v. LEE and others.

(*District Court, N. D. Mississippi. March 12, 1884.*)

MISJOINDER OF CAUSES OF ACTION—JOINT AND SEVERAL LIABILITY.

Where two or more defendants are sued jointly, a count in the same case against one of them alone upon his several liability cannot be sustained.

Demurrer to Declaration.

Lamar, Mayes & Branham, for plaintiffs.

C. B. Howry, for defendants.

HILL, J.: The questions presented for decision arise upon the demurrer of the defendant A. C. Jobes to the second count in the declaration. The declaration in the first count charges that the defendants Lee and C. S. Jobes, under the firm name of Lee & Jobes, gave their bill of exchange upon the bank of Kosciusko, of which said Lee, C. S. Jobes, and A. C. Jobes were the owners and partners, the bank being a private and unincorporated banking house, payable 90 days after date, which was delivered to plaintiffs and afterwards presented to the bank for acceptance and accepted, and when due was presented for payment, which was refused, of which the drawers had due notice. The second count charges that afterwards A. C. Jobes, for a valuable consideration, promised in writing that if plaintiffs would return the bill back he would pay it, which was done, but payment was refused. The letter, which is alleged contains this promise, is exhibited with the declaration, and is signed "Cashier." There is no objection to joining the drawers, acceptors, and indorsers liable upon a bill of exchange in an action. This suit is properly brought against Lee and C. S. Jobes, as drawers, and the same parties, with A. C. Jobes as

partners, under the name of the Kosciusko Bank, as acceptors. The question is, can A. C. Jobes be sued in the same action, in a separate count, upon an individual undertaking in which neither of the other defendants are sought to be made liable. If in writing the letter upon which the promise is based he acted as a member of the banking firm, then he would be liable, if at all, by the promise made in the letter as a partner in the banking firm, and not as an individual. It is true that by the laws of this state all partnership contracts are both joint and several, and an action may be maintained against one partner upon a partnership contract as a several and individual obligation; and if the suit was brought against A. C. Jobes alone, upon the acceptance as a several and individual obligation, then I see no reason why the second count might not be joined in the declaration. But the general rule of pleading stated in Chit. Pl., and all the other elementary works on that subject, is that the joint action must be in favor of all as plaintiff, and against all as defendants, and that there cannot be united in one action a count against two or more, and in the same action a count against one of the defendants; and the high court of errors and appeals of the state, in the case of *Miller v. Northern Bank of Mississippi*, 5 George, (Miss.) 412, announced the same rule, which stands unreversed, so far I am informed. Under this rule I am of opinion that the demurrer to the second count must be sustained, with leave to the plaintiffs to amend their declarations if they shall be so advised.

UNITED STATES *ex rel.* SPINK.¹

UNITED STATES *ex rel.* WILLIAMS.¹

(Circuit Court, E. D. Louisiana. March 3, 1884.)

1. HABEAS CORPUS.

Where parties have a right, under the laws of the United States, to pilot vessels in and out of the Mississippi river to the sea through South pass, although they are not duly licensed and commissioned branch pilots under the laws of Louisiana, to imprison them for exercising this right is to imprison them in violation of the laws of the United States.

2. SAME.

The orders and writs of this court are issued under and by the authority of the laws of the United States, and when the affidavits against the relators were made in contempt of the restraining orders of this court, and the relators are imprisoned by virtue of such affidavits, they are imprisoned in violation of the laws of the United States.

3. SAME—JURISDICTION—REV. ST. 753.

If relators are imprisoned in violation of the laws of the United States, this court, under section 753, Rev. St., has jurisdiction to issue a writ of *habeas corpus* to inquire into the cause of their detention, and upon the hearing it has jurisdiction, and it is its duty to discharge them.

¹Reported by Joseph P. Hcnnor, Esq., of the New Orleans bar.

Habeas Corpus.

E. Howard McCaleb, Joseph P. Hornor, and F. W. Baker, for relators.

James R. Beckwith, contra.

PARDEE, J. In our opinion these parties, Spink and Williams, have a right, under the laws of the United States, to pilot vessels in and out of the Mississippi river to the sea through South pass, although they are not duly licensed and commissioned branch pilots under the laws of Louisiana. It has been practically so decided by this court in *The Flynn Case*, the district judge presiding, at the November term, 1882, which case is now pending on appeal in the Supreme Court of the United States. To imprison them for exercising this right is therefore, in the opinion of this court, to imprison them in violation of the laws of the United States. We desire to express our great respect for the opinions and decisions of the supreme court of the state of Louisiana; and the opinion here presented in the case *Ex rel. Williams v. Livaudais*, 35 La. Ann. —, lately decided, we have considered attentively; but as the question in controversy is one as to the proper construction of the laws of the United States, and of their force and effect, we feel bound to follow the adjudicated cases of our court, rather than the opinion of a state court, although of conceded high rank and authority in all questions of law. Further, in these present cases it appears that the affidavits upon which these relators have been arrested, and are now imprisoned, were made by several persons who are each defendants in certain equity cases now pending in this court, wherein this same right to pilot through South pass is involved, and wherein these persons have been severally restrained and enjoined, until the further orders of court, from making such affidavits and instituting such proceedings. The various orders and writs of this court are issued under and by authority of the laws of the United States. As the affidavits were made in contempt of the restraining orders of this court, and as the relators are imprisoned by virtue of such affidavits, it would seem from this view also that the relators are imprisoned in violation of the laws of the United States. If these relators are imprisoned in violation of the laws of the laws of the United States, this court, under section 753, Rev. St., has jurisdiction to issue a writ of *habeas corpus* to inquire into the cause of their detention, and, upon the hearing, it has jurisdiction, and it is its duty to discharge them.

BILLINGS, J., concurred.

UNITED STATES v. KELLER.

(Circuit Court, D. West Virginia. 1864.)

1. CRIMINAL LAW—PROVINCE OF JURORS.

Jurors are not the judges of the law as well as the facts, but must take the law as given by the court.

2. SAME—INDICTMENT.

Where each count in an indictment constitutes a distinct and separate offense, if one is found to be true the verdict must be "guilty," even though the jury finds against the other counts.

3. SAME—EVIDENCE—REASONABLE DOUBT.

Preponderance of evidence against an accused party will not of itself warrant a conviction, but the jury must be satisfied beyond a reasonable doubt of his guilt as charged in the indictment.

4. MANSLAUGHTER—COLLISION—PROOF—MALICE—NEGLIGENCE.

In trials for manslaughter, under the statute of the United States, making the officers of a steamer, in case of a fatal accident, liable to prosecution for that offense, it is not necessary to prove malice, provided negligence is proved, and a violation of the navigation laws, nor need it be proved that such negligence or violation were willful and intentional.

5. SAME—DEFINITION OF NEGLIGENCE.

Negligence is the omission to perform some duty, or the violation of some rule, which is made to govern and control one in the discharge of some duty.

6. SAME—NAVIGATION LAWS—DUTIES OF PILOTS.

In the event of there being no signal made on a descending steamer, as required by the navigation laws, or a signal made not understood on board of the ascending steamer, the latter must stop and not proceed again until the two steamers come to a complete understanding as to the course to be pursued.

7. SAME—RESPONSIBILITY OF PILOTS.

If the ascending steamer fails to return the signal of the steamer descending, and chooses rather to make a cross-signal, the acceptance of this by the descending steamer does not excuse the pilot of the other for his first fault.

8. SAME.

The wrongful act of the pilot of one vessel contributing to the accident does not justify the pilot of the other vessel for his neglect of duty.

For Manslaughter.

The case arose out of a collision between the steamers Scioto and John Lomas, in the Ohio river, between Mingo island and Indian Cross creek. The defendant was the pilot of the steamer Scioto, and was navigating his boat up the Ohio river on the fourth day of July, 1882, with about 500 persons on board. The John Lomas was at the same time coming down the river, also heavily loaded, but was much the smaller boat of the two, although much more strongly built than the Scioto. The boats came in sight of each other when they were about 1,200 yards apart, the Scioto being about Cross creek and the Lomas about the head of Mingo island. The defendant was indicted for manslaughter, under section 5344 of the Revised Statutes. The indictment contained four counts. The first count charged that the pilot of the John Lomas (his being the descending boat) blew one sound of his whistle for passing, by keeping to the right, when the boats were 900 yards apart; that the Scioto at the time this whistle

was blown was to the left of the Lomas, on the West Virginia side of the river; and that after said whistle was blown the defendant, without answering the whistle, steered his boat deliberately across the river in the direction the Lomas was going down; and when about the middle of the river answered with two sounds of his steam-whistle instead of one, as he should have done; and that by reason of this cross-whistle, and of other acts of misconduct, negligence, and inattention to his duties as pilot by the defendant, the boats collided, the Scioto was sunk, and that by reason and in consequence thereof the lives of 58 persons, whose names were given, and 25 others, whose names were unknown, were destroyed. This count also contained various specific charges of misconduct on the part of the defendant, such as being drunk, having too many people in the pilot-house, allowing women to steer the boat, etc. The second count was like the first except that it omitted a part of the specific acts of misconduct, etc., contained in the first. The third count charged that the signal for passing had not been sounded by the pilot of the John Lomas and answered by the defendant when the boats arrived at a distance of 800 yards from each other; that when they arrived at a distance of 800 yards from each other they were likely to pass near each other; that notwithstanding this fact both pilots failed to stop their engines, or to change their course, or to do anything to prevent a collision, but kept on in the direction of each other until the distance between them was about 500 yards, when the pilot of the John Lomas blew one sound of his steam-whistle for passing to the right and the defendant, the pilot of the Scioto, after some delay and without any necessity therefor, crossed the whistle and answered with two sounds of his whistle instead of one; and then contained the proper averments, showing that the death of the persons above referred to was caused by the misconduct, negligence, and inattention to his duties as pilot by the defendant. The fourth count was general, and charged in a general way, without any specific acts of misconduct, negligence, and inattention to his duty as pilot by the defendant; that the collision which was the immediate and direct cause of the death of these persons was caused by the misconduct, negligence, and inattention to his duties as pilot of the defendant. The evidence as to the position of the boats in the river at the time the whistle for passing to the right by the pilot of the steamer John Lomas was blown, and also as to the position of the Scioto in the river when the defendant answered with two sounds of his whistle, was conflicting.

The evidence for the government was that the first whistle of the John Lomas was blown when that boat was between the island and Mingo furnace; and that the Lomas was shaping her course towards the Ohio shore; and that at the same time the Scioto was down about De Vinny's warehouse, and about one third of the way out from the West Virginia shore; that after this one whistle of the Lomas the Scioto shaped her course, *quartering* (as the witnesses called

it) toward the Ohio shore, and at about the middle of the river the pilot of the Scioto blew his cross-whistle. On the other hand, the evidence of the defendant was that after passing around Cross-creek bar he shaped the course of his boat to the Ohio shore, and ran up that shore from 80 to 90 yards from it, and about parallel with the shore, to the place of the collision. He admitted that he did not stop the engines of his boat, or do anything else to prevent a collision, from the time the boats came within 800 yards of each other until he blew his cross-whistle, when they were from 350 to 400 yards apart; and that he then for the first time stopped his engines, and set them to backing, when he blew his cross-whistle; and that this was, in his best judgment, at the time, all he could do to prevent the collision which followed.

The pilot of the Lomas was examined as a witness for the defendant, and testified that when the defendant sounded his two whistles the boats were, in his opinion, about 500 yards apart, the Lomas running down the Ohio shore and the Scioto about the middle of the river and running *quartering* to the Ohio shore; and that her position in the river was such that he supposed her pilot was determined to run to the Ohio shore; and that for this reason he determined to give him the Ohio shore by starting his engines to backing and thereby get out of his way; and for that reason he answered the Scioto with two whistles and gave her the Ohio shore, which, in his opinion, was the best thing he could do under the circumstances; that when he set his engines to backing he supposed that his rudder was straight in the water, but he found, whether by his carelessness or what else, he did not know, his rudder had changed to the Ohio shore, and the force of the current took his wheel out of his hand and threw the stern of his boat towards the Ohio shore, and she ran in that position half way to the place of the collision before he got the control of his wheel again, but that when he did so the collision had become inevitable. He further testified that the blowing of the cross-whistle by the defendant had nothing to do with his wheel getting out of his hands. On cross-examination he testified that this cross-whistle did have something to do with the stopping of his engines, and the attempt to back his boat; and that but for those two whistles by the defendant he would not have stopped his engines, nor attempted to back his boat, and would have had no occasion to do so; and that if the defendant had answered with one whistle, and steered his boat accordingly, there would have been no collision.

Several pilots were examined as experts, and all of them testified that if the boats were running directly towards each other when they were 500 yards apart, and that the pilot of the John Lomas, even at that distance, blew one whistle, if the pilot of the Sciota had promptly answered with one whistle, and each boat had steered to the right in accordance with these whistles, that the collision could have been avoided.

W. H. H. Flick, Dist. Atty., and *James H. Ferguson*, Spec. Asst. Dist. Atty., for the Government.

John A. Hutchinson and *B. B. Dovener*, for defendant.

JACKSON, J., (charging jury.) It must be gratifying to you that we are at last approaching the conclusion of this protracted trial. Its great importance, both to the country and the accused, fully justifies the time consumed in its investigation. The defendant is indicted under section 5344 of the Revised Statutes, which declares "that every captain, engineer, pilot, or other person employed on any steam-boat or vessel, by whose misconduct, negligence, or inattention to his duties on such vessel, the life of any person is destroyed; and every owner, inspector, or other public officer, through whose fraud, connivance, misconduct, or violation of law, the life of any person is destroyed, shall be deemed guilty of manslaughter." The indictment in this case contains four distinct counts, setting up and charging the offense in as many different ways. The difference in the counts consists in the manner the offense is stated, and in describing different acts under the statute charged as general misconduct, negligence, and inattention to duty. Each count in the indictment constitutes a distinct and separate offense; and if you find from the evidence that the allegation as laid in any one of the counts in the indictments are true, it will be your duty to return a verdict of guilty, although you may find against all of the remaining counts. It is not the practice of this court to discuss the effect of evidence submitted to the jury, but to leave its consideration with the jury, as being more properly within the province of its duty. It is my duty to give you the law applicable to the issue as made up, which you are sworn to try and a true verdict to render, under the law and the evidence.

The court is asked to tell you that in the trial of criminal cases the jury is the judge of both the law and the fact. Such is not the case. The court explains the law, and it is both your moral and legal duty to accept it as given you "unless you can say upon your oaths that you are better judges of the law than the court." Of course you can disregard the instructions of the court and refuse to accept the law as given to you by it; but if you do you exercise a purely arbitrary power, which, in the case of an acquittal, makes the decision final, although the guilt of the party may have been fully established. It therefore follows that a jury which desires to discharge its whole duty must take the law from the court and apply it to the facts of the case it is called to pass upon. Before you can return a verdict of guilty against the accused, under this indictment, you must reach the conclusion that all the material allegations contained in some one of the counts in the indictment have been fully proved. It is not enough to convict that there is a preponderance of evidence against the defendant; but you must be satisfied from the evidence, beyond a reasonable doubt, of his guilt as charged in the indictment. This doubt must be real and substantial, and not an

imaginary or speculative doubt. It must rest upon the fact that the evidence is insufficient, in your judgment, to justify you in returning a verdict of guilty against the accused. If, therefore, you have such a doubt as I have described, it will be your duty to give the accused the benefit of it. It is manifest that when congress passed this act that its intention was to make all officers or persons who fall within its terms responsible for the loss of human life, when it results from their misconduct, negligence, or inattention to their duty. The law is humane in its provisions, and no one can question the wisdom and policy of congress in passing and placing it upon the federal statute books. It is the duty of the court, however unpleasant it may be, when called upon, to enforce it, and you, gentlemen of the jury, being an arm of the court in the execution of the law, if you reach the conclusion that this defendant has violated this statute, your plain duty is to return a verdict of guilty. You will observe, under the statute, that it is not necessary for you to find that the defendant was guilty of willful or intentional misconduct, negligence, or inattention to duty. It is sufficient if you find that he was guilty of a violation of the statute, in the absence of any intent; and if you so find, then a verdict of guilty should be returned. Otherwise your verdict should be for the accused.

In this connection it is proper that I should inform you what constitutes negligence. It has been well defined to be "a breach of duty." I think, however, the better definition is that it is an omission to perform some duty, or it is a violation of some rule, which is made to govern and control one in the discharge of some duty. Applying this rule of law, if you should find from the evidence that the accused omitted to perform any duty, or that there was an absence of proper attention, care, or skill, and the performance of his duties as pilot of the Scioto, then you must of necessity find him guilty of negligence; and that if in consequence of such negligence the life of any person was lost, then you must find him guilty as charged in the indictment. Upon your retirement to your chamber the first inquiry that should engage your attention is whether any of the persons named in the indictment lost his life in this collision. The fact that a number of lives were lost at the time of the collision is not disputed; but it is claimed by the defendant that the collision was not the immediate cause of the losing of life of any one of the persons named in the indictment. You will determine this question of fact, and ascertain whether the collision was the immediate cause of the death of any one of the persons named in the indictment. If you find the fact to be as the prosecution claims it, your next inquiry will be whether the loss of life was in any respect attributable "to the misconduct, negligence, or inattention to duty of the accused;" for if it was solely due to other causes, then the defendant would be excused. If, however, it is answered in the affirmative, you should then ascertain whether the accused was, as charged in the indict-

ment, the pilot on the Scioto, at the wheel, steering and guiding her, shortly before and at the time of the collision. In considering these questions, you should bear in mind the rule of law, that every one accused of crime is presumed to be innocent until his guilt is established by proof.

I have heretofore called your attention to the rules of criminal law applicable to this case, and it now becomes my duty to construe the rules and regulations for the government of pilots of steamers navigating the rivers flowing into the Gulf of Mexico and their tributaries. These rules are authorized by an act of congress, and were adopted by the board of supervising inspectors, June 1, 1871, and, as amended in 1880, were in force on the fourth day of July, 1882, when the collision occurred. Since their adoption they furnish the paramount rules for pilots in guiding and steering steamers on the rivers flowing into the Gulf of Mexico.

Under rule 1¹ it is the duty of the descending boat, when the steamers are approaching each other, to give the signal for passing, indicating on which side she will pass the ascending boat, and when such signal is given it is the duty of the ascending boat to promptly answer and accept such signal so given, which, being done, becomes an understanding between the pilots of the two steamers as to the course each steamer will take to avoid a collision in passing. This rule was binding on the pilots of both boats at the time the Lomas blew her first whistle and before the collision occurred, and it was their duty to obey it. Neither of them should have disregarded it, unless there was at the time such imminent danger of collision that to accept it would tend to increase that danger. It is a conceded fact in this case that the first signal was given by the Lomas blowing one blast of her steam-whistle, indicating that she desired to pass to the right of the Scioto, and that the pilot of the Scioto replied with two whistles. Under this rule it was clearly the duty of the pilot of the Scioto to accept promptly the signal given by the Lomas, if in his power to do so. This was his plain duty, and he had no right to disregard it so as to change and "cross the whistle." If he could not accept the signal of the Lomas without imminent danger to his boat from collision or otherwise, he should have stopped, and, if necessary, backed her, and waited until he had arrived at an understanding with the Lomas. Ordinary prudence demanded this much from an officer in his position, and if he failed to do this he neglected to pursue the course that ordinary care and prudence would require him to do. If you should reach the conclusion that this action of the pilot of the Scioto, in replying with two whistles instead of one, produced confusion between the pilots which contributed to or caused the col-

¹ Rule 1. When steamers are approaching each other, the signal for passing shall be one sound of the steam-whistle to keep to the right, and two sounds of the steam-whistle to keep to the left; the signals to be made first by the descending steamer.

lision, there can be no escape from the conclusion that he not only did what he ought not to have done, but he omitted to do what he should have done. But if the blowing of the cross-whistle did not contribute to or cause the collision, then the act would not of itself be negligence. But if you should find that the Scioto was in such a position, *without fault of her pilot*, when the Lomas blew her first whistle, that it was either too dangerous or too late to accept with safety the signal so given by the Lomas, and that a collision was so imminent as to be unavoidable, then you would be justified in excusing the defendant. Under this rule this is the only excuse the defendant can offer to justify his conduct. If, therefore, you find from the evidence that there was no contingency such as I have just referred to, it was his duty to accept the signal as given to pass to the right of the Lomas, if he could thereby avoid a collision. Otherwise he should have resorted to all the means in his power to prevent it.

Under rule 2¹ the first clause provides, where two steamers are likely to pass near each other, and the proper signals have not been made and answered by the time they have arrived at the distance of 800 yards of each other, the engines of both boats should be stopped. Applying this rule, if you find from the evidence that the two boats were likely to pass near each other, it was the duty of the Scioto, if the Lomas had given no signal by the time they had arrived at *that distance*, to stop her engines and check her headway. It becomes, then, a pertinent inquiry to ascertain whether this was done, and was the rule complied with. If it was, and still the collision could not have been avoided, then, so far as this defendant was guilty of a neglect of duty under the first clause of this rule, he should be excused. But if an observance of the rule on his part would have prevented the collision, then it was his duty to comply with it, and stop the engines of his boat until a proper understanding was had with the Lomas as to the course each boat would pursue in passing; and a failure to do so was a culpable neglect of duty on his part, which would be inexcusable. Under the second clause of this rule, if the two boats had arrived at a distance less than 800 yards from each other, and no proper signals had been given and answered, or, if given, not properly understood, it was the duty of the pilot of the Scioto to stop the engines of his boat and back her until her headway was fully checked, and not to start his boat ahead again until the proper signals had been made, answered, and understood. You will perceive

¹ Rule 2. Should steamers be likely to pass near each other, and these signals should not be made and answered by the time such boats shall have arrived at the distance of 800 yards of each other, the engines of both boats shall be stopped; or should the signals be given and not properly understood from any cause whatever, both boats shall be backed until their headway shall be fully checked, and the engines shall not be again started ahead until the proper signals are made, answered, and understood. Doubts or fears of misunderstanding signals shall be expressed by several short sounds of the whistle in quick succession.

that this clause of the rule requires the pilot to stop his boat as soon as he arrives inside the 800 yards—the distance fixed by the rule. If the evidence should satisfy you that this was not done, then clearly this is a violation of the rule that was obligatory on him, and which it was his duty to observe. It is for you to decide whether such are the facts, and whether if the rule had then been observed in all its parts, this collision would have been avoided by stopping the engines of his boat and checking her headway. It was his plain duty to do so, and a failure to do it was a culpable neglect of duty.

Under rule 4,¹ if the Scioto was running close on the shore, and at that time the Lomas had come so near that it was possible for a collision to ensue, then the Scioto would not have been justified in crossing the river in front of the Lomas. This rule, of course, must be construed with rule 1, and it is intended to prevent the descending boat from requiring the ascending boat unnecessarily to cross the river, and at the same time to inhibit her from crossing in front of the ascending boat. But if the jury should reach the conclusion that when the Lomas blew one whistle she was either on a line with, or to the left, of the Scioto, and that when she replied with two whistles they continued the same course toward each other until the collision occurred, then rule 4 has no application to the facts of this case. You will, however, apply this rule to the facts, and determine whether these boats bore such a relation to each other as this rule contemplates.

In this case the defendant is responsible only for his own negligence and inattention to duty, and not for that of any other. You are to pass upon the charges as stated in the indictment against him, as it is a matter of no importance, so far as this trial is concerned, whether the pilot of the Lomas was guilty or not guilty of contributing to the collision. Both may be guilty, or one may be guilty and the other innocent. And in this connection it is to be remembered that any wrongful act of the pilot of the Lomas does not justify this defendant for neglect of duty; and the fact that the pilot of the Lomas accepted the cross-signal given by the pilot of the Scioto in replying with two blasts, is no justification for the action of the defendant in this case, and does not release him from the consequences of, or justify his act in, refusing to accept the first signal given by the pilot of the Lomas. And by this I mean that the rules did not authorize the pilot of the Scioto to change the signal. All he could properly do, if the signal given was one he could not accept, was to stop his boat and use all the means in his power to avert a collision. And it is for you to say whether he did follow the rules adopted for his guide in steering his boat; and whether he did all that any prudent and

¹ Rule 4. When a steamer is ascending and running close on a bar or shore, the pilot shall in no case attempt to cross the river when a descending boat shall be so near that it would be possible for a collision to ensue therefrom.

careful pilot could have done to avert the great calamity that overtook his boat. If this collision was the result of misconduct, negligence, and inattention to duty of others then the defendant's, and he in nowise contributed to it, of course it follows that no blame for it can attach to him. He is responsible only for his own conduct on this occasion, and not for the conduct of any other. You must try him upon the charges as laid in the indictment, and find whether they are true or false, and in your investigation you are to pass upon his acts and ascertain for yourselves whether he did, under the rules of navigation, and under the circumstances surrounding him from the time the two boats came in full sight of each other, all that he could do as a careful and prudent pilot to avoid the collision. In this case no question of error of judgment arises, but simply questions of fact which involve his duty, from the time the boats sighted each other until the collision occurred.

I trust that you will bring to the examination of this case that calm and considerate reflection that a case of this importance requires. It is important both to the country and the defendant that the facts should be fairly and impartially considered, and the law properly applied, that you may arrive at a just and proper conclusion, and your action fully justified.

The jury found the defendant guilty of manslaughter in manner and form as charged in the indictment against him; and the court refused to set the verdict aside.

SWIFT v. JENKS and others.

(*Circuit Court, N. D. New York. March 3, 1884.*)

1. PATENTS—NON-CLAIM OF APPARENT DEVICE—ABANDONMENT.

The omission by an inventor to claim a combination or device apparent upon the face of his patent amounts to a dedication of the neglected contrivance to the uses of the public.

2. INJUNCTION—NOT TO ISSUE WHEN IT WOULD WORK INJUSTICE.

An injunction should not issue when it would work great harm to one party without corresponding benefit to the other, at least where adequate protection can be afforded by other means.

Motion for Preliminary Injunction.

Duell & Hey, for complainant.

Neri Pine, for defendants.

COXE, J. This is a motion for a preliminary injunction. The complainant is the inventor of an alleged improvement in lubricators for which letters patent were issued August 28, 1883. The claims in controversy are as follows:

v.19,no.9—41

"(5) In combination with the steam-condensing duct and its horizontal extension, *c*, the lubricant-cup composed of metal and provided in front of the duct-extension, *c*, with an observation-port, *r*, covered with a transparent plate, substantially as and for the purposes set forth.

"(6) In combination with the oil-cup of a lubricator, the port, *r*, covered by a glass plate, and the pipe or tube, *c*, having an inclined end or face, substantially as set forth."

Prior to this time, and on the second day of May, 1882, letters patent for a similar invention were issued to the defendants. An interference was declared, and, after a thorough investigation, the examiners and commissioner concurred in deciding that the complainant was the prior inventor. But the proceedings in the patent office determined more. Upon defendants' motion to dissolve the interference the commissioner was required to pass upon the question whether or not the subject-matter claimed was patentable. Various references, which, as was urged by the defendants, anticipated the complainant's invention, were presented, and although the examiners in chief and the commissioner were not in accord upon this question it cannot be denied that the issuing of the patent was, to the extent that the question was there investigated, a decision in favor of the complainant. The proceedings in the patent office having, as between these parties, determined,—*First*, that the complainant was the prior inventor, and, *second*, that the subject-matter of the patent was not void for want of novelty, the complainant would be entitled, if there were no other considerations, to the injunction prayed for, there being no dispute as to the infringement. *Smith v. Halkyard*, 16 FED. REP. 414; *Shuter v. Davis*, Id. 564.

But the defendants again insist that the patent is void for want of patentable novelty, and in support of this defense they produce various references not presented to the examiners. They also produce affidavits tending to show that one Giles was the original inventor of the patented device or combination. But the argument having the most weight with the court is the one based upon the complainant's prior patent of March 21, 1882. It is urged that he there fully discloses the subject matter of claim 5, *supra*. The language of the specification is as follows:

"It is not essential that the cylinder should be wholly of glass, so long as that portion directly opposite the end of the tube or pipe, *E*, is transparent, to expose to view the end thereof * * * the cylinder may be constructed of metal, with a window or 'sight' on a line opposite the tube or pipe."

The metal cylinder with the glass observation port opposite the end of the tube was not claimed in the March patent, and the language of Mr. Justice BRADLEY in *Miller v. Brass Co.* 104 U. S. 352, is therefore applicable:

"But it must be remembered that the claim of a specific device or combination, and an omission to claim other devices or combinations apparent on the face of the patent, are, in law, a dedication to the public of that which is

not claimed. It is a declaration that that which is not claimed is either not the patentee's invention or, if his, he dedicates it to the public."

It is argued for the complainant that the patent in suit is not for a particular device but for a combination, and that, construed most favorably for the defendants, the March patent discloses but one element of that combination. This contention presents for consideration a number of questions not argued upon the motion, but which may perhaps be sufficiently suggested by an examination of *Slawson v. Grand St. R. R.* 107 U. S. 649; S. C. 2 Sup. Ct. Rep. 663, and other like authorities.

Although the papers presented on this motion have been carefully examined it is not the purpose of the court to discuss the defenses referred to at this time or express an opinion regarding them; they should be disposed of only after careful consideration on final hearing. They are mentioned here simply to show that the defendants have succeeded in raising a sufficient doubt as to the validity of the complainant's patent to induce the court to withhold the writ asked for provided the complainant's right can be fully protected without resort to so positive a remedy. Where an injunction will work great injury to one party without corresponding benefit to the other it should not ordinarily issue, especially where adequate protection can be had without it.

An injunction should issue unless the defendants within 15 days after service of a certified copy of the order entered upon this decision shall give a bond with two or more sureties to be approved by a commissioner of this court, conditioned to keep an account of all the lubricators manufactured and sold by them and to file such account duly verified once a month in the office of the clerk of this court, and to pay the amount of any final decree which may be awarded against them; the penalty of the bond to be in such sum as may be agreed on by the parties, or if they are unable to agree, as may be fixed by the court upon proof by affidavit or otherwise of the extent of the defendants' business.

THE FISH-WHEEL CASE.

WILLIAMS v. McCORD and others.

(Circuit Court, D. Oregon. March 26, 1884.)

PATENT FOR "REVOLVING DIP-NET."

The patent issued to Thornton F. Williams on August 2, 1881, and numbered 245,251, for an "improvement in revolving dip-nets," declared void for want of both invention and novelty, the same having been invented and put into operation by Samuel Wilson at the Cascades of the Columbia in the spring of 1879, from which machine the said Williams, in the fall of that year and the spring of 1880, constructed his "revolving dip-net."

Suit for Infringement of Patent, and for an account and injunction.
D. P. Kennedy and William B. Gilbert, for plaintiff.
H. B. Nicholas, for defendant.

DEADY, J. This suit was commenced on January 12, 1883, and is brought against the defendants for an account, and to recover damages for the wrongful use, by them, of a certain "revolving dip-net," alleged to have been invented by the plaintiff, and for an injunction to restrain them from the further use thereof. The bill alleged that the plaintiff, being the first and original inventor of such dip-net, on November 4, 1880, applied for letters patent thereon, which were duly issued to him on August 2, 1881, and numbered 245,251; that the defendants, on March 1, 1882, without the consent of the plaintiff, constructed "a revolving dip-net on the south side of Bradford's island, in the Columbia river, * * * embracing the improvement and invention described in said letters patent," and maintained the same "in operation during the fishing season of 1882,"—that is, from April 1st to August 1st,—to the damage of the plaintiff, \$100; and still continues to operate the same.

The defendants, answering the complaint, deny that the plaintiff is the original inventor of the net in question, and that the same was not in public use when the plaintiff applied for his letters patent, and allege that said dip-net was fully described in *Harper's Monthly Magazine* for May, 1880; that Samuel Wilson, of Dallas, Iowa, invented and put in operation, on the Columbia river, the dip-net described in the bill, in April, 1879, long before the alleged invention of the plaintiff, and that the plaintiff surreptitiously availed himself of said Wilson's idea and invention, and obtained a patent for the same while the latter was engaged in perfecting it; but that neither said Wilson nor the plaintiff were the first inventors of said dip-net, and that the same had been in use in other places, by other persons, for the purpose of catching fish, for many years before, specifying, among others, sundry places and persons on the Catawba and Pee Dee rivers, in North Carolina, where it had been in use, in some instances, for more than 50 years; that on January 4, 1882, the defendant McCord, being the first and original inventor of certain improvements in a fish wheel, made application for letters patent thereon, which, on May 16th of the same year, were duly issued to him and other defendants, as the assignees of said McCord, and numbered 251,960, for an invention entitled a "fish wheel;" that afterwards, in 1882, the defendants licensed the "Snail Wheel Fishing Company," a corporation duly formed under the laws of Oregon, the defendants being the officers and stockholders thereof, to conduct such a fish wheel on the south side of Bradford's island, and that said corporation did construct and operate such wheel at said place during the fishing season of 1882, which is the same machine referred to and mentioned in the bill as being an infringement on the plaintiff's dip-net.

It appears from the evidence that fish wheels or dipping wheels

have been used on various rivers in North Carolina for the purpose of taking shad and other fish that are in the habit of ascending the same, as alleged in the answer. The wheel consisted of an axle or shaft of four or five feet in length, resting horizontally upon two upright posts or forked timbers planted on either side of a sluice or chute in the river, into which were let three pairs of arms or bows from three to eight feet long, owing to the depth of the water, and equidistant from each other. These arms were made of tough wood, and bent forward at the outer end like a plow-handle, and covered with a netting of twine so as to constitute a "dipper," not unlike in appearance, according to the language of a witness, "the top of a falling top buggy." The wheel was turned down stream by the force of the current striking the back of the "dippers," one of which was always in the water, and into which the fish ascending the stream by that chute or sluice went, and were carried upwards and backwards over the shaft and lodged on an inclined trough made of slats placed between the inner ends of the arms, on which they slide down into a box or tank immediately outside of the in-shore post.

In the spring of 1879 and prior thereto, Samuel Wilson, a carpenter, who was living at the Cascades of the Columbia, on the Washington side, conceived the idea of taking fish by means of a wheel driven by the current, and actually constructed one and put it in operation there by April, 1879, but on account of the health of himself and family he returned to Iowa in May of that year, leaving his wheel in charge of James Parker, who took a few fish in it before the high water carried it away. Afterwards, on March 28, 1882, Wilson applied for a patent on his invention of "a new and improved fishing wheel," which was issued to him on September 12, 1882, and numbered 264,395. In the specification it is described as "a wheel constructed with nets embraced in four or more sections thereof, to each of which nets an opening is made from the periphery or near it, and from which there is an escape passage from the center of the wheel, and at one side, to a chute leading to a cage-net, all so arranged that the wheel, being located in a fish-way, to be rotated by the water flowing against it, or by another wheel attached to the shaft outside of the fish-way, the mouths of the passages into the nets of the wheel will open at the rear of the wheel to the fish ascending the stream, to be entered by them as they attempt to pass under the wheel, whereby, as that side of the wheel rises, the fish will be caught, carried up, and shunted out through the aforesaid side central passages into the chute, by which they will be delivered into the trap-cage, to be taken out at pleasure, as hereinafter more fully described." The size of the wheel might vary from 10 to 40 feet, owing to the depth of the water; and the one constructed was about 20 feet in diameter.

As early as the spring of 1877 the plaintiff lived at the Cascades of the Columbia, on the Oregon side, and was engaged in taking fish there with the ordinary gill and dip net, and has lived there ever

since. It is asserted in his testimony that he "conceived" the idea of this revolving dip-net in the fall of 1878; and that he commenced to construct it then, but did not get the lumber in time to finish it for the fishing season of 1879, and therefore abandoned it or gave it up till the fall of that year, when he went to work on it again, and got it into operation in time for the fishing season of 1880, and afterwards obtained a patent for the same, as alleged in the bill. In his specification the plaintiff describes his alleged invention as "a new and useful improvement in revolving dip-nets," and claims "as new" therein:

(1) "The box-nets, I, constructed with holes, M, at their inner ends, substantially as herein shown and described, whereby the first (?) [fish or nets] are discharged, as set forth; (2) the nets, I, secured to arms of shaft, E, leaving an opening at the front, except at the inner part, for the inlet of the fish, and at the rear an opening for their outlet, as shown and described; and (3) the combination, with a rotary wheel having nets, I, with discharge openings, M, near the hub, and having the inner part inclined towards said openings, of a receptacle, J., arranged as shown and described."

But the decided weight of the evidence is that, in the fall of 1878, the plaintiff was engaged in getting together the material and preparing the timbers for a fish "trap" at the Cascades, and not a wheel or net, which he never completed, and is now falsely claiming to be the *conception* or beginning of his "revolving dip-net;" and that in the fall of 1879 he availed himself of his knowledge of Wilson's invention, thinking, it may be, that he had abandoned it, and constructed the machine for which he afterwards obtained a patent.

In the May number of Harper's *Monthly* for 1880 there is a wood cut of the North Carolina wheel, (page 849,) illustrating an article, "The Shad and the Alewife." The Wilson wheel, either as patented by himself or the plaintiff, although in the main anticipated by the North Carolina wheel, was, so far as appears, constructed without any knowledge of the existence of the latter, and is an improvement upon it in some material particulars. But the plaintiff's wheel being a mere copy of Wilson's, with some immaterial changes in form and material, his patent is void, both for want of invention and novelty. Walk. Pat. §§ 23, 52. The wheel used and patented by the defendants is probably an improvement on Wilson's, particularly in the arrangement of the basket or nets, whereby the fish are discharged below the shaft, and are less liable to be injured. But as the patent to the plaintiff appears to be void for the reasons stated, it is not necessary to consider that question. But I cannot refrain from adding, on behalf of the public, that I think the best disposition that could be made of this controversy would be for the legislature to intervene in the interest of the fish in the future, and prohibit the use of these murderous machines anywhere in the waters of the state.

The bill is dismissed, with costs.

DUKE v. GRAHAM.

(District Court, N. D. Mississippi. March 5, 1884.).

1. CONTRACT TO ASSIGN PATENT-RIGHT—SPECIFIC PERFORMANCE—INJUNCTION.

Where it was mutually agreed between a patentee and the inventor of an improvement upon his device that the patentee should surrender his individual right, and a new patent for the improved device should be applied for by the two parties jointly, *held* that in equity they were joint owners of the patent as improved by the subsequent invention, and that the inventor of the improvement could restrain the patentee from using his patent, except for their joint benefit.

2. SAME—JURISDICTION OF FEDERAL COURT.

Held, also, that the controversy related to the patent-right itself, and was within the jurisdiction of the circuit court, without respect to diversity of citizenship.

In Equity.

Lamar, Mayes & Branham, for complainant.

H. A. Barr, for defendant.

HILL, J. This cause is submitted upon bill, answer, exhibit, and proofs, from which the following facts appear:

In 1876 the defendant, being the sole owner of the patent of what is known as the Swift cotton press, employed complainant as his agent to sell the right to erect and use said cotton press, and to manufacture and put the same up in the state of Texas. During that time complainant invented and made certain valuable improvements on said press, rendering it much more valuable. An agreement was entered into between complainant and defendant, by which it was mutually agreed that the defendant should surrender his individual right under the Swift patent, and that a new patent should be applied for, for the same invention, with the improvement of complainant—in other words, of the Swift invention as improved by complainant; the application to be made and the patent to be issued in the joint names of complainant and defendant; complainant before that time having assigned the one-half interest in his said invention to defendant.

The bill charges that defendant fraudulently represented to complainant that he could not use his invention without an infraction of the Swift patent, and that if he used it he would charge him as a royalty upon each press the sum of five dollars; and to induce complainant to transfer to him the one-half interest in his invention, he promised that the new patent named be extended for 21 years, instead of 17 years; and further charges that the defendant did not comply with his contract by the surrender of the Swift patent, but, upon the contrary, continued to manufacture and sell presses under it, to the injury of complainant. The allegation that defendant continued to manufacture presses under the Swift patent alone and in his own name is denied in the answer; and denies that he has abandoned its use since said contract, but does not know whether his solicitors, as they were authorized to do, made a formal surrender of all rights under the Swift patent. The proof on this point is not sufficient to overcome this denial in the answer. The contract was evidently a mutual

one between the parties. Complainant could not rightfully make his invention available without the benefit of that secured by the Swift patent, unless he procured a license to do so, for which he would have had to pay a royalty such as might be demanded by defendant; and defendant could not rightfully avail himself of the advantages of the invention and improvement made by complainant, without a license, and such royalty by way of compensation as complainant might demand. To obtain the benefit of the Swift invention, and to prevent its being used in any other way than in connection with his improvement and invention, was the consideration moving complainant to make the assignment, and was a good and valid consideration upon complainant's part; and to get the benefit of complainant's invention and improvement was the consideration moving defendant to agree to surrender his individual right under the Swift patent, and was a good and valid consideration, and estopped defendant from using the invention for his individual benefit, or, aside from its use, under the invention and improvement of complainant. The result is that the complainant is entitled to a decree enjoining and restraining defendant from all right under the Swift patent, or of transferring the right to make and use presses according to that invention only in connection with and as part of the invention of complainant, secured by the letters patent of November 16, 1880: provided, however, that this court has jurisdiction to maintain the bill and grant the relief prayed for, or any part thereof, which it is denied that this court has conferred upon it.

If this had been a transaction accruing after the issuance of the letters patent, the parties both being citizens of this state, it is clear that this court would have no jurisdiction of the subject-matter of the suit, but it is a question involving the property rights, so to speak, of the defendant in the letters patent themselves, and as between the copartners themselves. The bill seeks to set aside the rights conferred upon defendant as one of the partners, and to vest the entire right in complainant. This, it seems to me, affects the patent, and also seeks to restrain the defendant from using in any way the rights conferred under the Swift patent, and which, by the understanding of the parties, was to become, in connection with complainant's improvement thereon, the joint property of complainant and defendant,—the rights secured by the letters patent issued by the government November 16, 1880,—and is essentially different from rights growing out of contracts between the patentees and third parties.

I am of opinion that this court has jurisdiction to determine the question as to the right of the parties to the rights and benefits conferred by the patent issued to them by the government, and enforce their rights by a proper decree. I am further of opinion that the complainant and defendant are in equity the joint owners of the Swift patent, or the rights secured under it as improved by the invention of complainant, and that the complainant has a right to have defendant, and all persons claiming under or through him, enjoined

and restrained from making or using cotton or hay presses as invented and made, and secured by the letters patent known as the Swift invention and patent, except as in connection with complainant's improvement, and under the rights conferred under the patent last issued. A decree will be entered accordingly, and that each party pay one-half the costs of this cause.

MATTHEWS and others v. GREEN.¹

(Circuit Court, E. D. Pennsylvania. February 11, 1884.)

PATENT—LICENSE—SALE OF, TO SATISFY JUDGMENT DEBT.

A license to use a patented invention may, by a bill in equity, be subjected to sale for the payment of a judgment debt.

Hearing on Bill, Answer, and Proofs.

This was a bill in equity by John Matthews and others, citizens of New York, against Robert M. Green, a citizen of Pennsylvania, setting forth that by an agreement under seal, dated the thirteenth of February, 1874, complainants, in consideration of one dollar, granted to defendant the exclusive right to use Matthews, patent steel fountains for aerated beverages, patent dated June 25, 1872, No. 182,411, and "Mathews' patent wagons for transporting soda-water fountains," patent dated April 9, 1872, No. 125,592, for the term of the patents, within the city of Philadelphia, provided that defendant should purchase from complainant within four years a number of fountains, equal to one for each 500 inhabitants of the territory; and the defendant agreed to purchase from complainant all the fountains he might need in his business, and not to sell or dispose of the fountains to go outside of the territory without the written consent of the owner of the territory in which he might desire to send them, nor to continue to use the same, except within the territory granted after notice given by complainants. In pursuance of this agreement, a large number of fountains, to the value of about \$24,000, were furnished to defendant, and for a balance of the price he gave certain promissory notes, upon which the complainants had obtained judgments, in the court of common pleas of Philadelphia, for \$4,709.99, \$1,117.17, and \$1,203.16, respectively, and upon the first judgment a writ of *fiat facias* had been returned, "no goods." That the defendant had neglected and refused to perform the covenants of said agreement by failing to pay the notes, and by using the fountains without the limits of Philadelphia, after notice. It was provided in the agreement that, upon the failure of the defendant to perform the covenants, the

¹ Reported by Albert B. Guilbert, Esq., of the Philadelphia bar.

complainants, at their option, and they being the judges thereof, might cancel the same. The bill prayed an injunction restraining the further use of the patents; that the agreement should be delivered up and canceled; or, in the alternative, that the license or right (if any there be) of the defendant in the patents be ordered to be sold by the decree of the court, to satisfy, so far as may be, the complainants' judgments, and an account of the profits realized by the use of fountains outside of Philadelphia. The defendant claimed that he had sustained damage by reason of defects in the fountains, and by the failure of the complainants to protect him from an interference by parties manufacturing similar fountains, and contended that the written contract had been modified by an understanding that in certain cases he should have the right to use the fountains without the limits of Philadelphia. It appeared that the defense of defects in the fountains had been made by the defendant in the actions upon the above-mentioned promissory notes, and that in one case the jury had rendered a verdict for \$1,000 less than the claim of the plaintiffs, and in the remaining two cases the jury had rendered verdicts for the full amounts of the notes. The defense of failure to protect from infringement by other manufacturers was also set up as a defense in these suits. Whether, however, any evidence was given under it, or whether it entered into the computation of damages, was a question in dispute. It also appeared that in 1879 complainants made oath to the invalidity of their patent for fountains, and surrendered it for the purpose of obtaining a reissue.

Wayne McVeagh, (with whom was *G. T. Bispham*,) for complainants.

The matters of defense have passed *in rem judicatam*. The defendant's right was *to use*, not *to make and sell*, and not being a grant of an *entire* interest, was a mere license. *Gayler v. Wilder*, 10 How. 494; *Hayward v. Andrews*, 106 U. S. 673; S. C. 1 Sup. Ct. Rep. 544; *Walk. Pat.* 216. A patent-right may be taken in execution by bill in equity. *Ager v. Murray*, 105 U. S. 126. A license may be equitably conveyed. *Wilson v. Stolley*, 4 McLean, 275.

Frank P. Prichard, (with whom was *John G. Johnson*,) for defendant.

Complainants are not entitled to an injunction to restrain a purchaser from using purchased machines because he has failed to pay a balance of the price; nor are they entitled to an injunction restraining the use of the machines outside of Philadelphia since the remedy provided by the agreement for that use was the forfeiture of respondent's exclusive right within the territory. Complainants have shown no such irreparable damage as entitles them to the aid of a court of equity.

BUTLER, J. We see no serious objection to granting the relief asked for by the third prayer of the bill—that the license held by the respondent be sold towards satisfying the complainants' judgments. The paper of February 13, 1874, executed by the parties, was in-

tended to and does control and regulate the use of all the "fountains" obtained. It is, in effect, a license conferring on the respondent a right to use the fountains in the city of Philadelphia, to the exclusion of all other persons. The compensation or price named, and to be paid, was the consideration for the fountains, and the use, thus limited. The respondent having failed to pay the judgments recovered, for money due under this contract, it is just that the license should be subjected to sale for this purpose.

The questions arising out of the first and second prayers need not be discussed. It is sufficient to say that the relief just indicated is all the complainants should have on the bill.

A decree may be prepared accordingly.

THE ASHLAND.¹

(Circuit Court, E. D. Louisiana. February 12, 1884.)

1. SALVAGE.

Salvage refused in case where the facts showed that libelants should have had some knowledge of how the vessel got adrift, with her chains and ropes missing, she having been shown to have been securely fastened a short time before.

2. COSTS.

Where both parties have unnecessarily encumbered the record, no costs will be allowed.

Admiralty Appeal.

R. King Cutler, for libelants.

A. G. Brice, Joseph P. Hornor, and F. W. Baker, for claimants.

PARDEE, J. The Ashland was undoubtedly cast adrift from the landing where she was tied by some person or persons, for unlawful purposes. If she was loosed from the shore the ropes and chains with which she was tied would have remained fastened to her, and been dragged along after her in her course down the river. If she was loosed from her deck or from aboard, the ropes and chains would have remained fast to the posts ashore. If she was loosed by casting off both ashore and aboard, the chains, at least, would have remained to show the fact. The shore showed signs of the ropes and chains having been dragged out as the boat went down stream, and neither ropes and chains were found attached to the mooring posts. The conclusion is irresistible that she was cast adrift by letting go the shore end of the ropes and chains with which she was moored, and that she dragged the ropes and chains out after her. The libelants say that they stood on the levee about one and one-half

¹ Reported by Joseph P. Hornor, Esq., of the New Orleans bar.

squares above where the Ashland was tied, and saw a light out in the river which looked like a barge afloat, and which they boarded and found to be the Ashland. From where they say they stood it was impossible for them to have seen the Ashland "*out in the river*," for they stood directly above where she was tied and from where she was cast adrift, without she was pulled out into the river. Unless she was pulled out, she would, of necessity, go down with the current, drifting directly away from libelants and not getting out into the river until a long distance further down stream; and it seems this was the fact, for when she passed the coal-yard, four squares below, she was from 100 to 150 feet out from the bank. From these facts it is safe to say that libelants boarded the Ashland either at or very near her landing. They should have found the ropes and chains attached and dragging after. They found nothing of the kind, except a piece of rope.

Taking the aforesaid facts into consideration, with the evidence of libelant Fisher, corroborated by libelant Deibel, and by Stubbs, De-fuer, and Merchant, to this effect, "I was standing on the levee at Burdette street. Mr. Deibel and myself were together, and we started up the street, and stopped at Schilling's box factory, and Stubbs, De-fuer, and Merchant came along, and *so I then saw a light out in the river*, and I said, 'Don't that look like a boat going down the river?' and they all said 'Yes, it does;' and then Deibel said, '*There is no harm in going to see;*' and then Deibel and Fisher went to Deibel's boat, already prepared with a 550-foot line,—it would appear that some explanation should be given of the means by which the Ashland got adrift, with her chains and ropes missing, before salvage should be awarded libelants, who, under the circumstances, should have had some knowledge of the matter.

This unfavorable view of libelants' demand for salvage, derived entirely from undisputed facts and circumstances in the case, renders it unnecessary for me to review and analyze the great mass of conflicting evidence brought up in the transcript. And it is a relief to me to escape this task, for, after a thorough examination and consideration of it all, I am unable to say on which side the truth lies. It is inexplicable to me that so much evidently manufactured evidence should be brought forward in such an originally trifling case. And it is not confined to one side; for, while the claimants have offered some ridiculously gotten-up stories as to a conspiracy on the part of libelants to cast the Ashland adrift, the libelants have not hesitated to swear away the reputation for truth of some highly respected and disinterested parties, personally known to me for years as men of fair reputation for honesty and veracity. And then the record shows all the details at length of a disgraceful transaction between Fisher, one of the libelants, and the agent of claimants, in regard to paying money for evidence, of which it is impossible to say from the evidence whether it was honest on either side. If Fisher was acting

honestly in this transaction, then the inference is strong that he was implicated in casting the Ashland adrift. That claimants' agent was acting honestly in the transaction can only be found at the expense of his intelligence. Swindling on the one side, and attempted subornation of perjury on the other, seems to be the most apparent conclusion from the showing made in the record. In the argument each side charged the other with the blame in incumbering the record with so much immaterial matter, so largely increasing costs in the case. Apparently the charge is correct, and on that account I deem it proper to divide the costs.

A decree will be entered in the case dismissing the libel, neither party recovering costs in the district court, but each party paying his own; the costs of this court, including cost of transcript, to be divided, each party to pay one-half.

THE PRINZ GEORG.¹

(District Court, E. D. Louisiana. February, 1884.)

1. JOINDER OF PARTIES.

Where a thing is defendant, and several persons are asserting rights in it, distinct, but before the same tribunal, the proceedings are, for certain purposes, necessarily to be considered together; i. e., whenever it is necessary to rank the claims or to proportion the proceeds.

2. SAME.

When the claims rest upon a charge of a voluntary withholding of provisions, etc., the cases necessarily involve a common question, viz., whether an adequate supply of provisions was originally laden on board. The case is therefore analogous to cases of salvage or collision, in this respect, and for this reason the joinder would be permissible.

3. SAME.

The joinder is allowed even in cases which are in their origin distinct, and have no connection, save that they are asserted against a common *res*.

In Admiralty. An exception.

Richard De Gray and R. King Cutler, for libelants.

E. W. Huntington, H. L. Dufour, Geo. H. Braughn, Chas. F. Buck, Max Dinklespeil, and Emmet D. Craig, for claimants.

BILLINGS, J. This cause has been heard on an exception of a misjoinder of parties. The numerous libelants were steerage passengers on the libeled vessel on a voyage from Palermo to the port of New Orleans, and have joined in the suit to recover the penalty against the vessel established by the act of August 2, 1884, entitled "An act to regulate the carriage of passengers by sea," (22 St. at Large, 186,) as well as for the recovery of further damages. The suit is a proceeding *in rem*, and the numerous libelants assert distinct

¹ Reported by Joseph P. Hornor, Esq., of the New Orleans bar.

claims, each for himself. Can such claims be joined in one suit? I think, upon principle as well as authority, the question must be answered in the affirmative. Where a thing is defendant and several persons are asserting rights in it, distinct, but before the same tribunal, the proceedings are, for certain purposes, necessarily to be considered together; *i. e.*, whenever it is necessary to rank the claims or to proportion the proceeds. This would happen whenever the proceeds should be insufficient to pay all the claims in full. Again, when, as in this case, the claims rest upon a charge of a voluntary withholding of provisions, etc., the cases necessarily involve a common question, *viz.*, whether an adequate supply of provisions was originally laden on board. The case is therefore analogous to cases of salvage or collision in this respect, and for this reason the joinder would be permissible. But I think the joinder is allowed even in cases which are in their origin distinct, and have no connection save that they are asserted against a common *res*. When there is a suit *in rem*, it is a prerequisite of jurisdiction that there should be a warrant and a seizure. In these cases there must be either the expense of 60 seizures, or there must be a joinder that one seizure may arrest for all the claims. Therefore the joinder is allowed. The difficulties of answering and defending are not enhanced, and the expense is reduced. It is for this reason, also, that the statute permits that suits separately commenced may be consolidated by the court when they are "of a like nature or relative to the same question." 3 St. 21; Rev. St. § 921.

Judge WARE, speaking of unconnected claims of material-men, thus lays down the rule:

"Being maritime liens, there is no doubt that they may be enforced by process in the admiralty, where all may join and have their rights settled in a single suit, or may intervene for their own interest, after a libel has been filed, and have the whole matter disposed of in or under one proceeding, or one attachment, instead of having as many suits as there are creditors." *The Hull of a New Ship*, Davies, (2 Ware,) 203, 205. See, also, Judge BERT's opinion in *The Child Harold*, where the same rule was followed, *Olc.* 275.

The objection is not that the cause of each libellant is not distinctly and issuably stated, but that they are all stated in one pleading, and are in their nature separate causes of action accruing to distinct persons. In other suits the ruling might be very different, but in a proceeding *in rem*, in the admiralty, this is not irregular or unauthorized, and the exception must be overruled.

THE CAROZAL.¹

(District Court, E. D. Louisiana. February, 1884.)

AMENDMENTS TO PLEADINGS—ADMIRALTY RULE NO. 24.

Admiralty rule No. 24 is not an arbitrary rule. It does not mean that in every case counts presenting new causes of action may, under all circumstances, be added, but leaves the matter to the discretion of the court, the rule being merely permissive, and the discretion to be exercised upon principles of justice toward the defendant. "Amendments are always limited by due consideration of the rights of the opposite party, and where, by the amendment, he would be prejudiced, it is not allowed."

In Admiralty. An exception to amended libel.

Richard De Gray, for libelant.

Charles B. Singleton, R. H. Browne, and B. F. Choate, for claimant.

BILLINGS, J. The vessel had been seized under the libel and released on a stipulation when the amended libel was filed. The original libel was for wages as engineer on a voyage from Cincinnati to the port of New Orleans. The amended libel seeks to recover for wages commencing at the time when the voyage is asserted in the original libel to have begun, and at the same rate, namely, at the rate of \$125 per month, for employment down to December 5th, under a contract whereby libelant agreed to devote his time, and did devote his time, first, to an attempt to purchase for the party, who subsequently owned and now owns the Carozal, and later to the superintendence of the building, for the present owner, the said Carozal. The further allegations in the amended libel are that after December 5th the libelant was employed as engineer, making the trip from Cincinnati to New Orleans. The fact that the property has been released on bail would not preclude a proper amendment of the libel; the principle being that the person bailing property is considered as holding it subject to all legal dispositions by the court. *The Harmony*, 1 Gall. 123, 125; *Rex v. Holland*, 4 Term R. 457, 458; and *Dunlap*, Adm. Pr. (marginal paging,) 214; *Newell v. Norton*, 3 Wall. 266. The question, then, is to be determined by the general rules controlling amendments in pleading in admiralty. The cause of action is clearly a new one, distinct from that set out in the original libel. The weight of authority is that new counts in revenue and instance causes may be added, but only under particular circumstances. *Sackett v. Thompson*, 2 Johns. 206; *The Harmony*, 1 Gall. 124. In *Petre v. Craft*, 4 East, 433, the court allowed the amendment on the ground that the amendment was of such a nature that the plaintiff could not thereby introduce any new fact in proof not originally within his contemplation; and in *Newell v. Norton*, *supra*, the court sanctioned the allowance of the amendment because it neither increased nor diminished the liability of the sureties upon the bond. I do not un-

¹Reported by Joseph P. Hornor, Esq., of the New Orleans bar.

derstand that the court meant liability in amount, but liability intrinsically. For, though the amount of this liability might not be increased, the substitution of another ground of recovery would substantially vary it.

There is another circumstance which should be considered. The original libel is for mariner's wages solely, and in such class of suits the libelant is dispensed with giving a stipulation with surety for costs. In the libel as amended the cause of action, if it be within the admiralty jurisdiction, presents such a cause of action as would require the actor to give surety for costs. To allow such amendment would be to allow a complaining party to derive an advantage by the amendment which he could not have had in an original suit. Admiralty rule 24, prescribed by the supreme court, is not an arbitrary rule. It does not mean that in every case counts presenting new causes of action may under all circumstances be added, but leaves the matter to the discretion of the court, the rule being merely permissive, and the discretion to be exercised upon principles of justice towards the defendant. The meaning was not to abrogate or qualify the universal rule of pleading, as stated by Stephen in his work on Pleading, at page 75, that "amendments are, however, always limited by due consideration of the rights of the opposite party; and where, by the amendment he would be prejudiced, it is not allowed." In the system of pleading in the admiralty, the rules of the common-law courts, so far as they are technical, are relaxed, but, so far as they are founded upon justice between the parties, are unabated.

Considering the case with reference to both the claimant and sureties, I am of the opinion that the exception should be maintained, and the amended libel is accordingly dismissed.

HULL v. DILLS.

(Circuit Court, D. Indiana. February 26, 1884.)

JURISDICTION OF UNITED STATES COURTS—HOW AFFECTED BY STATE LAWS.

A bill of complaint having been filed by a ward against his guardian in the United States circuit court for Indiana, it was contended by the defense that, according to the laws of Indiana, in matters of probate, relief could be granted only by the courts in which the proceedings were had, and that these could not be made subject to any collateral proceedings. *Held*, that the equity courts of the United States are not affected by the restrictions laid by the several states upon their own equity courts.

On Demurrer to Bill.

Sullivan & Jones, W. L. Penfield, and E. Callahan, for complainant.

Coombs, Bell & Morris, for defendant.

Woods, J. The bill, stated generally, charges that the defendant was appointed guardian of the complainant by the probate court of De Kalb county, Indiana, and that, as such guardian, he wrongfully and fraudulently sold real estate of the complainant for less than its value, and afterwards, in like manner, procured an order of the court for the investment of the proceeds of the sale in other lands, owned by the defendant, at and for a sum greatly exceeding the value of the land, and thereupon conveyed the land to the plaintiff, and procured the approval of the court to the conveyance, by concealing from the court the fact that the land belonged the guardian himself; that the guardian had made false and fraudulent reports, and had been guilty of other official delinquencies specified, (but which need not be particularized here;) and that in October, 1878, the defendant filed with the court his resignation as guardian, concerning which the entry of record made at the time is of the tenor following, to-wit: "Which resignation is accepted." That plaintiff became of lawful age in December, 1882, and on the next day after attaining his majority, executed and tendered to the defendant a reconveyance by quitclaim deed of said land, and demanded an accounting of said guardianship, all of which the defendant refused. The prayer of the bill is "to have the said record and proceedings examined in this court and corrected or revised; annulled, canceled, and set aside;" that the order authorizing such sale may be reviewed and wholly reversed; and that the plaintiff be restored to his rights as if the sale had not been made; and, if this cannot be done, "that an account may be taken of the matters and things charged," etc.; and for general relief.

The objections made to the bill is that it shows a case wherein relief should be sought, and can be granted, only in the circuit court of De Kalb county, Indiana,—the court which is clothed with probate powers, and in which the proceedings complained of were had. In support of this view, counsel for the defendant insist, and the fact cannot be denied, that the supreme court of Indiana has repeatedly

decided that the orders of the probate courts, whether final or interlocutory, are binding until set aside; that they cannot be attacked collaterally; and that they can be set aside or corrected only in the particular court which made them; that a bill in equity is a collateral attack, and cannot be maintained in any other court. Among the cases cited are *Spaulding v. Baldwin*, 31 Ind. 376; *Barnes v. Bartlett*, 47 Ind. 98; *Holland v. State ex rel.* 48 Ind. 391; *Sanders v. Loy*, 61 Ind. 298; *Parsons v. Milford*, 67 Ind. 489; *Briscoe v. Johnson*, 73 Ind. 573; *Candy v. Hanmore*, 76 Ind. 125; *Jennison v. Hapgood*, 7 Pick. 1; *Paine v. Stone*, 10 Pick. 75; *Negley v. Gard*, 20 Ohio, 310; *Goodrich v. Thompson*, 4 Day, 215; *State v. Rolland*, 23 Mo. 95; *Short v. Johnson*, 25 Ill. 489; *Iverson v. Loberg*, 26 Ill. 180; *Freem. Judgm.* §§ 319a, 608.

Counsel for the complainant, on the contrary, contend that, notwithstanding the statutes which confer probate jurisdiction upon particular courts, courts of equity continue to have jurisdiction in such cases, and consequently that an original bill of review may be maintained in any court of general equity powers, state or national, which can obtain jurisdiction of the parties; and cite *Bond v. Lockwood*, 33 Ill. 212; *Wickizer v. Cook*, 85 Ill. 68; *Fogarty v. Ream*, 100 Ill. 366; *Jones & C. Pr.* p. 270, § 6; *Rorer, Jud. Sales*, p. 125, § 317; 2 *Story, Eq.* § 1339.

Whatever may be the rule in and in respect to the state courts, the jurisdiction of the federal courts, in such cases, if the parties be citizens of different states, seems to have been distinctly declared and upheld. In *Payne v. Hook*, 7 Wall. 425, a case wherein the bill sought "to open the settlements with the probate court as fraudulent, and to cancel the receipt and transfer from the complainant to the administrator because obtained by false representations," the proposition was advanced "that a federal court of chancery sitting in Missouri will not enforce demands against an administrator or executor, if the state court, having general chancery powers, could not enforce similar demands." In response to this, the supreme court, by DAVIS, J., says: "If this position could be maintained, an important part of the jurisdiction conferred on the federal courts by the constitution and laws of congress would be abrogated. But this objection to the jurisdiction of the federal tribunals has been heretofore presented to this court and overruled."

"We have repeatedly held 'that the jurisdiction of the courts of the United States cannot be impaired by the laws of the states, which prescribe the modes of redress in their courts, or which regulate the distribution of their judicial power.' If legal remedies are sometimes modified to suit the changes in the laws of the states, and the practice of their courts, it is not so with equitable. The equity jurisdiction conferred on the federal courts is the same that the high court of chancery in England possesses; is subject to neither limitation nor restraint by state legislation; and is uniform throughout the different

states of the Union. *Hyde v. Stone*, 20 How. 175; *Union Bank v. Jolly's Adm'rs*, 18 How. 503; *Suydam v. Broadnax*, 14 Pet. 67." See, also, *Fiske v. Hills*, 11 Biss. 294; S. C. 12 FED. REP. 372; *Cornett v. Williams*, 20 Wall. 249.

This bill shows that the complainant is a citizen and resident of Illinois, and the respondent of Indiana, and, except in the respect already considered, its sufficiency has not been questioned. The demurrer is therefore overruled.

CARTER v. CITY OF NEW ORLEANS.¹

(Circuit Court, E. D. Louisiana. February, 1884.)

1. INTERVENTIONS IN EQUITY CASES.

Third persons may be permitted to intervene for their rights in equity cases, if those rights are to be affected, and if at the hearing the court would be compelled to notice their absence, and order the case to stand over until they were brought in, or their rights were protected. 1 Daniell, Ch. 287, note 2; Story, Eq. Pl. § 220.

2. INJUNCTION—TRUST FUND.

A creditor of a trust fund is not entitled to an absolute injunction restraining the trustee from paying over any part of the fund, absolutely, but only from making any payment until the complaining creditor is paid.

On Motion of Intervenor to Quash Injunction, and on motion of complainant to strike out the interventions.

Thomas J. Semmes, J. C. Payne, and Charles Carroll, for complainant.

Joseph P. Hornor and Francis W. Baker, for intervenors.

Charles F. Buck, City Atty., for defendant.

PARDEE, J. This is a suit by a creditor to secure payment from an alleged trust fund, in preference to other creditors, over whom priority is claimed. The fund is not enough to pay all the claims. The intervenors are some of the other creditors, over whom priority is claimed. If their rights are to be affected they are necessary parties. At the hearing, if their rights would be lost by a decree, the court would be compelled to notice their absence, and order the case to stand over until they were brought in, or their rights were protected. 1 Daniell, Ch. 287, note 2; Story, Eq. Pl. § 220. As they are here of their own motion, and as no decree can be rendered without them, and as the court can compel the complainant to bring them in, I see no impropriety in permitting the interventions to remain. The motion to strike off the interventions is therefore denied.

The injunction *pendente* is warranted by the allegations of the bill, but it apparently goes further than is necessary to protect complain-

¹ Reported by Joseph P. Hornor, Esq., of the New Orleans bar.

ant's rights. If he is paid in full, his interest ceases, and he cannot complain. The injunction will, therefore, be modified so as only to restrain the defendants from paying other claims out of the fund in question until the complainant is paid the amount of his demands, and this modification will be effected by inserting in the injunction, as set forth in the transcript, page 36, in the tenth line from the bottom, after the word "until," and before the word "ordinances," the words "the demands of the complainant arising under."

Solicitor for defendant will see that the proper order is taken.

WESTERN UNION TEL. CO. v. BALTIMORE & O. TEL. CO. and others.

(Circuit Court S. D. New York. March 23, 1884.)

RAILROAD IS A POST-ROAD, AND AS SUCH AMENABLE TO ACT OF CONGRESS, JULY 24, 1866.

A railroad is, under the statutes of the United States, a post-road, and accordingly the act of congress of July 24, 1866, giving to all telegraph companies alike the right to construct, maintain, and operate lines along all post-roads of the United States, is paramount over any agreement made by a railroad company securing to a telegraph company the sole use of its line of road for its wires.

In Equity.

Wager Swayne and *Burton N. Harrison*, for Western Union Tel. Co.
Dorsheimer, Bacon & Steele, for Baltimore & O. Tel. Co. and Nat. Tel. Co.

P. B. McLennan, for N. Y., W. S. & B. Ry.

WALLACE, J. The complainant moves for a preliminary injunction to restrain the two telegraph companies defendants from erecting and operating the telegraph line upon the land of the defendant railway company, and to enjoin the railway company from permitting either of the defendant telegraph companies to use its right of way for such purpose, and from violating any of the provisions of an agreement entered into between the complainants and the Jersey City & Albany Railway Company on the seventh day of January, 1880.

The facts are these: On the seventh day of January, 1880, the complainant entered into a written agreement with the Jersey City & Albany Railway Company, which, among other things, contained the following clause:

"The railway company, so far as it legally may, hereby grants and agrees to assure to the telegraph company an exclusive right of way on and along the line and lands of the railway company, and on any extension or branches thereof, for the construction and use of lines of poles and wires for commercial or public uses or business, with the right to put up from time to time such additional wires, or lines of poles and wires, as the telegraph company may deem expedient; and the said railway further agrees * * * that it

will not furnish for any competing line any facilities or assistance that it may lawfully withhold."

At the time this agreement was entered into, the Jersey City & Albany Railway Company was constructing a line of railroad from a point on or near the Hudson river, in the county of Hudson, in the state of New Jersey, and thence northerly to a point at or near Fort Montgomery, on the Hudson river, those points being the *termini* of its route, as provided in its articles of association. It appears by the affidavits that the complainant constructed a telegraph line of about 26 miles in length, along the right of way of the railroad company, between Richfield Junction, New Jersey, and Haverstraw, New York, which was carried into and connected with the several stations of the railway; which line was operated by the complainant under its contract with the Jersey City & Albany Railway Company. In March, 1880, the North River Railway was incorporated and organized, and in May, 1881, the Jersey City & Albany Railway Company consolidated with this corporation. In February, 1880, the defendant the New York, West Shore & Buffalo Railway Company was incorporated and organized, and in June following consolidated with the North River Railway Company, and by the agreement of consolidation succeeded to and assumed all the obligations of the Jersey City & Albany Railway Company to the complainant. The bill alleges that the defendant railway company is now seeking to disaffirm and violate the obligations of the contract of January 7, 1880, and is allowing and assisting the defendant telegraph companies to construct and operate over its right of way a line of telegraph to be operated in competition with any line which may be constructed by the complainant, and that the defendant telegraph companies are proceeding to construct and erect their competing line upon the lands of the railway company without the consent of the complainant, and without acquiring any right of way by condemnation and compensation to the complainants therefor.

It is claimed on the part of the complainant that along certain portions of the lands of the railway company, owing to the physical characteristics of the route, there is not sufficient room for more telegraph lines than are or may be necessary for the convenient operations of the complainant's business. The proofs do not sustain this contention.

Without considering the question whether the railway of the New York, West Shore & Buffalo Company is an extension of the Jersey City & Albany Railway Company, the case may be disposed of upon other grounds. If it was the purpose of the agreement to enable the complainant to exclude all other telegraph companies from acquiring a right of way for constructing and operating their lines over the lands of the railway company, the agreement was void as against public policy, and in contravention of the act of congress of July 24, 1866. That act authorized any telegraph company then organized, or thereafter to be organized, under the laws of any state of the Union, to

construct, maintain, and operate lines of telegraph over and along any post-road of the United States. The railroad here, and all railroads in the United States, are such post-roads; the act of congress applies to them, and its provisions are operative and supreme as a legitimate regulation of commercial intercourse among the states. This was decided by the supreme court in *Pensacola Tel. Co. v. Western Union Tel. Co.* 96 U. S. 1. It was not held in that case that a telegraph company could acquire a right of way over a railroad without the consent of the owner of the railroad, or even that the act gave to telegraph companies the power to acquire such a right of way by compulsory proceedings, upon due compensation to the owner; and the contrary was plainly intimated. But the act was considered and expounded as intended, and effectual, to deny to any one telegraph company the power to acquire any such easement in the lands of a railroad for telegraphic facilities as would exclude other companies from obtaining like privileges, and as a declaration by congress of a policy in the interests of the public and of the government which was reasonable and lawful. Since that decision it has been adjudged in two cases in the circuit courts of the United States that a railroad company cannot grant to a telegraph company the exclusive right to establish a line over its right of way. *Western Union Tel. Co. v. American Union Tel. Co.* 9 Biss. 72; *Western Union Tel. Co. v. Burlington & S. Ry. Co.* 11 FED. REP. 1. See, also, *Western Union Tel. Co. v. American Union Tel. Co.* 65 Ga. 160. Whether an agreement of this kind would not be void as intended to strangle competition, and therefore as being in restraint of trade and obnoxious to public policy, irrespective of the act of congress, is a question which it is not necessary to discuss; it suffices that such an agreement is void because contrary to the policy declared by congress.

The agreement here is to be interpreted so as, if possible, to give it some efficacy and validity. Its language is carefully chosen so as to permit it to be thus interpreted. The railway company assumes to grant only "so far as it legally may." Were it not for this qualification the grant would be void. The complainant can take nothing by the agreement beyond such an easement as is necessary for its legitimate use in constructing and operating its lines. To this extent it could acquire the exclusive right. It could not acquire the right to dictate to other telegraph companies upon what terms they may be permitted to construct and operate competing lines. Nor could the railway company put it out of its own power to permit any telegraph company to enjoy the privileges given by the act of congress, by a cession of that power to the complainant. This would be as obnoxious to the spirit and meaning of the statute as a grant excluding other telegraph companies from the lands of the railway. It would be doing indirectly what cannot be done directly. It would lodge the power with a favored company to impose such onerous terms upon other companies as to preclude competition.

If it were impracticable for the defendant telegraph companies to construct their lines upon the lands of the railroad without invading the complainant's easement by using its poles or otherwise, they would be obliged to obtain the consent of the complainant, or resort to such proceedings as are authorized by the laws of the state under the power of eminent domain. Such is not the case exhibited by the record, and the railway company consents. As to these defendants, therefore, the motion for an injunction is denied.

The complainant alleges that the railway company has removed some of the old line of poles and wires erected by the complainant between Richfield Junction and Haverstraw, with the intention of preventing complainant from operating its line. This is denied by the railway company. Sufficient appears, however, to indicate that the railroad company is hostile to the complainant and in sympathy with the defendant telegraph companies, and, in view of all the circumstances, it is deemed reasonable that the complainant be protected during the pendency of the suit in its possession of the line it has actually constructed. To this extent an injunction will be granted as against the railway company.

The agreement between the complainant and the predecessor of the present railway company contains various stipulations for the benefit of the complainant, which the complainant insists the railway company proposes to violate, and should be enjoined from violating. One of these stipulations is that the railway company shall furnish office-room, light, and fuel, free of charge, to the complainant whenever the complainant elects to establish an office at a station of the railway company. As to all these stipulations, it is sufficient to say that the complainant has an adequate remedy at law for any breach that may take place. Although equity interferes by injunction to restrain breach of agreement when the case is one in which a decree for a specific performance might be made, as also in some cases to restrain the breach of negative covenants, the ground of the jurisdiction is that compensation in damages will not afford redress to the complaining party. This is not such a case.

BRASSEY v. NEW YORK & N. E. R. Co. and others

(Circuit Court, D. Connecticut. March 7, 1884.)

1. CORPORATION—RECEIVERSHIP—WHEN PROPER.

An insolvent railroad corporation may, in the discretion of the court, upon a bill for an injunction and a receivership, be put in the hands of a receiver whenever the welfare of the various interests clearly requires it, even though no default has actually been made by the corporation in its obligations to the petitioner, but a default is imminent and manifest, and the corporation is in peril of a breaking up and destruction of its business.

2. SAME—COLLUSION, WHEN FRAUDULENT.

The mere concurrence of the directors, in an attempt to secure the appointment of a receiver, does not amount to fraudulent collusion, unless they design some injury to the company or its creditors.

3. FINANCES OF THE NEW YORK AND NEW ENGLAND RAILROAD.

The financial condition of the New York & New England Railroad Company reviewed, and *held* to warrant the appointment of a receiver.

Motion of Jonas H. French and others to dissolve order appointing receiver, etc.

SHIPMAN, J. The petitioners have put their case upon the ground that neither the allegations of the original bill nor the facts in regard to the New York & New England Railroad Company existing at the time of the appointment of the receiver justified the order, but that, on the contrary, the institution of the suit and the procurement of the vote of the directors at a special meeting assenting to the proposed appointment were a plan on the part of sundry directors and the president to injure the corporation, perhaps for selfish purposes. On the other hand, the corporation and the trustees of the second mortgage have placed their opposition to the revocation of the order in part upon the fact that the present acknowledged financial condition of the corporation demands a receivership, and that the taking of the road out of the hands of a receiver, in view of the pendency of three petitions before three legislatures for additional legislative authority to raise money, (the petitions being based upon the financial necessities of the corporation,) would put the corporation in the midst of perplexities and dangers from which it is now relieved, and would imperil the success of any attempt to place the corporation in a condition of solvency.

It is of course apparent that, in their opposition to a revocation of the order, the trustees of the second-mortgage bonds and the corporation have a great leverage, from the fact that the business community, the shippers of freight, and the creditors of the corporation are now perfectly aware that the company has not been able to pay its debts, has lived by borrowing and by the grace of a portion of its creditors, and from a natural fear of the danger which might result from putting the corporation back into a condition where it might not be able either to serve the public or to help itself. The position which the commonwealth of Massachusetts, by virtue of its ownership of about seventeen twenty-eighths of the whole number of outstanding second-mortgage bonds, has taken in regard to the receivership, is also, in this part of the case, entitled to much respect. But it is not my purpose to dispose of this motion upon such considerations. The petitioners have given voice to their suspicions, not to say their accusations, that this receivership was the result of a plan to injure either the corporation or the holders of its securities, and that the suit was collusive between the parties, in the sense of a fraudulent collusion to deceive the court, and thereby to accomplish selfish

and improper purposes. If this is true it is the duty of the court either to set aside the order or to remove the receiver.

I, therefore, propose briefly to examine into the facts, and see whether there was or was not a necessity, arising out of the financial condition and circumstances of the road, for the appointment of a receiver, and to look into the validity of the charges or suspicions of collusive fraud, recognizing the fact that the changed position and relations of the active petitioners in regard to the controlling management of the corporation resulting from the election of directors in the early part of December, might naturally engender suspicions in their minds either of the good faith or of the propriety of the conduct of the new board, although those suspicions might not be well founded. And I re-examine the condition of things on December 31, 1883, with reference to a receivership, with the more willingness because it has been stated here that it was said in another court that probably, if I had known all the facts, the order would not have been granted.

Previous to the annual election of directors of the corporation, Lee, Higginson & Co. gave public notice, by advertisement, that an attempt would be made to elect a new and different board, intimating plainly a dissatisfaction with the policy of the existing management, and solicited the proxies of the stockholders for that purpose. This attempt was openly and plainly proclaimed, and resulted in dropping from the board Gen. Wilson, the former president, and Messrs. Grant and Cannon, who apparently were efficient financial friends of the existing management. Col. French, who was also on friendly terms with these gentleman, was re-elected, and Mr. Kingsbury, a member of the board for many years, was also re-elected. Whether others of the old board were re-elected I do not know.

The report of the retiring president showed that from various causes the road had not, during the year ending September 30, 1883, earned its fixed charges. Promptly, with the announcement of the probable or actual result of the election, Mr. Cannon and the firm of which Mr. Grant is a member demanded and received payment of demand notes against the company amounting to \$104,000. I do not speak of this action as unnatural or improper, but simply as one of the financial facts in the case. The retiring directors probably thought it not improper that they should no longer be obliged to address themselves to the work of providing means to sustain the credit and pay the overdue debts of the company.

The new board, as appears both from the official record of their action, and as appeared more in detail upon the original hearing, found themselves compelled to turn early and prompt attention to this subject, and found the company in unexpected straits for money. The pressing debts were apparently larger than they had anticipated. No money was in the treasury to meet the interest on the first-mortgage bonds, maturing on January 1st. There was no money to pay the old debts due to connecting roads. Money could not be spared

to pay maturing notes, except under supposed compulsion. The directors set themselves to the task of borrowing money to meet pressing obligations. It was estimated that some \$800,000 were needed, and but about \$300,000 could be promised. At this point, in reply to a letter from Mr. Clark, was received a letter from the president of the Erie Railroad Company, in which Mr. Jewett stated that he desired payment of \$90,000 of the debt of \$190,000 due that company, and that \$100,000 might remain for a time. Payment of the January interest could neither be made from the receipts of the New York & New England road, nor could the money be borrowed. A plan was projected and finally carried into effect that the January coupons should be cashed or bought by money furnished by the persons interested in the road, and held until the succeeding July, and that \$10,000 should be furnished by the company in consideration of this forbearance and as commission for the services of the bank, which was to receive and disburse the money. Notice to all creditors and the public was thus given of the company's inability either to pay their interest or to borrow the money with which to pay it, and that the company was without either money or adequate credit. For purposes of the present inquiry, an examination of the causes which had brought about this result would neither be gracious nor useful, neither have I sufficient *data* to state them with accuracy.

The fact that the corporation was at a standstill, so far as the payment of its debts and obligations was concerned, existed. The fact that no duty rested upon the directors or upon the stockholders to lend money upon unsecured notes and thus to meet these obligations seems to me to be plain. The directors owed two duties—one to the public, that this road should be kept in running condition so that it could serve the public; the other to the stockholders and to the bondholders, that if possible the property might be kept intact and preserved, so that finally unsecured and secured creditors might be paid and the stock might be saved, and they were called upon to take all proper measures to discharge these two duties. At this time, from the twenty-seventh to the thirty-first of December, the question of temporary relief by a receivership from the peril in which they found the corporation undoubtedly presented itself to the minds of the directors. It would be natural that the idea of protection to the property and benefit to the public through such an instrumentality should have suggested itself. On the thirty-first of December the agent of the syndicate which had agreed to take second-mortgage bonds and thus provide the means for the payment of the expenses of double-tracking the road, the proceeds of the bonds to be used only for work already done, refused to answer the call which was made upon him to take and pay for 170 bonds. I do not propose to consider the propriety or impropriety of the refusal, but, on the contrary, to assume that the agent took the proper course. It is a fact in the case, and a fact which, taken with the occurrences of that day, led the

president to believe that not only no more bonds would be taken, and therefore that the double-tracking of the road must be stopped, but also that Messrs. Cannon, Grant, and French were planning themselves to procure the appointment of a receiver who would act in harmony with them and in hostility to the new policy of the new board, if that policy should prove to be a radical departure from the system of the old board.

In pursuance of authority which had been previously given by the board to call special meetings, the president called a meeting of his board at Hartford on the evening of December 31st, to act upon the question of agreeing or consenting to the appointment of a receiver. Messrs. Clark, Nickerson, Higginson, and French left Boston on the same train, and the silence of the three first-named gentlemen in reply to Col. French's questions in regard to the proposed meeting is seriously criticized. The answer to these criticisms is that they honestly believed that if he was informed of the object before the hour of meeting he would take prompt and effectual measures to communicate with his friends and obtain a hostile receivership in the courts of New York. Their silence and expedition led him to distrust their good faith. This mutual distrust was the cause of the subsequent excitement which attended the issuing of the order. Messrs. French, Cannon, and Grant all deny under oath that the suspicions were well founded or that they had any knowledge of or privity in such a design, and there is no evidence before me which casts doubt upon the truth of the denial. Neither is there any more room for doubt that the other directors really believed that they were only endeavoring to forestall similar action on the part of the gentlemen whom I have named. When the meeting was held a quorum of seven was present and a vote approving of a receivership was carried by a vote of five to two. This action was at a meeting held on January 7th, deliberately approved by a large majority of all the directors. At the hearing on the evening of the first meeting Col. French urgently opposed the granting of the order. The case resolved itself into this: The inability of the corporation to pay its coupons and its other debts was admitted. The expedient which had been adopted for the payment of the coupons was explained. The plan which all parties then agreed was the only feasible plan by which to raise money, was to obtain the requisite permission from the legislatures of Massachusetts, Connecticut, and Rhode Island, and also from the requisite number of the existing second-mortgage bondholders, to issue second-mortgage bonds in payment of the floating debt—a proceeding which would evidently require time and care. Col. French was of the opinion that no danger would arise from attachments, or cessation of business, from connecting roads, or from any other adverse causes, while the applications were pending. The other gentlemen thought that the corporation would be put into great hazard as soon as the knowledge of their actual inability to pay their January interest was known,

and that the announcement of this fact would be a signal for the commencement of hostilities. Mr. Kingsbury, the trustee of the second mortgage, who resided in Connecticut, and who had long been a director of the road, and had given much time and thought to the affairs of the company, reluctantly assented to the necessity of a receivership. I believed then, and I still think, that the condition of the corporation was such that there was not only no safety, but that there was absolute and imminent peril to all the interests of stockholders, bondholders, and creditors if a receivership should be refused, and that the welfare of all the various interests required that the corporation should temporarily be placed in a position where hostile arms could not attack it. The corporation is now enabled actively and efficiently to discharge its obligations to the public from the fact that it is under protection. Subsequent events simply confirm the conclusion to which I then came. It could not even now do business, unless it had been permitted to use some of its receipts to pay a part of the outstanding debts due to connecting roads. The receiver has been seeking from the Connecticut legislature the remission of taxes which are a first lien upon the Connecticut real estate of the company. A receivership by some court was inevitable.

The question still remains to be considered, was the institution of this suit, and the efforts on the part of the directors to promote it, an attempted fraud upon any one? I have carefully listened to the facts and suggestions and inferences which have been stated by the counsel for the petitioners, and I can discover no actual trace of a desire to injure the property or securities, or the honest and true character of the company. I see circumstances which a mind predisposed to suspicion can easily fasten upon as indicative of a sinister and indirect motive. The petitioners were carrying a large amount of the second-mortgage bonds, and would naturally distrust action which would depreciate the market value of these securities; but when the circumstances are looked at in the light of other existing facts, the idea of attempted fraud disappears. I am at a loss to find where the fraud exists when the pecuniary condition of the company is really understood. If the directors had in mind the wrecking of the road, they could have done it easily by not favoring a receivership. At the time when the original order was granted, the substantial facts, which have been stated, were apparent, except that I do not now recollect that the refusal of the syndicate to take the bonds, or the payment of the notes to Cannon and Grant & Co., were adverted to, and except that the relations between some of the directors also favored a receivership, and some of the members of the old board were not clearly understood by me. The facts in regard to the pecuniary condition of the company, and the impossibility of any immediate ability to obtain more money, and thereby gain relief, were clearly perceived. Upon this hearing the conduct of the receiver, since his appointment, in closing his fast through freight contract

with the New York, Lake Erie & Western Railroad Company, and his printed statements or reports in regard to the financial condition of the company, have been criticised. If the traffic arrangement resulted, through too low rates to the New York & New England road, in constant pecuniary loss to the company, I can see no propriety in continuing the contract, and in continued pecuniary losses. In regard to his financial exhibit, I have heard no adequate reason to doubt its truth, and it was certainly his duty to inform the stockholders and the bondholders of the exact condition of the company.

Were the allegations of the bill sufficient to justify the appointment of a receiver? The petitioner's position is that, ordinarily, to justify such an appointment, a case must be pending in which other and principal relief is sought—as to foreclose a mortgage. It is true that in general a receivership is ancillary or incidental to the main purpose of the bill, but it does not follow that where a case is presented which demands the relief which can be best given by a receivership, such relief must be refused, because the time has not arrived when other substantial relief can be asked. For example, although as a rule, a mortgagee cannot ask for relief until his mortgage debt has become due, he can go into a court of equity before that time has arrived and ask for an injunction and a receiver to prevent the subject-matter of his mortgage from being impaired and wasted. As was said in *Long Dock Co. v. Mallery*, 12 N. J. Eq. 431:

“The power of the court to preserve the pledge from destruction, and to answer to the exigency of the mortgage, is undoubted. * * * If the bill shows a case for an injunction and a receiver, the exercise of the power is called for, although the time of payment, set in the mortgage, has not come unless the equity of the bill is met by the answer.”

This bill alleged the existence of the corporation and the first and second mortgage bonds, and of the actual inability of the road to pay its interest, to become due on January 1st; the existence of the floating debt, and its inability to pay that; the intention of some of the creditors to attach the mortgaged property; the peril to the road arising from anticipated attachments of the property covered by the second mortgage; and the loss of and breaking up of the business of the road from its inability to pay connecting lines; and its consequent inability to pay the interest due on February 1st. In brief, it alleged the insolvency of the road, though not in terms, and the danger and hazard of serious injury to the revenues of the company, unless suits were prohibited, and those who did business with it were assured that its current expenses were to be paid. Those allegations were admitted both by the corporation and by the trustees of the second mortgage. I am of the opinion that when a railroad corporation, with its well-known obligations to the public, has become entirely insolvent, and unable to pay its secured debts, unable to pay its floating debt, and unable to pay the sums due its connecting lines, unable to borrow money, and in peril of the breaking up and destruc-

tion of its business, and confesses this inability, although no default has as yet taken place upon the securities owned by the orator, but a default is imminent and manifest, a case has arisen where, upon a bill for an injunction against attacks upon the mortgaged property, and a receivership to protect the property of the corporation against peril, a temporary receiver may properly and wisely be appointed.

It is next said that this was a case of collusion between the orator and the railroad corporation. There is no claim that there was any collusion on the part of the second-mortgage trustees. If by collusion it is meant that the preparation for and institution of the suit were known and desired by the directors, or some of them, in the belief that the granting of the prayer of the bill would be prudent and wise, then there was collusion. If by collusion it is meant that the institution of the suit, or its management, was marked by fraudulent design or purpose, then there was not collusion. The complainant was the actual owner of five mortgage bonds. They were not placed in his hands, and were not transferred to him fictitiously, and were not bought by him for the purpose of this suit. The firm of Lee, Higginson & Co. had the authority to bring suit in his name, or their action has been ratified and approved. The railroad company consented, prior to coming into court, to the appointment, as is frequently and properly the course in cases of this kind. No one attacks the fidelity of the second-mortgage trustees, and they also assented.

In regard to the prayer of the petition for the removal of the receiver, no adequate reason has, in my opinion, been given for such a course. The affidavits of the second-mortgage trustees contain a sufficient reason why such a prayer should be denied.

In regard to the prayer of the petition for the appointment of a co-receiver, I see no reason for antagonistic receivers; and a receiver who should be in accord with Mr. Clark would not, probably, be satisfactory to the petitioners.

The prayer of the petition is denied.

SPINK v. FRANCIS and others.¹

WILLIAMS v. SAME.¹

(Circuit Court, E. D. Louisiana. February 20, 1884.)

INJUNCTION.

A bill for an injunction to prevent interference by criminal procedure will lie when the parties sought to be enjoined have, as plaintiffs, submitted themselves to the court by a bill in equity as to the matter or right affected by or involved in the criminal procedure.

¹ Reported by Joseph P. Hornor, Esq., of the New Orleans bar.

In Equity. On demurrer.

A. G. Brice, Joseph P. Hornor, and F. W. Baker, for complainant.
James R. Beckwith, for defendants.

BILLINGS, J. These are bills of complaint, which are, in their general scope, bills for an injunction to prevent interference by criminal procedure. The extent to which such a bill will lie is well defined. It is when the parties sought to be enjoined have, as plaintiffs, submitted themselves to the court by a bill in equity as to the matter or right affected by or involved in the criminal procedure. In such case the court will by a decree, affecting the parties so situated personally, enjoin. *Atty. Gen. v. Cleaver*, 18 Ves. 220, 211, note *a*; *Story, Eq. Jur.* § 893; *Jeremy, Eq. Jur.* 308, 309; and 3 *Daniell, Ch. Pr.* (Perkin's Ed. 1865,) p. 1721. These cases have been considered upon the ground that the parties defendant in these bills are in this category. As to such parties the bills would be good, but as to no others. The bills do not show this. The demurrers must therefore be sustained, with leave to amend the bills, so as to set forth in a distinct form which of the parties sought to be enjoined have as plaintiffs in civil causes submitted the matter or right involved in or affected by the criminal procedure to this court.

PARDEE, J., concurs.

UNION MUT. LIFE INS. CO. v. STEVENS and others.

(District Court, N. D. Illinois. December 17, 1883.)

1. LIFE INSURANCE—LAPSE OF POLICY BY COLLUSION TO DEFEAT INTERESTS OF BENEFICIARY.

If the insured, even by collusion with the company, suffers his policy to lapse, with the intention of securing another policy containing the name of a new person as beneficiary, the courts will not regard the second policy as a mere continuation of the first.

2. SAME—RIGHTS OF THE ASSURED AS TO THE RECIPIENT OF BENEFITS OF POLICY.

A policy of insurance may be considered as an inchoate or uncompleted gift from the assured to the beneficiary. The former ought to be able to make it at will, or to change the direction of its benefits.

3. SAME—POLICY IN FAVOR OF ASSURED HIMSELF—AMOUNT BECOMES ASSETS.

If the assured himself appears by name in the policy as the beneficiary, the money accruing on the policy at his death becomes assets in the hands of the administrator.

In Equity.

Swett, Haskell & Bates, for complainant.

H. F. Vallette and Pliny B. Smith, for Mrs. Taylor.

Gary, Cody & Gary, for Mrs. Stevens.

BLODGETT, J. This is a bill of interpleader filed by the complainant, the Union Mutual Life Insurance Company of Maine, charging,

in substance, that on the seventeenth of June, 1853, it issued to Samuel P. Stevens a life insurance policy for the sole use of his wife, Mary F. Stevens and heirs, for the sum of \$1,200, which policy was payable on the death of the said Samuel P. Stevens, and upon which an annual premium of \$42.24 was to be paid on or before the seventh day of June in every year during the continuance of said policy. It is further charged that on the fifteenth of June, 1870, the said Samuel P. Stevens, by an agreement with the complainant, surrendered the aforesaid policy to complainant and took out a new policy, bearing the same number, for the same amount, and for the payment of the same premium, and the agreement was that this new policy should, in all respects, stand in lieu of the first policy, except as to the party to be benefited thereby, and that the new policy insured the life of the said Samuel P. Stevens for the sole and separate use and benefit of himself. It is also charged that the said Samuel P. Stevens has since died testate, and that Eliza M. Stevens, executrix of his last will and testament, has brought suit at law in the circuit court of the county of Du Page, in the state of Illinois, upon the last-described policy, declaring upon the promises, undertakings, and conditions of said policy, and claiming judgment as such executrix, against complainant, for the sum of \$1,200 named therein, and that said suit is now pending in the circuit court of Du Page county. The complainant further charges that one Mary Taylor has brought suit at law in the circuit court of Cook county, in this state, claiming that the money due under the last-mentioned policy should be paid to her as sole heir at law of said Mary F. Stevens. The bill then prays that the defendant Eliza M. Stevens, as executrix of said Samuel P. Stevens, and the said Mary Taylor, may interplead in this cause, and that the court shall determine which of said parties is entitled to the proceeds of the said policy, and the money admitted to be due from complainant upon the last-issued policy has been paid into court for the benefit of whoever the court shall determine is entitled thereto. Eliza M. Stevens, as executrix, and Mary Taylor have answered the bill, and each claims the benefit of the money in question. The defendant Mary Taylor contends that the second policy was issued by fraudulent collusion between said Samuel P. Stevens and the complainant, and is but a continuation of the original policy, which was payable to Mary F. Stevens and heirs, and that she, the said Mary Taylor, is the sole child and heir at law of the said Mary F. Stevens.

The case is submitted to the court upon the bill and answers, and certain stipulated proof, including the original policy, the new policy, and the correspondence between Samuel P. Stevens and the officers of the complainant at about the time the second policy was issued. The material facts, as they appear from the pleadings and the proofs submitted, are, briefly, these: Samuel P. Stevens took out the first policy in question, and paid the premiums regularly thereon until and including the premium which matured in June, 1869. In June, 1856,

Mary F. Stevens, the wife of Samuel P. Stevens, mentioned in said policy, died, and at some subsequent date between the death of the wife and October, 1869, Samuel P. Stevens married Eliza M. Stevens, now the executrix of his will. In October, 1869, Samuel P. Stevens requested that the life insurance company would change the terms of the policy so that the amount of insurance thereby on his life should be made payable to himself, and giving as his reasons that the circumstances of his family had materially changed, and others were dependent upon him who, in justice, should receive a proportion of the policy whenever it became available. The insurance company, in substance, replied that they could not consent to any change of the beneficiary in the policy, but suggested that the change desired might be brought about by Stevens forfeiting the policy by non-payment of the premium, and then making an application for the issue of a new policy; and in pursuance of this suggestion Stevens did not pay the premium which fell due June 7, 1870, and the policy was declared forfeited. He then applied for the issue of another policy for the same amount and on the same premium as the first, and in pursuance of that application the second policy, mentioned in the bill, was issued, insuring the life of said Samuel P. Stevens for the sum of \$1,200, for the sole and separate use and benefit of himself, on the payment of the same annual premium provided for in the first policy, during the continuance of his life.

It further appears in the case that Samuel P. Stevens had one child born to him by his first wife, Mary F. Stevens, who is the Mary Taylor made a defendant in this case, and that said Mary Taylor is, so far as this case discloses, the sole heir at law of the said Mary F. Stevens. It also appears that the said Mary F. Stevens was killed in 1856, in a railroad accident in the state of New York, and that Samuel P. Stevens, her husband, received from the railroad company the sum of \$2,000 in settlement of the claim against the company for having caused her death, which claim he collected as the representative and guardian of his daughter, the said Mary Taylor, as heir of her mother, Mary F. Stevens, but has never paid the same to her. It further appears that said Samuel P. Stevens, by his will, which has been duly probated in Du Page county, in this state, provides "that the sum of \$2,000, received by him from the New York Central Railroad on account of the death of his former wife and the mother of his daughter Mary, should be paid to his said daughter Mary as soon after his decease, and from his estate, as conveniently may be, and made the said legacy a charge and lien upon all his estate, real and personal, including any money that may be due "on any life insurance policy, or any other property or money."

The first question made in the case is, is this a proper case for a bill of interpleader? Does the case show such a state of facts as places the complainant in the position of an innocent stakeholder who has no interest as to which of the contending parties shall re-

ceive the sum of money in question? It is contended on the part of the defendant Eliza M. Stevens that if the complainant is in danger of having two judgments against it for the same contract, it is in consequence of its own imprudent acts and mistakes, and that a proper case for appeal to a court of equity by bill of interpleader is not shown. It seems to me, however, from a consideration, not only of the facts in the case, but the allegations in the answers of both defendants, that the only question is, to whom does the money due upon the last policy belong? Which of these defendants is entitled to it? As it is clear from the proof that the insurance company never intended to make but one contract, as far as the company and Stevens could do, the purpose was to let the first policy lapse and issue the second policy in place of the first. The defendant Mary Taylor insists that the second or new policy is but a continuation of the old policy; that the mere change of form as to the beneficiary does not and cannot defeat her rights as the heir of her mother, Mary F. Stevens, to receive the money due on the latter policy; and it seems quite clear to me that if Mrs. Taylor is to recover anything in this suit, it must be by reason of the correctness of the assumption, that, so far as she is concerned, the new policy is but a substitution for the old, and she is still the beneficiary under it. In other words, that the contract of June 17, 1853, is as to her the only contract in force, and if she recovers at all, it must be because she is still entitled to the benefit of the old policy. The whole question, it seems to me, depends upon whether Samuel P. Stevens had the right to make the change in the beneficiary of this policy. There is no doubt that there is a conflict of authority as to the power of a person, situated as Samuel P. Stevens was, to change the direction of the money to accrue in this insurance on his life so as to divert it from the person named as beneficiary in the original policy. The most notable cases, and probably the ones most directly in point, and which have been most generally followed are the cases of *Pulcher v. N. Y. L. Ins. Co.* 33 La. Ann. 332, and *Ricker v. Charter O. L. Ins. Co.* 27 Minn. 195, S. C. 6 N. W. Rep. 771, where it is held that there is a vested right in the beneficiaries in a policy of life insurance which renders the policy irrevocable as to them. The contrary rule has been held in Wisconsin, Missouri, and Illinois. *Clark v. Durand*, 12 Wis. 248; *Kerman v. Howard*, 23 Wis. 108; *Foster v. Gile*, 50 Wis. 602; S. C. 7 N. W. Rep. 555; *Charter O. L. Ins. Co. v. Brant*, 47 Mo. 419; *Baker v. Young*, Id. 453; *Gamb v. Cov. M. L. Ins. Co.* 50 Mo. 44; *Swift v. R. P., etc., Ass'n*, 96 Ill. 309. Where a question has never been decided by the supreme court of the United States, and as to which the state authorities are conflicting, this court is at liberty to follow such authority as is deemed most consonant with what seems to be just and equitable. I do not intend to decide that in all cases where a life insurance policy has been taken out, payable to a certain person as the beneficiary, it is in the power of the person

whose life is so insured, by a subsequent agreement with the insurance company, to change the beneficiary, because it is obvious that each case of that character must depend almost wholly upon its own peculiar facts, and an examination of the apparently conflicting cases upon the points raised in this case satisfies me that the apparent conflict grows more out of the variant facts, acted upon by the courts in the different cases, than from any essential difference in principle.

In this case, it can hardly be contended that, after the death of Mary F. Stevens, her daughter, Mary, had any vested right in the proceeds of the then existing policy, payable to her mother and heirs. It is even doubtful whether the true construction of the language of that policy, describing the beneficiary, does not mean that the money should be payable to the wife, Mary F. Stevens, and the heirs of Samuel P. Stevens; that is, whether the words "his wife, Mary F. Stevens, and heirs" do not really mean his wife, Mary F. Stevens, and his heirs; thereby making the children by the second wife, or the heirs at law of Samuel P. Stevens, if he has any other than his daughter, by his first wife, equal participants in the proceeds of this policy. But, be that as it may, the facts in this case show that Samuel P. Stevens retained possession of this policy, and that he, and he alone, always paid the premium; that in June, 1870, he failed to pay the premium on the original policy, and that by its own terms it lapsed and became void by such non-payment; and that he subsequently applied for and obtained this second policy. Now, it is very clear that no one could compel him to continue to pay the premiums on this original policy. He had a right to suspend paying the premiums at any moment, and the policy would at once lapse by reason of such failure. He was under no obligation to his daughter, now Mrs. Taylor, to continue to pay these premiums for her benefit. As he says in his letter, addressed to the officers of this insurance company, the circumstances of his family had so far changed that he did not consider it right to continue paying these premiums for the sole benefit of his daughter. It seems to me, therefore, that he had the right to make the arrangement with the insurance company, and it may be assumed, for the purposes of this case, that he did arrange before hand with the insurance company to allow the policy to lapse, with the understanding that he was to have a new policy issued to him, payable to himself, for the express purpose and no other purpose than to change the beneficiary. If Mrs. Taylor could not compel her father to continue paying those premiums for the purpose of keeping the policy alive for her sole benefit, it seems to me very clear that he was under no legal obligations to her to do so. In other words, it strikes me very forcibly that this policy, at the time the change was made, was, at most, an inchoate or uncompleted gift from Samuel P. Stevens to his wife and heirs. He had the right to change his mind. He was in a position where he could revoke that gift, and direct that the money secured by this policy should go elsewhere. I can see no

reason why he was not as much at liberty to change the direction of the money which would accrue at his death upon this policy, as he was to change his will in reference to the disposition of any of his estate at any time preceding his death.

It is urged, however, that Mrs. Taylor has certain equitable claims in this fund, from the fact that, as heir of her mother, she has never received the amount which Samuel P. Stevens, her father, collected from this railroad company as compensation for the death of his wife, and to which the daughter was entitled; and that in his will Samuel P. Stevens directed the application of this insurance money to the payment of his indebtedness to her. A sufficient reply to this, as it seems to me, is that the money accruing on this policy, being payable to the assured, becomes assets of his estate, and is to go into the hands of his executor like any other money collected in the due administration of the estate, and that Mrs. Taylor's claim is to be paid in the due course of administration, with proper regard to the will, under the directions of the probate court in which that estate is being settled. It may be that the probate court can award or has awarded the proceeds of this policy to the widow of Samuel P. Stevens. With that, this court, I think, has nothing to do. If this money is an asset of the estate of Samuel P. Stevens, then it is to be applied as the court charged with the settlement of that estate shall order.

The decree will therefore be entered ordering the payment of the money involved in this suit to Eliza M. Stevens, executrix of Samuel P. Stevens. It is further ordered that each party shall pay their own costs.

EVANS v. STATE NAT. BANK.¹

(Circuit Court, E. D. Louisiana. February, 1884.)

VERBAL AGREEMENTS.

No verbal agreement of parties or their counsel, touching any cause pending before this court, shall be deemed of any validity, or be noticed in any way by the court, in case of dispute or disagreement.

In Equity.

J. R. Beckwith and W. R. Mills, for plaintiff.

H. B. Kelly and James McConnell, for defendant.

Thomas Gilmore, for heirs of Lapeyre.

BILLINGS, J. The sole question which can be considered is as to the effect to be given to an alleged verbal agreement. It is the general rule that such an agreement cannot be noticed by the court. *Parker v. Root*, 7 Johns. 320; *Dubois v. Roosa*, 3 Johns. 145, and num-

¹ Reported by Joseph P. Hornor, Esq., of the New Orleans bar.

erous cases there cited in note, as *Huff v. State*, 29 Ga. 424; *Reese v. Mahoney*, 21 Cal. 305; and *Shippen's Lessee v. Bush*, 1 Dall. 250. Rule 22 of this court is but a statement of the universal canon or precept which is observed by all courts where the matter of rights is involved. That rule is as follows: "*No verbal agreement of parties or their counsel, touching any cause pending before this court, shall be deemed of any validity, or be noticed in any way, by the court, in case of dispute or disagreement.*" The rule is thus stated in Hoff. Ch. Pr.: "It will be noticed that the agreement or consent, unless thus established, is not even to be suggested against the party; and our chancellors have been strict in adhering to this rule." Page 26. The necessity and wisdom of the restriction is manifest by its universal adoption by the courts, and, having been further emphasized by being enrolled as a rule of this court, is obligatory, and must be followed. The rule must therefore be discharged.

BARLOW v. LOOMIS and others.

(Circuit Court, D. Vermont. March 20, 1884.)

1. TRUST—POWER OF REVOCATION—FAILURE TO EXERCISE.

A trust declared by testator during his life-time, with the privilege of revocation, will, if unrecalled, prevail over the title of a residuary legatee.

2. SAME—STATEMENT.

Testator transferred stocks and bonds to L., upon trust to pay him the income while he lived, and after his death to transfer them to others, reserving the power, however, to revoke this disposition of the property at any time. He died, leaving the trusts unrevoked. *Held*, that the power of revocation died with him, and that upon his death the trusts became absolute.

In Equity.

E. R. Hard, and A. G. Safford, for orator.

Daniel Roberts and Robert Roberts, for defendants.

WHEELER, J. The orator is a residuary legatee under the will of Sidney Barlow, who, in his life, at three several times, delivered and transferred to the defendant Loomis stocks and bonds, under written agreements made between them, providing in two of them that Loomis should hold the stock and bonds in trust, to pay over the interest and dividends to Barlow during his life, and at his decease to transfer them to the other defendants; and in the other that Loomis should hold the bonds for the benefit of other defendants at the death of Barlow, reserving the right to him to demand and have the income while he should live, and to revoke the trust altogether and have the bonds returned to him if he should so elect. Loomis paid the income to Barlow during his life; he did not revoke the trust, but died leaving the stocks and bonds in the possession of Loomis. This bill

is brought to have these stocks and bonds brought into the assets of the estate, so that the orator may have his share of them. The orator's interest in them depends wholly upon whether they were a part of the estate of the testator at the time of his death. If they were, his share in them goes to him by the will; if they were not, nothing of them would pass by the will to him, or any one. There is no question as to mental capacity, nor as to the rights of creditors, nor in any way as to the right and power of the testator to give or dispose of these securities to Loomis, or the beneficiaries, or any one else, in any manner he might see fit. The sole inquiry is as to the effect of what he did do. He could control the disposition of his estate after his death only by will, executed according to the statute of wills; but he could divest himself of this property during life by mere delivery and transfer, such as he fully accomplished. Had there been no reservations, there could have been no question. But these reservations were all optional and personal to himself. If he did not exercise his right to them, they were gone. He died without exercising the right, and it expired with him, leaving the property absolutely gone out of his estate, and wholly beyond the orator's rights. The transaction was in Vermont, (governed by Vermont laws,) which fully uphold it in this view. *Blanchard v. Sheldon*, 43 Vt. 512. Upon the case made, there is no relief to which the orator is entitled.

Let there be a decree dismissing the bill, with costs.

SPINK *v.* FRANCIS and others.¹

BROWN *v.* SAME.¹

(Circuit Court, E. D. Louisiana. February 20, 1884.)

CONTEMPT.

Where the acts of the defendants were violations of the orders of the court, when strictly considered and construed, and where the defendants in their sworn answers purge themselves of any intentional violation of the court's orders, and may have misconceived the responsibility for the acts committed, the court reserved for future consideration, in connection with subsequent conduct, the doings of the defendants as presented by the evidence, and taxed against them the costs of the rules.

On Rule for Contempt.

A. G. Brice, Joseph P. Hornor, and F. W. Baker, for complainants.
James R. Beckwith, for defendants.

BILLINGS, J. These causes are before us on rules for contempt. The cases show the issuance of the injunctions and the defendants' knowledge of them by service or otherwise. It also appears that the

¹ Reported by Joseph P. Hornor, Esq., of the New Orleans bar.

defendants were connected with prosecutions which were prohibited by the injunctions, and aided such procedures after the existence of the prohibitory orders. We think the acts of the defendants were violations of the orders of the court when strictly considered and construed. On the other hand, the defendants, in their sworn answers, purge themselves of any intentional violation of the court's orders; and the nature of the things done rendered it possible that the defendants, in advance of any judicial interpretation of the orders, might have mis-conceived the responsibility for the acts committed. On the whole, we are inclined, for the present, to suspend the imposition of any punishment for what we must adjudge to be acts of disobedience, and therefore of contempt. The authority of the court and the rights of the parties will be sufficiently maintained if we reserve for future consideration, in connection with subsequent conduct, the doings of the defendants as presented by the evidence now before us. The costs of these rules will be taxed against the defendants in the rules; those in each rule against the defendant in that rule.

LOUISVILLE & N. R. Co. v. RAILROAD COMMISSION OF TENNESSEE.

EAST TENNESSEE, V. & G. R. Co. v. SAME.

(Circuit Court, M. D. Tennessee. February 29, 1884.)

1. RAILROADS—LEGISLATIVE CONTROL.

Railroads having been created mainly for the accommodation of the public, and to facilitate the business of the country, and being indispensable to the rapid and cheap transportation of commodities, are subject to legislative control within the limits of state and federal constitutional restrictions, and may be required by law to refrain from so using their property as to injure others, and by appropriate pains and penalties may be restrained from unjust discrimination and extortionate charges, compelled to observe precautionary measures against accident, and in other ways regulated for the public welfare.

2. SAME—VESTED RIGHTS.

But the legislation adopted must observe the contract rights of corporations under their charters; must be confined to the exercise of the *police power*, and not interfere with the vested rights of the companies in their property or franchises; must not inflict punishment or take property otherwise than by due process of law nor without compensation; must not deny to them the equal protection of the law; and must in all respects observe the constitutional guaranties prescribed for the protection of all citizens—railroad companies being for such purposes as much citizens as natural persons.

3. SAME—TENNESSEE ACT OF MARCH 30, 1883—UNCERTAINTY OF THE ACT—CONSTITUTIONAL LAW.

The act of the general assembly of Tennessee of March 30, 1883, to establish a railroad commission analyzed, and *held* to be invalid because its provisions are too indefinite, vague, and uncertain to sustain a suit for the penalties imposed, and do not sufficiently define the offenses therein declared. It leaves to the jury to say whether, upon the proof, the difference in rates amounted to discrimination, or whether the charges were unjust and unreasonable, thus making the guilt or innocence of the accused depend upon the finding of a jury,

and not upon a construction of the act. It relegates the administration of the law to the unrestrained discretion of the jury, and there could be therefore no reasonable approximation to uniform results, but verdicts would be as variant as their prejudices, and inevitably lead to inequalities and injustice.

4. SAME—STANDARD PRESCRIBED BY THE ACT.

Neither is the objection to the act for uncertainty removed by its attempt to prescribe a standard of compensation for the guidance of the jury. It does not with precision point out the assessment for taxation which is to furnish the basis of judgment, nor prescribe the rule under which the net earnings are to be computed. But if these difficulties were overcome, there remains no method of measuring what is a "fair and just return" on the value of the property of the companies which they are allowed to earn before becoming liable to the penalties of the statute, but the act leaves it to the unqualified discretion of the jury, whose verdicts may vary not only as between different companies, but as between different suits with the same company. One jury may fix it at one rate per cent., and others at different rates, so that no company could tell whether it was violating the law or not, and the fact would be determined by the fluctuating contingencies of business, and a charge made on the calculation that 6 per cent. would be fair, might, by the verdict of a jury, upon facts transpiring subsequent to the alleged violation, be pronounced unreasonable and unjust. The legislature cannot delegate such power to a jury without a practical confiscation of the citizen's property.

5. SAME—CONSTITUTION OF TENNESSEE, ART. 11, § 8—CONSTITUTION OF UNITED STATES, FOURTEENTH AMENDMENT.

The act violates the eighth section of the eleventh article of the state constitution and the fourteenth amendment of the constitution of the United States. It discriminates against railroad corporations, in its third and thirteenth sections, by imposing upon them penalties in favor of the state, which are not imposed for like offenses or conduct upon other persons operating railroads in the state, although the act professes to regulate both. It also, in the twenty-ninth-section, discriminates in favor of roads not completed, or the construction of which has not commenced, by exempting them from regulation and punishment for 10 years. The act also reverses the presumption of innocence, and substitutes one of guilt, to be removed only by the accused proving innocence, and puts the power to raise this presumption in the hands of three commissioners, who can, by their act, place the burden on the accused, or leave it off, and arms them with authority to enforce their decree by imposing penalties, which may amount to the taking of private property without compensation. Besides, it enables a political party to bring to its aid the immense railroad property and influence, by action through the commissioners, which shall be friendly or unfriendly, as the railroad companies favor one party or the other.

Per BAXTER, J.

6. SAME—INTERSTATE COMMERCE—STATE REGULATION OF RAILROAD RATES.

The act of the Tennessee legislature, approved March 30, 1883, c. 199, entitled, "An act to provide for the regulation of railroad companies and persons operating railroads in this state, to prevent discrimination upon railroads in this state, and to provide for the punishment of the same, and to appoint a railroad commission," is invalid so far as it applies to the plaintiffs in these cases, because it is a regulation of interstate commerce, acting directly, by a control of the rates of compensation, upon the transportation of persons and commodities in transit from one state into another. The states have surrendered the power to do this by the federal constitution, art. 1, § 8, which confers on congress the exclusive power "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes."

7. SAME—POWER OF THE STATES DEFINED.

The power of the states to regulate railroad rates by such direct action is limited to domestic transportation, which means that carried on exclusively within the boundaries of a state, and transportation can be domestic only when it begins and ends within those boundaries; and this definition cannot, for the purpose of enlarging state authority, be held to include so much of a transportation on a continuous shipment between two or more states as will cover the

distance traveled within the limits of any one of those states; for this construction would utterly destroy the exclusive power of congress over the interstate transportation, abrogate the constitutional provision, and enable the states to restrict, obstruct, or impair that freedom of commerce between the states which it was the object of the provision to permanently secure. It can only include the transportation carried on upon roads lying wholly within the state, or else it may be to shipments beginning and ending in the state, without reference to the character of the road in that regard. This is the utmost reach of state power, and, as to this, no decision is now made, because the act itself makes no discrimination, and attempts to control *all* rates.

8. SAME—REGULATING THE INSTRUMENTALITIES OF COMMERCE—INVALID STATUTES—WHEN WHOLLY VOID.

Until congress chooses to exercise whatever power it may have over domestic commerce, as above described, by reason of any relation it may bear to interstate commerce as an auxiliary or instrumentality thereof, the states may continue their control over it as over any other such instrumentality within their territorial limits, although the interstate commerce of which it is an instrumentality may be indirectly or incidentally affected by such control, but they can never touch the interstate commerce itself by direct action upon it or any part of it, by these regulations, and any state law, be it wise or unwise, valid or invalid in other respects, and no matter what its character or the necessity for such a law may be, which acts upon the contract between the carrier and shipper for interstate transportation to regulate the charges for it, or any part of it, or the conditions thereof in any respect, operates directly on the commerce itself, of which the transportation is certainly a part, and not on an instrumentality of it. These distinctions must be observed in legislation, and that which neglects or overlooks them, or assumes to disregard them, is necessarily invalid; and the courts cannot cure the defect by supplying through judicial decree the necessary qualifications to conform the legislation to constitutional limitations.

9. SAME—POWER TO REGULATE CORPORATIONS.

It is as impossible for a state to make a regulation of interstate commerce by the exercise of its power over the corporations of its creation as by any other power, if it permits them to engage in interstate commerce. Possibly, it may bind the corporations permitted to engage in interstate commerce to schedules of rates *agreed* upon by them; but this is binding only by force of the contract of the carrier to be so bound, and not as a regulation of the rates under any municipal power of the states over the commerce. A regulation of interstate commerce, *as such*, is as invalid in a charter as elsewhere in a state statute.

10. SAME—CASE IN JUDGMENT.

The Louisville & Nashville Railroad Company, being a Kentucky corporation, was authorized by license of the laws of Tennessee to extend its road into that state; and, subsequently, by laws passed for the purpose, to consolidate with other railroad companies, and thereby became an extensive system of intercommunication between the states from the Ohio river to the Gulf of Mexico. The East Tennessee, Virginia & Georgia Railroad Company, a Tennessee corporation, by authority of law, became a consolidated corporation, operating a system of railroads between the states and extending through Tennessee into Georgia, Alabama, and Mississippi, forming with its connections a united line of intercommunication, traversing North and South Carolina, Virginia, and other states. *Held*, that an act of the legislature which attempts to control the rates for fares and freights of persons and commodities passing over these roads from one state into another, on the theory of regulating the charges for the distances traveled within the state of Tennessee, is invalid as a regulation of interstate commerce, and the railroad commissioners will be enjoined from executing it as to these roads.

Per HAMMOND, J.

Application for Preliminary Injunction.

The Louisville & Nashville Railroad Company filed its bill alleging that it was a Kentucky corporation, extending its road into the

state of Tennessee by authority of the laws of the latter state; that by other laws passed for the purpose it had been authorized to acquire and to consolidate with other roads extending into neighboring states; that by its charter, and the charters of the other roads so acquired by it, there were fixed certain maximum rates of charges for transportation, which conferred a contract right to establish its own rates within the maximum, which had not been exceeded by it. The East Tennessee, Virginia & Georgia Railroad Company, by its bill, alleged that it was a Tennessee corporation, authorized by law to consolidate its roads with others, and operating a system of roads extending into neighboring states, and that by its charter there were fixed certain maximum rates which conferred upon it the contract right to establish its own rates within the maximum, and which it had not exceeded. Both bills alleged that the defendants had been appointed railroad commissioners, and were assuming to act by authority claimed under the act of the general assembly of the state of Tennessee, approved March 30, 1883, which is as follows:

"Chapter CXCIX.

"RAILROAD COMMISSION BILL.

"A bill to be entitled 'An Act to provide for the regulation of railroad companies, and persons operating railroads in this state; to prevent discrimination upon railroads in this state; and to provide for the punishment for the same; and to appoint a railroad commission.'

"Section 1. Be it enacted by the general assembly of the state of Tennessee, that the main track and all the branches of every railroad in this state is a public highway, over which all persons have equal rights of transportation for passengers and freights, on the payment of just and reasonable compensation to the owner of the railroad for such transportation; and any person or corporation engaged in the business of transporting passengers or freights over any railroad in this state who shall exact and receive for any such transportation more than just and reasonable compensation for the services rendered, or demand more than the rates specified in any bill of lading issued by such person or corporation, or who for his or its advantage, or for the advantage of any connecting line, or of any person or locality, shall make any unjust and unreasonable discrimination in transportation against any individual, locality, or corporation, shall be guilty of extortion, and in every case it shall be for the jury to determine from all the evidence whether more than just and reasonable compensation was exacted and received, or whether any such discrimination in transportation, which may be established by the evidence, against the individual, locality, or corporation, as the case may be, was made for the benefit or advantage of the person or corporation operating such railroad, or of any person or locality: provided, that nothing in this act shall be construed to prevent contracts for special rates for the purpose of developing any industrial enterprise, or to prevent the execution of any contract now existing.

"Sec. 2. Be it further enacted, that the party injured may recover of the person or corporation guilty of extortion, as defined in this act, ten times the amount of damages sustained by the overcharge or unjust discrimination, as the case may be, and a reasonable fee for the counsel prosecuting the case in any court having jurisdiction of the amount, in any county where the person or corporation operating the railroad does business; but if it appears that the service in which the extortion was committed was done at rates or upon terms

previously approved by the railroad commission hereinafter established, only actual damages, and no attorney's fee, shall be recovered.

"Sec. 3. Be it further enacted, that it shall be the duty of the commission to investigate and determine whether the provisions of this bill have been violated; and whenever said commissioners shall become satisfied that any railroad corporation has violated any of the provisions of this act, they shall immediately cause suit or suits to be commenced and prosecuted against any railroad corporation guilty of such violation in any court having jurisdiction of the subject-matter. Said suit shall be prosecuted in the name of the state of Tennessee, and conducted by the attorney general of the judicial circuit in which the same is instituted, under the direction of said commissioners, and no suit so instituted shall be dismissed without their consent. All moneys so collected shall be paid into the state treasury. If upon the trial of any cause for the recovery of the penalties provided in this bill, the jury shall find for the state, they shall assess and return with their verdict the amount of the penalty to be imposed on the defendant at any amount not less than \$100, nor more than \$1,000, and the court shall render judgment accordingly.

"Sec. 4. Be it further enacted, that in all suits or proceedings under this statute the defendant may give in evidence the fact that the rates or terms in respect to which extortion is alleged had been previously approved by the railroad commission hereinafter established, and such approval shall be *prima facie* evidence that such rates or terms were not extortionate.

"Sec. 5. Be it further enacted, that no rates or charges for service in the transportation of freight over any railroad shall be held or considered extortionate or excessive under any proceeding under this act, if it appears from the evidence that the net earnings of such railroad transporting freight, if done without such discrimination on the basis of such rate or charge, together with the net earnings from its passenger and other traffic, would not amount to more than a fair and just return on the value of which such railroads with its appurtenances and equipments to be assessed for taxation.

"Sec. 6. Be it further enacted, that all actions to recover damages under this act shall be commenced within six months after the cause of action accrues.

"Sec. 7. Be it further enacted, that the foregoing sections of this act shall not take effect until the first day of July, 1883.

"Sec. 8. Be it further enacted, that it shall be the duty of all persons or corporations in this state, who shall own or operate any railroad therein, to publish by posting at all the depots the tariffs of rates, which have been approved by said commission for transporting freights, showing the rates for each class, including general and special rates, and it shall be unlawful for such person or corporation to make any reduction or rebate from such tariff in favor of any person or corporation which shall not be made in favor of all other persons or corporations by a change in such published rates.

"Sec. 9. Be it further enacted, that it shall be unlawful and within the prohibition of this act for any railroad corporation doing business in this state, to make any contract, agreement, or arrangement with any other railroad corporation, or with any common carrier by water in respect to the transportation of freights of any description, from any place within this state by which it is to transport only a certain portion of such freights, or by which it is to refuse to transport such freights or any portion thereof, or by which any common carrier by water is to refuse to transport such freights or any portion thereof, or by which it is to receive any sum of money, or anything of value for not transporting all or any part of such freights, or by which it is to pay any sum of money, or part with anything of value as an inducement to any other railroad corporation or common carrier by water not to compete with it in the transportation of such freights, or by which it and other railroad corpo-

rations or common carrier by water, distribute among themselves for transportation, according to percentages, any freights offered for shipment; and railroad corporations are required to remove freights when delivered or offered for shipment to the extent of their facilities without unnecessary delay and without regard to any contract, agreement, or arrangement expressed or implied as aforesaid, and all railroad corporations refusing or neglecting so to do are hereby declared to be subject to the penalties imposed by this act.

"Sec. 10. Be it further enacted, that this act shall not prevent any railroad company from transporting freight free of charge, provided it is not done to evade the provisions of this act.

"Sec. 11. Be it further enacted, that it shall be the duty of the governor to nominate three competent persons, one from each grand division of the state, subject to the confirmation of the senate, if in session, who shall constitute the railroad commission of the state of Tennessee, and the commissioners, after qualifying, as prescribed in section 11 of this act, shall proceed to elect one of their number as president and one as secretary; and said commissioners shall hold their offices until the first day of January, 1885, and their successors shall be elected by the qualified voters of the state at the November election, 1884, and every two years thereafter.

"Sec. 12. Be it further enacted, that the said railroad commissioners shall be state officers, and before entering on their duties shall take the oath of office prescribed for other state officers, and may be impeached and removed from office for the same causes, and in the same manner, as other state officers. They shall hold office for two years and until their successors respectively are duly elected or appointed and qualified, and any vacancy shall be filled by the governor; the person so appointed shall hold office until his successor is duly appointed, confirmed, and qualified as above provided. No person in the employ of any railroad corporation, or other person, owning or operating a railroad in this state, or owning any stock in any railroad corporation, shall be nominated by the governor as a member of such commission, and any commissioner who shall accept any gift, gratuity, or emolument, or employment from any person or corporation owning or operating a railroad in this state, during his continuance in office, except a permit for himself to pass over the railroad of such person or corporation, shall forfeit his office, and may be impeached and removed from office for that cause, as well as any of the causes specified by law for the impeachment of other state officers.

"Sec. 13. Be it further enacted, that it shall be the duty of the commission to consider and carefully revise all tariffs of charges for transportation of any person or corporation owning or operating a railroad in this state, and if, in the judgment of the commission, any such charge is more than just and reasonable compensation for the service for which it is proposed to be made, or if any such charges amount to unjust and unreasonable discrimination against any person, locality, or corporation, the commission shall notify the person or corporation of the changes necessary to reduce the rate of charges to just and reasonable compensation, and to avoid unjust and unreasonable discrimination; when such changes are made or when none are deemed proper and expedient, the members of the commission shall append a certificate of its approval to such tariff or charges, and in case such change shall not be made, or if any charge subsequently made shall not conform thereto, said corporation shall be held *prima facie* guilty of extortion.

"Sec. 14. Be it further enacted, that it shall be the duty of said commission to hear all complaints made by any person against any such tariff or rates so approved, on the ground that the same in any respect is for more than just and reasonable compensation, or that such charges, or any of them, amount to or operate so as to effect unjust and unreasonable discrimination, such complaint must be in writing and specify the items in the tariff against which

complaint is made, and if it appears to the commission that there may be justice in the complaint, or that the matters ought to be investigated, the commission shall forthwith furnish to the person or corporation operating the railroads a copy of the complaint, together with notice that, at a time and place stated in the notice, the tariff as to said items will be revised by the commission, and at such time and place it shall be the duty of the commission to hear the parties to the controversy, or by counsel, and such evidence as may be offered, oral or in writing, and may examine witnesses on oath, conforming to the mode of proceedings as nearly as may be convenient to that required of arbitrators, giving such time and latitude to each side, and regulating the opening and conclusion of any argument as the commission may consider best adapted to arrive at the truth, and when the hearing is concluded, the commission shall give notice of any changes deemed proper by them to be made, to the person or corporation operating the railroad. And any subsequent charge higher than the amount fixed shall be *prima facie* evidence of extortion. And all railroad companies or persons operating railroads in this state shall make out and deliver for revision to the commissioners a schedule of their rates of charges for the transportation of freights, cars, and passengers, within twenty days after the president or superintendent is notified by the commissioners that they are ready to consider the same, and on failure to do so, said railroad company, or other persons so operating said railroad, shall be liable to a fine of \$100 for every day of said failure after the expiration of said twenty days; and said railroad company or other persons operating any railroad shall have the right to appear and make such proof as they may desire in regard to revision by said commissioners, under such regulations as the commissioners may prescribe.

"Sec. 15. Be it further enacted, that said commission shall have an office at the capital, and shall meet there on the first Monday in every month, and shall remain in session until all business before them is disposed of; and shall hold other sessions at such times and places as may be necessary for the proper discharge of their duties, or as the convenience of parties in the judgment of the commission may require. The members of said commission shall each receive a salary of two thousand dollars, unless restrained by law from the performance of their duties, to be paid as the salaries of the other state officers. It shall be the duty of the commission to keep a record of all its proceedings, which shall be open at all times to the inspection of the public.

"Sec. 16. Be it further enacted, that all money paid out under this act shall be paid on warrant of the comptroller to the treasurer, as by law provided, including such sum as may be necessary to procure office furniture, stationery, and other office expenses, including rent of office of said commission: provided that such office expenses shall not exceed five hundred dollars per annum.

"Sec. 17. Be it further enacted, that whenever, in the judgment of the railroad commission, it shall appear that repairs are necessary upon any such railroad, or that any addition to the rolling stock, or any addition to or change of the station or station-houses, or any change in the rates of fares for transporting freight or passengers, or any change in the mode of operating the road and conducting its business, is reasonable and expedient in order to promote the security, convenience, and accommodation of the public, they shall give information in writing to the corporation of the improvements and changes which they adjudge to be proper, and a report of the proceedings shall be included in the annual report of the commission to the legislature.

"Sec. 18. Be it further enacted, that the said commissioners shall have the right to pass free of charge in the performance of their duties on all the railroads in this state. That said commissioners shall have general supervision over all the railroads of Tennessee, and shall examine the same from time to time, and keep themselves informed as to their condition, and the manner in

which they are operated with reference to the security and accommodation of the public, and the compliance of the several corporations with their charters and the laws of the state.

"Sec. 19. Be it further enacted, that said commission shall, as often as they deem it necessary, examine the several railroads in this state, and shall recommend in writing to the several railroad companies, or any of them, from time to time, the adoption of such measures and regulations as said commissioners deem conducive to the public safety and interest.

"Sec. 20. Be it further enacted, that the managers operating the several railroads of this state shall furnish the said commission with all the information required, relative to the management of their respective lines, and particularly with copies of all leases, contracts, and agreements for transportation, with express, sleeping-car, or other companies, to which they are parties, with schedules of tariff rates.

"Sec. 21. Be it further enacted, that the several railroad companies, trustees, or receivers, or other persons operating railroads in this state, be and are hereby required to make annual returns of their business to the board of commissioners on or before the first day of September of each year, made up to the close of business on the thirtieth day of June next preceding, which annual returns shall be made in duplicate in the manner prescribed by said commissioners, upon the blank forms to be furnished by said commissioners to said railroad companies. Any railroad company which shall neglect or refuse to make such terms shall forfeit to the state \$100 for each day of such refusal or neglect.

"Sec. 22. Be it further enacted, that every railroad company shall, within twenty-four hours after the occurrence of any accident to a train, attended with serious personal injury, on any portion of its line within the limits of the state, give notice of the same to the railroad commissioners, who, upon receiving such notice, or upon public rumor of such accident, may repair or dispatch one or more of their number to the scene of said accident, and inquire into the facts and circumstances thereof, which shall be recorded in the minutes of their proceedings, and embraced in their annual report.

"Sec. 23. Be it further enacted, that the said commissioners may summon and examine, under oath, such witnesses as they may think proper in relation to the affairs of any railroad company.

"Sec. 24. Be it further enacted, that the board, through their chairman, shall make annual reports to the governor, on or before the first day of December in each year, for transmission to the legislature, of their doings for the year ending on the thirtieth day of June next preceding, containing such facts as will disclose the actual workings of the railway system in this state, and such suggestions as to the general railroad policy of the state as may seem to them appropriate. They shall also submit such recommendations for further legislation upon the subjects of railroads as they may deem necessary or advisable for the interests of the state.

"Sec. 25. Be it further enacted, that the railroad commissioners shall have at all times access to the list of stockholders of every corporation operating a railroad in this state, and may, in their discretion, at any time, cause the same to be copied in whole or in part for their own information, or for the information of persons owning stock in such corporations.

"Sec. 26. Be it further enacted, that it shall be the duty of the railroad commission, by correspondence, conventions, or otherwise, to confer with the railroad commissioners of other states of the Union, and with such persons from states having no railroad commissioners as the governor of such states may appoint, for the purpose of agreeing, if practicable, upon a draft of statutes to be submitted to the legislature of each state, which shall secure such uniform control of railroad transportation in the several states, and from one state into or through another state, as will best subserve the interest of trade

and commerce of the whole country; and said commission shall include in their annual report to the governor an abstract of the proceedings of any such conference or convention.

"Sec. 27. Be it further enacted, that no person holding the office of railroad commissioner shall, during his continuance in office, personally, or through any partner or agent, render any professional services, or make or perform any business contracts with or for any railroad owned or operated in this state, excepting contracts made with such railroad in its capacity as common carrier.

"Sec. 28. Be it further enacted, that nothing in this act contained shall be construed to affect in any manner or degree the legal duties, rights, and obligations of any railroad corporation or other person owning or operating any railroad in this state, or its legal liability for the consequences of its neglect or mismanagement, whether adjudged by said commission to be reasonable, expedient, and proper, or not.

"Sec. 29. Be it further enacted, that none of the provisions of this act shall apply to any railroad now being constructed, or which may hereafter be begun and constructed, in this state, until ten years from and after the completion of such new railroad.

"Sec. 30. Be it further enacted, that witnesses summoned to appear before said commission shall be entitled to the same *per diem* and mileage as witnesses attending the circuit court. Witnesses summoned by the commissioners shall be paid by warrant on the treasury, to be drawn by the comptroller on the certificate of the president of the board, of the amount to which such witness is entitled; witnesses summoned by any party, to be paid by the party by whom they are summoned. And the commissioners are hereby clothed with the same power to enforce the attendance of witnesses as is now possessed by any court of record.

"Sec. 31. Be it further enacted, that this act take effect from and after its passage, the public welfare requiring it.

"Passed March 29, 1883.

W. L. LEDGERWOOD,

"Speaker of the House of Representatives.

"B. F. ALEXANDER,

"Speaker of the Senate.

"Approved March 30, 1883.

WM. B. BATE, Governor."

The bills further averred that the defendants had notified the plaintiff corporations that they would proceed under that act to revise all their tariffs of rates within the state of Tennessee, and alleged that the proposed action of the commissioners, as well as the said legislation, were in violation of the state and federal constitutions in several respects, not necessary to report, as the decision of the court is not based upon them. The constitutional provisions relied upon, together with the averments of the bills pertinent thereto, are sufficiently stated in the opinions.

The defendants filed their *affidavits* in each of the cases, in which they denied the contention of the plaintiffs as to the construction of their respective charters, and the allegations upon which the validity of the passage of the act was attacked, denied that the act in any way violated the constitutional provisions relied on by the plaintiffs, or that they were about to act illegally or in violation of plaintiffs' rights, and explained in detail what they had done under the act in respect of the plaintiffs' roads, and what course of conduct they proposed to pursue. They averred the power of the state to pass

the act, and elaborately detailed certain facts in the conduct of the plaintiffs respectively, to show the necessity of regulation in order to prevent the unreasonable and unjust charges and discriminations of which affiants alleged the plaintiffs had been guilty, including excessive charges beyond the maximum prescribed by the respective charters of the plaintiffs. They also expressed a great desire to exercise their powers under the act with becoming caution and moderation, and in the best of faith to the railroad companies and the public, so that the interests of all should be reasonably promoted and protected.

The circuit judge granted a restraining order, and directed the application for a preliminary injunction to be argued at Nashville before himself and the two district judges of Tennessee.

Ed. Baxter, East & Fogg, Dickinson & Fraser, and Smith & Allison, for Louisville & N. R. Co.

Wm. M. Baxter, for East Tennessee, V. & G. R. Co.

Vertrees & Vertrees and S. F. Wilson, for defendants.

Before BAXTER, HAMMOND, and KEY, JJ.

BAXTER, J. The complainant, the Louisville & Nashville Railroad Company, claims to be a corporation and citizen of Kentucky, and the defendants are the "railroad commission," appointed under and pursuant to the act of March 30, 1883. The provisions of this act, so far as they are material, will be recited in the progress of this opinion. It is enough, for the present, to say that it purports to vest the defendants with general supervision of all the railroads and railroad operations in Tennessee. The complainant, who owns and operates several railroads in the state, contends—*First*, that said act was not passed in the manner prescribed and according to the formalities required by the constitution, or, if it was, it was not passed in the form in which it has been promulgated; and, *secondly*, if constitutionally enacted, it is repugnant to the state and federal constitutions, and therefore void and inoperative. It furthermore complains that the defendants are about to enforce the same to its great detriment and irreparable injury, and prays for an injunction to restrain the defendants from interfering, under the color thereof, with its property or business. *Per contra*, the defendants insist that the act was regularly passed as promulgated, and that it is, in all of its provisions, within the constitutional prerogatives of the general assembly, and a valid enactment; and that the enforcement thereof by them will be no legal wrong of which the complainant has any right to complain.

Our duty, therefore, is to inquire and determine whether there is any irreconcilable repugnance between the act and the state or federal constitutions. Its first declaration is that all railroads in the state are public highways, over which all persons have equal rights of transportation for their persons and freight, on the payment of a just and reasonable compensation therefor. To this we fully assent.

Railroads have been created mainly for the accommodation of the public and to facilitate the business of the country. They are indispensable to the rapid and cheap transportation of commercial commodities. Under the fostering care and protection hitherto extended to them, they have expanded into huge proportions. With the beginning of this year we had 125,000 miles of road, representing more than \$5,000,000,000 of capital, giving employment to 500,000 people, and in the annual receipt of more than \$800,000,000 of earnings. They permeate every part of this extended country, and in a large measure monopolize the entire inland carrying business. Everybody, from the very exigencies of business, is compelled to patronize them. In this regard business men are left without any option. If unrestrained by wholesome legislation the public would be very much at their mercy. They could, by unjust discriminations, made under the name of drawbacks, rebates, or other disingenuous pretenses, favor friends and oppress opponents, and so adjust and graduate their rates according to the exigencies of fluctuating markets, as to secure to themselves or those who operate them an undue proportion of advancing prices. It would, therefore, in view of these obvious possibilities, be a humiliating confession to admit that there was no reserved power, either in the court or the legislature, to protect the public against such possible abuses. We do not hesitate to affirm the existence of such a power. Every owner of property, however absolute and unqualified his title, holds it subject to the implied liability that the use thereof shall not be injurious to the public. Rights of property, like social and conventional rights, are held subject to such reasonable limitations in regard to their enjoyment as shall prevent them from being injurious to the rights of others, and to such reasonable restraints and regulations, to be established by law, as the legislature may from time to time ordain and establish. It is, in this principle, applicable alike to all kinds of property, generally denominated the "*police power*" of the state, that the authority is found for such control over individuals and corporations, and over their property, as is necessary to insure safety to all and promote the public convenience and welfare. And in the exercise of this reserved authority the legislature may require railroad corporations and persons operating railroads in the state to observe precautionary measures against accident, forbid unjust discrimination and extortionate charges, and, where there is no valid contract to the contrary, prescribe a reasonable maximum of charges for the services to be performed by them, and enforce the same by appropriate pains and penalties. There are many other things that may be lawfully exacted of them, which need not be recapitulated here. The legislature, however, cannot, under the pretense of regulation, deprive a corporation of any of its essential rights and privileges. In other words, the rules prescribed and the power exerted must be within the *police power* in fact, and not covert amendments to their charters in curtailment of their

corporate franchises. Nor can the legislature, in the exercise of this power, make any regulation in contravention of the state or national constitution. Every statute which invades vested rights, inflicts punishment or takes private property otherwise than by due process of law, impairs the obligation of valid contracts, or denies to any one or more persons the equal protection of the law, are unconstitutional and invalid.

Does the act in question violate any of these principles? As we have seen, it assumes to vest the defendants with a general supervision of all railroads and railroad operations in the state, and makes it their duty "to consider and carefully revise the tariffs of charges for transportation," etc., and if, in their judgment, the rate charged by them "is more than a just and reasonable compensation" for the service to be performed, or if such rate "amounts to unjust and unreasonable discrimination" against any person, locality, or corporation, they are to notify said corporations, etc., of the changes necessary to reduce the rate to "a just and reasonable compensation," and to "avoid unjust and unreasonable discrimination," and "when such changes are made or deemed unnecessary," said commissioners are commanded to append a certificate of approval to the schedule of charges so authorized by them, and the rates thus fixed, approved, and certified shall be *prima facie* evidence of the reasonableness and justice of the same; but they are nevertheless subject to revision by juries as will be hereinafter shown. The act does not, in express terms, command railroad carriers to adopt the rates prescribed by the commissioners, but provides that if they shall "exact and receive" more than "a just and reasonable compensation," or "demand more than the rates specified in any bill of lading" issued by them respectively, or shall for their "advantage or for the advantage of any connecting line," or of "any person or locality," or if such railroad corporation makes any "unjust or unreasonable discrimination," etc., (unless in the fulfillment of an existing contract or some contract to be thereafter made for the purpose of developing some industrial enterprise,) it shall be held *prima facie* guilty of the crime of extortion, as defined by the act, and subjected to the pains and penalties therein imposed; and every "injured" party is authorized to sue for each extortionate charge, and recover "ten times the amount of the damages sustained," and a reasonable fee for his counsel, unless it shall appear that the alleged extortionate charge conformed to the rates fixed by the commission, in which contingency, (if the jury shall entertain the opinion that the rates so fixed are too high or amount to an unjust and unreasonable discrimination,) they are required to find for the plaintiff, but only for his actual damages, excluding the fee to counsel. Furthermore, the commissioners themselves are not bound by the rates prescribed by them. On the contrary, they are charged with the duty of "investigating" and "determining" whether any of the provisions of said act are violated, and whenever satisfied

that violations thereof have occurred, notwithstanding the corporation may have charged the rates fixed and authorized by them, they are peremptorily commanded by the statute to bring suits for every such violation against the offender in the name and for the benefit of the state; and if upon the trial the jury shall believe from the testimony adduced that the charges are "unjust and unreasonable," or that they "amount to unjust and unreasonable discrimination," their verdict must be for the state, and they are required to assess and return therewith a penalty of not less than \$100 nor more than \$1,000, and the court *shall* render judgment therefor. •

The complainant insists that the act is too indefinite to sustain a suit for the penalties therein imposed, the offenses for which said penalties are to be inflicted not being sufficiently defined. The definition of the two principal of these offenses, is,—*First*, the taking of "unjust and unreasonable compensation;" and, *secondly*, the making of "unjust and unreasonable discriminations." But what is unjust and unreasonable compensation, and unjust and unreasonable discrimination? And can an action, *quasi* criminal, be predicated thereon? It was expressly held to the contrary in the case of *Cowan v. East Tenn., V. & G. R. Co.*, decided a few years since, at Knoxville, (but not reported,) because, as the learned judge said, "it would have to be left to a jury, upon the proof, to say whether the difference" in the rates "was discrimination or not," and that the same difference "might in one instance be held a violation of the law and in another not," thus making the guilt or innocence of the accused dependent upon the finding of the jury, and not upon a construction of the act. "This," he said, "I think cannot be done." If this decision is authoritative, it is conclusive of this part of this case. We think the decision clearly right. Questions as to what is a reasonable time for the performance of a contract, or reasonable compensation for work and labor done by one man at the request of another without any stipulation as to the price to be paid, and other like cases, frequently arise in civil controversies. But the law furnishes, in all such cases, a *standard* of compensation for the guidance of the jury. Without such legal standard there could be no reasonable approximation to uniform results; the verdicts of juries would be as variant as their prejudices, and this could not be tolerated. To thus relegate the administration of the law to the unrestrained discretion of the jury; to thus authorize them to determine the *measure* of damages and then assess the amount to which a plaintiff may be entitled, would inevitably lead to inequalities and to injustice. Hence, the statute under consideration undertakes to supply this *desideratum* by which juries are to be governed in the determination of the questions submitted to them. That standard is "that no rates or charges for service in the transportation of freight over any railroad, shall be held or considered extortionate or excessive under any proceeding under this act, if it appears from the evidence that the net earnings * * * from its passenger and other traffic

would not amount to more than a *fair and just return* on the value of which such railroads with its appurtenances and equipments to be assessed for taxation."

This definition is somewhat obscure. But, however interpreted, it does not obviate the objection made or mitigate its force, but intensifies pre-existing doubts. The value is to be the amount at which the road, its appurtenances and equipments are "*to be assessed for taxation.*" But what assessment is to govern? The one made before or after the alleged overcharge or prohibited discrimination? The language of the act is, "*to be assessed.*" But we will not tarry here. Suppose the value satisfactorily ascertained, how and upon what basis are the net earnings to be computed? Is the estimate to be based on past receipts, current income, or anticipated earnings? Is the accused corporation to be held to anticipate its future operations, foresee the amount of its receipts and expenditures, and accurately foreknow its future profits and losses, so as to be able to strike a balance in advance of actual results in order to make its charges conform to the requirements of the statute? If so, how far in the future must their foreknowledge extend? These are some of the many difficulties with which railroad companies are to be embarrassed, and against which the act requires them to provide. But we will suppose these to have been successfully surmounted, and another and more obstinate problem remains. These corporations are, in addition to their expenses, allowed to charge at a rate that will insure a "fair and just return" on the value of their property. But what is a fair and just return? This vital question is by the act left to the unqualified and unrestrained discretion of the jury. There is no legal standard erected whereby the jury can measure the amount. One jury may fix it at 2 or 3 per cent. per annum, while another jury may, in view of business contingencies and fluctuating values, allow 6, 8, or 10 per cent., and their action would be so far conclusive as to be beyond the revision of any reviewing court. The facts that the jury are to ascertain are—*First*, the *net earnings*; and, *secondly*, what would be a "fair and just return." The ascertainment of net earnings involves necessarily an inquiry into the gross receipts and expenditures. May the jury revise the expense account, and if so, to what extent? Both the earnings and expenses vary in accordance with the exigencies of business. Are rates to be varied in accordance with the fluctuating fortunes of railroad operations? If so, a charge reasonable in itself and honestly made might be rendered extortionate, and hence criminal, by a reduction of expenses or an unexpected increase of business, or a charge honestly made on the supposition that 5 or 6 per cent. would be fair and just, might be converted into a crime by the verdict of a jury subsequently rendered, based, it may be, upon facts transpiring subsequent to the alleged violation of the law.

We think the property of a citizen—and a railroad corporation is, in legal contemplation, a citizen—cannot be thus imperiled by such

vague, uncertain, and indefinite enactments. The corporations and persons against whom this act is directed can do nothing under it with reasonable safety. They may take counsel of the commission, act upon their advice, and honestly endeavor to conform to the statute. But if a jury before whom they may be subsequently arraigned, shall, in their judgment and upon such arbitrary basis as they are at liberty to adopt, conclude that the commissioners misadvised or that the managers of the accused railroad corporation made a mistake in regulating their charges upon a 5 per cent., instead of a 4 per cent., basis, the honesty and good faith of the accused will go for nothing, and penalty upon penalty may be added until the defendants' property shall be gradually transferred to the public. This cannot be permitted. Penalties cannot be thus inflicted at the discretion of a jury. Before the property of a citizen, natural or corporate, can be thus confiscated, the crime for which the penalty is inflicted must be defined by the law-making power. The legislature cannot delegate this power to a jury. If it can declare it a criminal act for a railroad corporation to take more than a "fair and just return" on its investments, it must, in order to the validity of the law, define with reasonable certainty what would constitute such "fair and just return." The act under review does not do this, but leaves it to the jury to supply the omission. No railroad company can possibly anticipate what view a jury may take of the matter, and hence cannot know in advance of a verdict whether its charges are lawful or unlawful. One jury may convict for a charge made on a basis of 4 per cent., while another might acquit an accused who had demanded and received at the rate of 6 per cent., rendering the statute, in its practical working, as unequal and unjust in its operation as it is indefinite in its terms. No citizen, under the protection of this court, can be constitutionally subjected to penalties and despoiled of his property, in a criminal or *quasi* criminal proceeding, under and by force of such indefinite legislation.

The act furthermore conflicts with the eighth section of the eleventh article of the state constitution and the fourteenth amendment to the constitution of the United States. The first of these provides that "the legislature shall have no power to suspend any general law for the benefit of any particular individual, nor to pass any law for the benefit of individuals, inconsistent with the general laws of the land; nor to pass any law granting to any individual or individuals rights, privileges, immunities, or exemptions, other than such as may be by the same law extended to every member of the community who may be able to bring himself within the provisions of such law;" and the last—the fourteenth amendment—prohibits the states from "depriving any person of life, liberty, or property without due process of law, or denying to any person within their jurisdiction the equal protection of the law." It is not necessary for us to undertake, in this case, to define the boundaries or limit the operation of these just con-

stitutional restrictions upon legislative authority. Their general object is to secure to all citizens in like circumstances an equality of legal rights, and to protect minorities and other interests not strong enough to protect themselves against the aggressions of the majority; to restrain all injurious legislative discrimination against persons and property; to compel an equal distribution of the burdens of government upon every citizen, natural or corporate, coming fairly within the purview of the law; and to give to every one an equal right to invoke the remedies prescribed by law for the redress of wrongs done, either to his person, reputation, or property. Such, we say, is the general purpose and intent of these constitutional provisions. The accuracy of this interpretation is not, as we understand, questioned by the defendants. Their contention is that railroad property is, in many respects, peculiar in its characteristics and uses, requiring legislation peculiarly adapted to them, and that to so legislate is not within the prohibitions of the foregoing constitutional guaranties, as, for instance, the enactment of a statute to regulate the running of trains by railroads. We admit the contention that it is competent for the legislature to enact laws for the government and regulation of railroads, and that the same could not be rendered invalid because of their non-applicability to other and dissimilar properties. But it does not follow that the legislature can enact statutes applicable as well to other kinds of property as to railroads, and therein discriminate so as to impose heavier burdens on one than are imposed on the other. Certainly, they cannot so distinguish as between different railroad companies or between railroad corporations and persons operating railroads in competition with them. Nevertheless, the act in question, if valid, has made this discrimination in the most direct and positive terms. Although it professes to provide for the regulation of railroad companies and persons operating railroads in this state; and although both are common carriers by rail, use the same kind of machinery and motive power, are under equal obligations to the public and to their patrons, and compete in business, railroad corporations are thereby burdened with pains and penalties not imposed on persons operating railroads in competition with them. By the first section of the act both are declared amenable to "injured parties" for the causes therein enumerated. But the third section, prescribing penalties in favor of the state, as hereinbefore stated, for charges made in excess of what a jury may subsequently find in manner aforesaid and upon the basis stated, to be more than just and reasonable compensation, or unjust and unreasonable discrimination, is expressly confined to corporations. Under this section, corporations are subject to be sued, harassed, and worried by expensive and ruinous litigation, and to the payment of the penalties and costs therein provided, while persons operating railroads in active competition with them, engaged in the same kind of *quasi* public service and under the same obligations of fidelity and diligence, are exempt therefrom.

Another and like invidious discrimination is contained in section 13. This section makes it the duty of the commissioners to "consider and carefully revise all the tariffs of charges for transportation of any person or corporation owning or operating a railroad in this state," and if, in their judgment, "any such charge is more than just and reasonable compensation for the service for which it is proposed to be made, or if any such charge amounts to unjust and unreasonable discrimination against any person, locality or corporation," the commissioners are to "notify the person or corporation of the changes necessary to reduce the rate to a just and reasonable compensation, and to avoid an unjust and unreasonable discrimination;" and "when such changes are made," or "when none are deemed proper and expedient, the commissioners are to append a certificate of approval to such tariff of charges, and in case such change" suggested by the commission "shall not be made," or if "any charge, subsequently made, shall not conform thereto," said "corporation shall be held *prima facie* guilty of extortion." It is corporations, and not persons operating railroads, who are to be held *prima facie* guilty of extortion under this section, and it is corporations, and corporations only, who can be punished under its provisions, and thus it appears the act is, in its severest features, more exacting and oppressive of corporations than of persons operating railroads, the former being subjected to penalties and to punishment from which the latter are exempt. But the unconstitutional discrimination of this act is not confined to discrimination between railroad corporations and persons operating railroads, but extends to a discrimination between railroad corporations themselves, the twenty-ninth section thereof expressly declaring that "none of its provisions" shall apply to any railroad then being "constructed," or which might thereafter be "begun and constructed in the state," until "ten years from and after its completion." Wherefore this distinction between existing roads and roads to be thereafter built? If the act was a proper regulation, why not apply it to roads to be hereafter built? If the legislature can thus draw the line between different railroads based on the date at which they were or are to be constructed, where and at what point is legislative discrimination to cease? If the legislature can thus discriminate between new and old roads, it can assume any other arbitrary basis in support of invidious legislation, and in this way oppress one interest for the benefit of another; and if it can do this, the foregoing wise and just provisions of the state and national constitutions, intended to secure an equality of rights to every citizen, may as well be eliminated from those sacred instruments.

Notwithstanding the act under consideration professes to regulate railroad operations, it, in effect, places the business of all railroad corporations in the state under defendants' supervision and control. In addition to the authority to revise their tariffs of charges, as hereinbefore shown, the commissioners may, for undisclosed reasons, and

without accountability to any one, give better rates to one corporation than to another. And (section 17) whenever, in their judgment, "it shall appear that repairs are necessary," or that "additional rolling stock" is needed, or "any change of stations or station-houses," or "any change in rates" are desirable, or "change in the mode of operating any road, and conducting its business is reasonable or expedient," the commissioners "shall give information in writing" to the corporation of the "improvements and changes which they may adjudge proper," etc. These powers, in addition to the authority to prescribe rates, include all the incidents pertaining to the absolute ownership of property. In the exercise of them the commission can limit receipts and dictate expenditures, insure prosperity to one company and drive another into bankruptcy, and assume the management and control of the business and operations of every railroad corporation in the state.

But the defendants say that their revisions of tariff rates and suggestions in regard to the methods of conducting business are not obligatory on the railroad corporations; that the statute is advisory and not mandatory in its terms. This is true; upon the face of it, the railroad companies are left to adopt or reject the rates fixed, and ignore the suggestions made by the commissioners. But if they decline to conform to the rates fixed by the commissioners they do so at the peril of subjecting themselves to a multiplicity of suits by the state and by individuals, to be tried by juries interested in the reduction of charges, and upon the anomalous principles declared by the act, which, by force of the *prima facie* effect therein given to the *ex parte* action of the commissioners, reverses the presumption of innocence hitherto accorded to all defendants in criminal or *quasi* criminal proceedings, and casts the burden of exculpation on the accused. That such litigation will follow is not at all problematical; it is certain. The authors of this statute have been careful to place this beyond doubt. It is therein made the imperative duty of the commissioners, in the event any railroad company refuses to adopt the rates to be prescribed by them, to institute and prosecute a suit, as hereinbefore stated, for every overcharge; and the juries called to try them, will, by the express command of the statute, be compelled to find against the defendants and assess the penalties imposed, unless defendants establish by affirmative proof that its *future* net earnings, on the arbitrary basis declared by the act, will not exceed a fair and just return on the value of its property *to be assessed for taxation*, the jury being the exclusive judges of what a fair and just return is. This much is expressly commanded. But "injured parties" are left to the exercise of their own discretion whether they will sue or not. Nevertheless, by way of inducement, the *prima facie* effect given by the act to the judgment of the commissioners supplies them with the requisite proof to sustain their actions, and, as an additional encouragement, the act offers *ten times* the amount of the damages sustained.

and a reasonable attorney's fee, to be paid by the railroad company. No railroad company in the state can successfully cope with the litigation that will inevitably follow a refusal by it to conform to the requirements of the commissioners in the particular mentioned. Through the indefinite terms of the statute, severity and multiplicity of its penalties, the impossibility of determining in advance of the verdict of a jury in the particular case, what is and what is not a violation of its provisions, the power conferred or attempted to be conferred on juries to define the offense and then inflict punishment, coupled with the *ex post facto* effect given to their verdict, involves everything in uncertainty and commits every railroad corporation in the state to the mercy of the commission. By the slow but certain operation of this statute, the commission can, if they want to, gradually take and appropriate all the railroad property in the state to the public use, without that just compensation provided for by the constitution. In a word, the commission, under the terms of this act, hold, in so far as railroad corporations are concerned, the issue of life and death as in the hollow of their hands.

Of what avail, then, is the suggestion that the powers of the commission are only advisory? To whom and in relation to what is their advice to be given? They speak to the owners of \$50,000,000 of railroad property; and, although they may speak in the most deferential language, the companies to whom their gentle admonitions are to be addressed, thoroughly understand and justly appreciate the unlimited authority with which they are clothed by the act, the uncertainties ahead, the dangers with which they are environed, and the ruinous litigation to which they will be exposed if they decline to adopt the suggestions made, and they will, therefore, with a lively sense of their utter helplessness, cravenly submit to the will of the commission, although such submission may remotely involve the company in hopeless insolvency. Like apprehension would continue them the ready and flexible tools of the power thus placed over them, and the expressed wishes of the commission would, in every instance, be accepted and acted upon as if it was a positive command. No prescience is requisite to forecast the consequences. The commission would become the practical managers of all our railroads. They are to be elected every two years by a popular vote. In the absence of some radical change of party methods, the commission, to be elected from time to time, would represent and execute the policy of the dominant party, and, unconsciously or intentionally, manipulate this great interest for the benefit of the political organization to which they belong. Railroad property, on the successful, judicious, and just management of which the future growth and prosperity of the state so essentially depend, would become the prey of the spoilsmen; and an irresponsible oligarchy, far more dangerous to political morals and the business interests of Tennessee than any possible railroad combination, would be firmly established in our midst.

We do not, by these comments, intend to cast any imputation upon the defendants. There is nothing in this record which, in any degree, impugns either their actions or motives. So far as we can see, they have, in good faith, endeavored to perform their duties as they understand them. Our object is simply to point out the extraordinary powers attempted to be conferred by the act, and to indicate the large opportunities which it affords for an abuse of power and an invasion of vested rights under the color of authority; how it is that railroad organizations could be subjected to party service under its provisions and be manipulated as well against as in furtherance of the public interests, and to say, in the language of the supreme court of Tennessee, in the case of *Farnsworth v. Vance*, 2 Coldw. 108, that "this tremendous power" does not, as we think, "lurk within the principles of legislative power." We repeat, the regulating power of the legislature and the courts is sufficient to compel railroad companies to perform all their undertakings in favor of the public, and to prevent or punish all derelictions of duty. The legislature can enact laws, within constitutional limits, for the regulation of railroads and railroad operations, but it cannot lawfully authorize a commission; by direct or indirect legislation intended to accomplish that end, or necessarily involving that result, to take control of their business and operations. Such legislation would be an unauthorized and unconstitutional invasion of private rights. The act is also, as we think, a regulation of interstate commerce, and to that extent an intrusion upon the exclusive legislative authority of congress. The reasons for this belief will, by special request, be stated by brother HAMMOND.

Other objections to the constitutional validity of the statute, which we think are entitled to grave consideration, have been urged in argument. But as those already discussed are decisive of the case, we do not deem it necessary to further consider or discuss them in this case.

The prayer of complainants for a preliminary injunction will be granted.

HAMMOND, J. It is, in our judgment, a grave misapprehension of the *Granger Cases* to affirm that they support the legislation involved in this controversy. *Munn v. Illinois*, 94 U. S. 113; *Chicago, etc., R. Co. v. Iowa*, Id. 155; *Peik v. Chicago, etc., R. R.* Id. 164; *Chicago, etc., R. R. v. Ackley*, Id. 179; *Winona, etc., R. R. v. Blake*, Id. 180; *Stone v. Wisconsin*, Id. 181; *Shields v. Ohio*, 95 U. S. 319. The overshadowing question in those cases, obviously, was that arising out of the claim to entire exemption from all legislative control over their business by the warehousemen and common carriers. This claim they based upon the supposed inviolability of their property rights, and the leading feature of the decisions is that they had not been "deprived of their property without due process of law" by legislation regulating the maximum of charges they might make, because they had, like ferrymen, millers, etc., embarked their property in a busi-

ness affected with a public interest, whereby it ceased to be *juris privati* only. The court said comparatively little upon the subject of interstate commerce in its relation to such legislation, and it is somewhat difficult, from the meagre report of the cases, on that point, to be read, in the light of previous and subsequent decisions, on that especial subject, there is no difficulty whatever in reaching a full understanding of its meaning. The decisions amount, we think, only to this—where a warehouseman or common carrier is engaged in the storage of goods or their carriage *within a state, and exclusively within it*, the rates of charges for such business are subject to legislative control by the state, and the fact that such legislation may *indirectly and remotely* affect commerce between the states does not invalidate it; because, if congress has, by reason of this indirect and remote relation of such local business to interstate commerce, any right to assert control over what is primarily domestic commerce only, it is to be presumed, until congress acts, that it does not intend to displace the right of the state to control its domestic commerce.

While it does not appear by the report of these cases, it is familiar to all who are informed about the general character of the discussions had over these questions, that the railroad companies have contended, at all times and in all places, that there is such a necessary co-relation and interdependence between domestic commerce by rail within a state and that which is carried on among the states, and between local and through rates of charges for transportation and competitive rates from more or less distant points, that local rates cannot be regulated by the several states, or any one of them, without disturbing disastrously all rates whatever, thereby seriously and directly affecting interstate commerce. It was undoubtedly in reply to this argument that the decisions were directed, and there is no denying that they close the argument and preserve the right of state control, notwithstanding any disturbance it may occasion rates for transportation between the states. But there is a vast difference between that principle and the argument made here in support of this legislation, that until congress chooses to regulate interstate commerce in respect to rates for transportation from one to another state, the states may regulate it, each within its own limits. It is applying the doctrine of the supreme court, in these cases, to an entirely different subject-matter. To say that the state may regulate the rates of transportation for its domestic commerce until congress chooses to exercise any power it may have over that transportation, because of its more or less intimate connection with commerce between the states, is one thing, and to say that all rates of transportation on articles in transit within the borders of the states, whether passing between two or more states or not, concern domestic commerce, and are *pro hac vice* subject to state control, is quite another.

One of the learned counsel for defendants seemed to shrink from taking this position at the argument, struggling in the face of the plain language of the act to somewhat confine its operation to local limits, but the other, following the attorney general of Illinois, in *People v. Wabash, etc., R. R.* 104 Ill. 476; S. C. 105 Ill. 236, boldly assumed that until congress acts the legislature may regulate *all* rates for carriage "within the state," no matter where the carriage is to be done, on the theory that it is the act of making the charge or rate for transportation that the state condemns or regulates, and not the transportation itself; wherefore its effect on interstate commerce is only indirect. By this counsel mean—for the illustration was put to test the argument—that the state may regulate charges on a car-load of coal coming from the Ohio river at Cincinnati, or Louisville, to Nashville, or passing through the state to Montgomery, so long as the regulation is confined to the charges for transportation over those miles of the route within the boundary of Tennessee. But we do not think this is what the supreme court means in the *Granger Cases*. It is true, counsel say this is only affecting interstate commerce "incidentally," but they are driven to this because the supreme court has declared that it can only be so affected. But for that exigency it is probable no ingenuity would suggest that the control of compensation for the carriage of goods was not a direct control of the carriage itself, nor that the control of a part was not as direct in its action as the control of the whole compensation. Nor does it in the least change this result to affirm that it is the act of making an unjust charge or discrimination at which the law is aimed. What is making the charge? Plainly, it is simply the act of contracting for the transportation, and the operation of the law is just as direct when the contract is forbidden, or regulated as to its terms, as when the act of transportation itself is forbidden or only permitted on those terms. It is, in fact, the most direct and, of all regulations, the most vital to that intercourse we call commerce, to control the compensation for that transportation by which an exchange of the commodities is effected; for without the transportation there can be no exchange between different places, and it is therefore the chief element of *interstate* commerce. It is like saying the control of the circulation of the blood for a space of one inch along the aortal trunk affects the victim's life only "incidentally," to say that the control of the rates of compensation of that part of a great line of interstate commerce, lying between the boundaries of a state, so affects that commerce. The injury may be small, but it is none the less direct, and not at all incidental, because it is only slight. And, as the circuit judge well remarked at the argument, if Tennessee may control the rates for interstate commerce within its limits, Kentucky may, and so on until the states have usurped the regulation of the whole matter. Indeed, this act of the legislature seems to be grounded on

this very notion, for we find in section 26 that the railroad commission is constituted a kind of diplomatic agency to accomplish that purpose. It enacts:

"That it shall be the duty of the railroad commission, by correspondence, conventions, or otherwise, to confer with the railroad commissioners of other states of the Union, and with such persons from states having no railroad commissioners as the governor of such states may appoint, for the purpose of agreeing, if practicable, upon a draft of statutes to be submitted to the legislature of each state, which shall secure such uniform control of railroad transportation in the several states, and from one state into or through another state, as will best subserve the interest of trade and commerce of the whole country; and said commission shall include, in their annual report to the governor, an abstract of the proceedings of any such conference or convention."

It was to obviate the necessity for making commercial treaties—and in effect this section is a provision for such treaties—and to avoid the danger, confusion, and disaster certain to result to commerce between the states from this power of sovereign states over that commerce that the exclusive power was conferred upon the federal government "to regulate commerce with foreign nations, and among the several states and with the Indian tribes." Const. art. 1, § 8. This operates as a necessary, wise, and self-imposed limitation upon the otherwise sovereign power of the states over the subject. It is not a police power in any proper sense, and in our judgment much confusion has arisen by so treating it in the struggle to find some method of evading the federal compact to surrender it. It belongs, it may be, to that immense and almost illimitable residuum of governmental power which has not been technically classified; but if it has been, there is no better name for it than that by which it is known among all nations—the commercial power; or, as it is called in the constitution itself, the power to regulate commerce. It is one of the chief functions of all governments to promote and encourage the interchange of commodities and intercourse of the people among themselves and with foreign nations and neighboring states. In the exercise of this power innumerable laws are made, and, in matters relating to the international or interstate concerns of commerce, treaties and compacts are formed, of which the federal constitution is, in this respect, a conspicuous example.

If the interchange or intercourse be "within the state," it is properly called domestic commerce, if from one to another, international, or, as to our Union, *interstate* commerce; and the government may, and often does, where it can control at all, under this power "to regulate commerce," control the instrumentalities of that commerce. There are, to be sure, certain limitations on the power, as on all its other powers, arising out of the laws of private right and private property; but it is too late now to deny, in view of these decisions of the supreme court, that charges for transportation are a matter of public concern, the private property engaged being dedicated, so to speak, to a public use, and the government may therefore exercise

certain legislative control of these charges. But *non constat* that the states may, under our system of government, exercise it. If it be domestic transportation, wholly within the state, they may; nor does it cease to be wholly within because the thing transported has come from without, nor because it may be destined to go, ultimately, beyond the state; but the particular transportation for which the charge is made must be wholly within the state. If it be partly within and partly without, the state cannot regulate that within and leave the federal power to act on that without, but has no control whatever over the charges for such a transportation. It is in the very nature of the thing itself not local or of domestic concern, and the states have no more power by such a construction or characterization to regulate the rates by the uniform legislation suggested by the section of the act just quoted than they have to so regulate the rates of postage or the weights of coins. That congress refrains from establishing such uniform regulation only indicates an expression of the federal will that the rates shall be left to regulate themselves under the ordinary economic laws that govern the commerce between the states. Declamation and argument in favor of the wisdom or necessity for some regulation are appropriate in the halls of congress, at the ballot-box, or wherever the state, as one of the federal units, may bring its power to bear upon the federal will, but they cannot and should not influence the courts, state or federal, to evade or deny this distributive principle of our governmental power over the subject of transportation as an instrumentality of commerce.

Again, to interpret the opinions of the supreme court in the *Granger Cases*, as they are by this act of the Tennessee legislature and the arguments made at the bar interpreted, is to convict the court of an expression of the barest platitude by a declaration, in another form, that an act of a state legislature can have no extraterritorial force; for it amounts to nothing more to hold that when a car-load of merchandise starts across the country from New York to New Orleans, each state may, until congress acts, regulate the charges for its transportation over the rails situated in that state; because, it is apparent that, whether congress has acted or not, neither state could regulate it elsewhere, and this without the least regard to the "domestic" or "interstate" character of the commerce, or to the "direct" or "incidental" effect upon it. Every mile of the route lies in some state, and when each has acted successively on the transportation, whether the action be "direct" or "incidental," and the subject-matter of it "domestic" or "interstate," becomes wholly immaterial, and there is nothing left to support the force of these terms as used in the opinions. But they are full of significance, if we observe the distinction between a transportation that commences in one state and ends in another and one that commences and ends within the limits of a single state. By this act, and the argument in support of it, all distinctions are obliterated and all commerce is forced to become do-

mestic in order that the states may act upon it. While the car-load of goods is in New York it is domestic to that state, and so on as it rolls over each state line to the end. The inexorable logic of the argument, therefore, is that, until congress acts, there is no such thing as interstate commerce in the matter of the transportation of commodities passing in exchange between the states.

This construction ignores the most prominent predication in the opinions of the court on the subject of interstate commerce. In every case of the series affecting railroad transportation, the court affirms with great distinctness the analogy to the *Warehouse Case*, the first of the series. Now, the subject-matter of that case was *storage*, which was held to be wholly within the state, and therefore subject to its regulation as to rates, and this regulation was not to be evaded because some of *the grain* might have come from another state, and might be destined for sale beyond it. We can scarcely imagine interstate storage, and the analogy of transportation to it would be incomplete unless the transportation involved were wholly between points within the state, as it plainly was in the *Shields Case* of the series. But let us imagine an elevator on wheels, and engaged in the storage of grain while passing from one state to another. It may be affirmed on these cases, keeping the analogy in view, that grain received and stored while passing from one point in Illinois to another in the same state was a transaction within that state, and subject to its control. But surely there is nothing in them to justify the claim that for the storage of grain received at Chicago, to be delivered in Detroit, the state of Illinois could regulate for the time consumed in passing through that state, and Michigan for the time in that state. So, as to railroad transportation, keeping again the analogy in view, we do not understand these cases to justify the claim that a state may be measured from east to west and from north to south, as appears in argument has been done by the defendants here, and on the basis of distance within the state regulate the charges for all property and persons passing over the rails within the territorial jurisdiction, but only that the state may regulate local rates on shipments commencing within the state and ending within it, although the article carried may have come from without and be destined to go beyond the state, and although in this remote and indirect way interstate commerce may be involved. For example, a car-load of merchandise shipped at Nashville to Memphis, on a route wholly within the state, may have come from Louisville and may be intended to be sent from Memphis into Arkansas, without affecting the state's power of regulation, but it does not follow if it came from Richmond via Nashville or Memphis *en route* to Arkansas, or to Nashville or Memphis, that the state would have the same power of regulating rates on the distance traveled within the state; and this is the important distinction which this act overlooks.

The court does not say in these *Granger Cases*, and has not elsewhere definitely determined, that congress can ever control or regulate local rates for domestic transportation, as we have above described it, by reason of any remote or indirect influence such regulation may have on interstate commerce, but it does say that until congress assumes that power the states may continue their control. This view of these cases carries out the analogy to storage in a warehouse, and no other is consistent with it. Any argument which disregards this pre-eminently distinctive and descriptive analogy that is the very foundation stone of the opinions in the railroad cases of the series, does the cases injustice and puts them in irreconcilable conflict with every decision the court has made on the subject of interstate commerce, while the construction we give them preserves their harmony with the others. It is proper to remark here that, for the purposes of this judgment, we deem it unimportant to determine whether any particular transportation is to derive its character of locality or domesticity from the *status* of the road over which it passes as lying and having its legal existence only within the state,—in which case all transportation over it might fall within the definition of domestic commerce,—or from the nature of the contract for a carriage which, by its terms, begins and ends at points within the state, without any regard to the *status* of the road. This act makes no distinctions in either aspect of this question, and is equally defective whichever view we take of it, and this whether either or both be correct. Moreover, neither of the plaintiff's roads in the cases we are deciding is local or domestic in the sense above described.

This opinion would be unpardonably incomplete if we did not, in view of the magnitude of the interests here involved, justify our judgment by a careful examination of the adjudications above construed. In the Iowa case it does not appear what particular acts of transportation, if any, were involved. It was an injunction bill by the railroad company to enjoin the prosecution of suits against it; whether those only threatened or already brought does not appear. The opinion is mainly devoted to other questions; but, although there were two railroads connected by a bridge and making, in one sense, a continuous line between two states, and, in that sense, engaged in interstate as well as state commerce, we have the authority of the opinion itself that the plaintiff's roads, "like the warehouse, is situated within the limits of a single state. Its business is carried on there and its regulation is a matter of domestic concern." This being so, all transportation upon it was, in a legal sense, exclusively within the state, and it mattered not that the goods or passengers had come from another state or where they were destined—the transportation was wholly domestic, and the analogy to the storage of grain is complete. It was a local road leased by a foreign corporation, and in contemplation of the opinion, all transportation over it was essentially domestic, and

its interstate commerce was such only in the indirect way in which the grain elevator was engaged in like commerce.

We have the authority of the supreme court of Iowa for this construction, in a decision made long afterwards, declaring the Iowa act unconstitutional, as an attempt to regulate interstate commerce. Says that court:

"The cases of *State v. Munn*, 94 U. S. 113, etc., (citing them,) do not appear to us to sanction the validity of acts of the state legislature regulating the transportation of freight and passengers between the states. They merely determine the power of the states to fix reasonable warehouse charges, and reasonable charges for transportation of freight within the boundaries of the states, respectively, and that, when such power is exercised, although it may incidentally affect commerce between the states, yet the laws of the state are not regulations of interstate commerce because of such incidental results. That it was not intended in those cases to uphold legislation like that under consideration in this case it appears to us is conclusively shown by the reasoning in the later cases of *Hall v. De Cuir*, 95 U. S. 485, and *Railroad Co. v. Husen*, Id. 465." *Carton v. Illinois Cent. R. Co.* 59 Iowa, 148, 153; S. C. 13 N. W. Rep. 69; S. C. 22 Amer. Law Reg. 373, and note.

That was a case of the continuous shipment of car-loads of wheat from Ackley, Iowa, to Chicago, Illinois, and a claim for conformity to the rates established by the state act for so much of the distance as lay in Iowa, and the act was held a violation of the commerce clause of the federal constitution.

In the Wisconsin case, the next in the series of the *Granger Cases*, the court mainly deals again with what were evidently considered by all more important questions. Circuit Judge DRUMMOND tells us the question we are considering was scarcely argued at all in the court below, and evidently it was only incidentally considered in the supreme court. *Piek v. Railroad Co.* 6 Biss. 177. The Wisconsin act, unlike ours, contained an exception which excluded from its operation all rates of charges for "carrying freight which comes from beyond the boundaries of the state and to be carried across or through the state." Possibly, notwithstanding its terms, the act may have been construed, within the purview of this exception, not to apply to persons and property coming from other states into Wisconsin, or going from that into other states, which was not thought, however, to be its construction in the court below, though the question whether it could so apply under the *State Freight Tax Cases*, 15 Wall. 232, was reserved, and not decided in that court. The opinion of the supreme court says:

"The law is confined to state commerce or such interstate commerce as directly affects the people of Wisconsin. Until congress acts in reference to the relations of this company to interstate commerce it is certainly within the power of Wisconsin to regulate its fares, etc., so far as they are of domestic concern. With the people of Wisconsin this company has domestic relations. Incidentally, these may reach beyond the state. But certainly, until congress undertakes to legislate for those who are without the state, Wisconsin may provide for those within, even though it may indirectly affect those without."

Now, strange to say, the bill in that case attacked the law because the exemption we have noticed was itself a regulation of interstate commerce, on the theory, perhaps, that it gave an advantage to the citizens of the state over those of other states, which is sometimes applied as a test to determine whether a given law be a regulation of interstate commerce. But whether the court had the exemption section of the Wisconsin act in view, and construed the act in reference to it, is not satisfactorily shown. If, however, we turn to the report of the case to see what is meant by "this company" having "domestic relations" with the people of Wisconsin, the analogy of the warehouse case reappears, though not as distinctly as in the other cases. No particular freight charges were involved in the controversy, it being a bill by bondholders and stockholders to enjoin the company from obedience to, and the railroad commissioners from enforcing, the act, and although this Wisconsin company had been consolidated with an Illinois corporation, the court is at the greatest pains to show that it had not ceased by that consolidation to be, in a legal sense, a local road, as the Iowa road had just been held to be. Counsel say in argument here that this was for another purpose in the opinion, which is true, but it is as potential for one purpose as another, and the opinion in the language quoted so treats it by connecting the "domestic relations" of "this company" with the people of Wisconsin to this subject of interstate commerce. There is certainly nothing in the case to show *specifically* that the court held, as we are asked to hold, that a state may regulate fares and freights, for carriage between two or more states, over that portion of the route lying in that state. This construction is purely an inference drawn by those who claim it. We freely admit that, looking alone to this series of cases, and ignoring all others on the subject of interstate commerce, the construction we are giving them is somewhat inferential, but it seems to us the fairest and most reasonable. And this more clearly appears by reference to the report of this case in the court below, and to that of a contemporaneous case under the same statute in the state courts of Wisconsin, in which the pleadings and argument are more fully shown. *Atty. Gen. v. Railroad Co.* 35 Wis. 425, 449, 453, 470, 478, 484, 485, 511. The court below complained that the case, now under analysis, was scarcely argued on this point, and for that reason refused to consider it, while in the court above it was thought of so little relative importance that the dissenting opinions do not notice it, and the court disposes of it in a comparatively few lines. And yet, the misconception of these *Granger Cases*, which we are seeking to remove, is undoubtedly the foundation of a belief in the power of the states to legislate, as this act does, without limitation or qualification.

In the next case of the series, the particular character of the transportation involved is not shown, and it is of no importance on this subject; nor do the next two shed any further light on it, except by the constant reference to the *Warehouse Case*. But when we come

to the Ohio case, generally classed as one of the series, we find for the first time that the particular act of transportation is given, and that it commenced and ended within the state. Going back to the *Warehouse Case*, we find that the language of the court on this subject of interstate commerce seems to have been selected with a purpose to use the case for convenience as an analogy in the subsequent cases affecting railroads. The court says: "The warehouses of these plaintiffs in error are situated and their business carried on *exclusively within the limits of the State of Illinois*." They are likened to the carts and drays transferring grain from one railroad station to another, and their instrumentality in interstate commerce is said to be *incidental*. Certainly, this cannot be said of either of the roads in the cases we have in hand. One plaintiff is a Kentucky corporation, extending its road into this state by license of our own laws, presumably, for the primary purpose of interstate commerce. *Louisville & N. R. Co. v. Henry Co.*, (unreported,) by BAXTER, J.; *Callahan v. Louisville & N. R. Co.* 11 FED. REP. 536, by KEY, J. The other road, as shown by the bill, extends into Georgia, Alabama, and Mississippi, and in no sense can they be said to be carrying on their business exclusively within the limits of a single state. They are not like warehouses, carts, and drays, or purely local roads engaged incidentally in interstate commerce, but are great arteries of intercourse and transportation with neighboring states—as much so as the Tennessee, Cumberland, or Mississippi rivers. The analogy wholly fails unless we limit the regulation, which this act does not pretend to do, to purely local transportation commencing and ceasing at points within the state; and, even then, it may be doubtful, on these *Granger Cases*, whether the analogy they establish would apply, unless the roads were local in the sense the roads in those cases were held to be, which point we need not determine, as the act itself makes no distinction.

Turning now from the *Granger Cases* to others, and this interpretation of them becomes so plainly the correct one that it seems impossible to resist the conviction that they have been misunderstood in the reliance placed upon them to support this act. It was held in the *State Freight Tax Case*, 15 Wall. 232, that the transportation, whether by land or water, of commodities from one state to another was interstate commerce, and the prominent idea of such commerce in the minds of the framers of our federal constitution; that its direct regulation is exclusively within the control of congress; that when the subjects of regulation are in their nature national; or admit of uniform regulation, that fact demonstrates the exclusive power of congress over them; and that the state cannot, even in the exercise of its taxing power, jeopardize the freedom of transportation between the states. That the regulation of rates of charges for such transportation does admit of uniformity, cannot be denied, and certainly not by the advocates of the power to pass this act, since it provides for such uniform regulation by inviting and promoting separate ac-

tion by all the states in the manner therein pointed out. And, if the state may not, by the exercise of its *taking power*, interfere with the freedom of inter-state commerce, under what power can it act more potentially? Again, if a tax upon a commodity in transit between the states be a direct interference with the freedom of the transportation, can it possibly be said that an act which forbids the carriage by punishing the carrier unless he complies with certain prescribed conditions is any less direct in its action? We think not. The *Granger Cases* and that just cited may be harmoniously reconciled, understood as we have interpreted them, but not as the defendants' counsel and the framers of this act have construed them.

The *Daniel Ball Case*, 10 Wall. 557, and the *Montello Case*, 11 Wall. 411, S. C. 20 Wall. 439, are very clear illustrations of the force and effect of the *situs* of an *instrumentality* of commerce in determining whether the subject-matter of the given regulation be one of domestic concern only incidentally connected with interstate commerce, or a direct instrumentality of that commerce itself, and in the first case is a complete and careful definition of "commerce between the states" and the power of congress over it. We had intended to quote extensively from the opinion, because, more than any other perhaps, it explains the language used in the *Granger Cases*, but since it would prolong this opinion we forbear, and simply invite a careful scrutiny of the case. The distinctions are there pointed out between the domestic commerce, which the states may regulate as well as its agencies, and that interstate commerce which, *as to itself*, they cannot regulate at all, directly nor indirectly, incidentally or otherwise, whether congress has acted or not; but *as to the agencies of which*, until congress acts, there is left to the states almost illimitable control in any department of governmental power, so long as such control affects the commerce itself only incidentally, and does not directly interfere with its freedom. This is the thing secured by the constitutional provision, which is really a treaty or compact for absolute free trade between the states, subject to such uniform regulations as congress alone may impose. And it is doubtful if congress itself could impose one rate for Tennessee and different rates for the other states, as separate action by the states must do.

In another case the supreme court says:

"The fact that congress has not seen fit to prescribe any specific rules to govern interstate commerce does not affect the question. Its inaction on this subject, when considered with reference to its legislation with respect to foreign commerce, is equivalent to a declaration that interstate commerce shall be free and untrammelled." *Welton v. Missouri*, 91 U. S. 275, 282.

It is to be noticed in the *Daniel Ball* and *Montello Cases*, *supra*, that there was no question involving the commerce itself, but only an *instrumentality* of it, namely, a steam-boat; the inquiry being whether it was subject to the navigation laws of the United States, and its solution depending on whether Grand Rapid and Fox rivers were do-

mestic in the sense that they lay exclusively—like the railroads, in the *Granger Cases*—within the limits of a single state. It was found—and it is worthy of remark that one of them was artificially made so, like railroads—that these rivers were, as a *geographical fact*, not *domestic*, but *interstate* rivers, (if they may be so called,) and that the steam-boats were within the power of congress. But had the fact been the other way, as in the *Granger Cases*, the result would have been the same, so far as the power of congress was concerned, because it was shown that the boats were actually carrying goods between the states, and this fact would support the power of congress, which had acted as to steam-boats so engaged. This was plainly intimated, if not decided. The power of congress to regulate such an *instrumentality of commerce* is practically unlimited, because it may reach the commerce itself as well as its agencies; wherefore, there is no need to look to the character of the regulation in determining the power, but only to the character of the commerce. But when we turn to the power of the states, we must necessarily scrutinize both. The definition of interstate commerce, as given in these cases, does not change; it is fixed whether congress has acted or has not acted, and the real question, as to the states, always is twofold,—does the proposed law act upon the *commerce itself*, or does it act *only* on the *instrumentality*? If the first, it is always void; if the second, its validity depends on the circumstances. Here lies the fallacy of this and all legislation, which overlooks the not always broad distinction between regulating the *commerce itself* and its *instrumentalities*, and we have the authority of the supreme court in the next case cited for saying it is often disregarded. We quote again:

“Commerce with foreign countries and among the states, strictly considered, consists of intercourse and traffic, including in these terms navigation, and the transportation and transit of persons and property, as well as the purchase, sale, and exchange of commodities. For the regulation of commerce as thus defined there can be only one system of rules applicable alike to the whole country, and the authority which can act for the whole country can alone adopt such a system. Action upon it by separate states is not, therefore, permissible. Language affirming the exclusiveness of the great power over commerce as thus defined may not be inaccurate, when it would be so if applied to legislation upon subjects which are merely auxiliary to commerce.” *Mobile Co. v. Kimball*, 102 U. S. 691, 702.

Can anything be more explicit than this, and does it not apply to this legislative act? The court has repeatedly said, as here, that the transportation of the commodity exchanged is a part of the commerce itself; and if the transit be between two or more states, it is, *ex vi termini*, interstate transportation and interstate commerce. Being so, does not any law which controls the price of the transportation, or restricts it under pains and penalties, affect the commerce itself, and this as directly as possible? It is a delusion to call such a law a regulation of the *instrumentality*, and the delusion is not concealed by naming the process a regulation of railroads or corporations or mo-

nopolies, nor yet by decrying these as instrumentalities which *need* regulation, as no doubt they often do in this regard. It is the instrumentality by which we reach that intangible thing called commerce, and in that sense the instrumentality, and not the commerce, is always regulated; but this confuses the distinction above adverted to by the supreme court.

To illustrate again, take a person engaged in interstate commerce as a carrier on ocean, river, railroad, or highway. If he or his agents be found within the limits of any state violating its laws, he may be arrested and imprisoned; if his property fall under condemnation of the law, it may be seized, although engaged in the commerce; he, his agents and property, and even his receipts for the freight, may be taxed, as well as any special franchise or privilege enjoyed by him, if these taxes be not disguised regulations of commerce. *State Tax Gross Receipts Case*, 15 Wall. 284; *Memphis & L. R. R. Co. v. Nolan*, 14 Fed. Rep. 532. By these and numerous other laws the commerce may be incidentally affected, even to destruction in some cases, through operation upon the *instrumentality* or *agency* alone; and where the carrier is a corporation, there are extended fields for such operation.

But if the carrier in the illustration is engaged in *domestic* commerce, where the state can act *directly* upon it, the capacity for affecting the articles of interstate commerce which may fall into his hands *to be locally transported* is increased; but the effect on *interstate* commerce is still incidental, and although the particular regulation ceases to act on the instrumentality alone, but acts directly on the state commerce itself, yet the distinction between a direct action upon the interstate commerce, and an incidental effect upon it through action upon the instrumentality, remains obvious; for, in such a case, the domestic transportation is itself only an instrumentality, agency, or auxiliary of the interstate commerce, which, until congress act, remains subject to state control. This distinction must be observed in determining what is incidental only in its action on interstate commerce and what is direct; and it runs through all the cases. But when a plain and unmistakable case of direct action on the commerce itself is presented,—as all regulations or restrictions on the contract of transportation must be,—all that need be looked to is the character of the commerce so regulated, and if it be interstate transportation, as defined in the cases cited, regulation or restriction by the state is void. If, for example, as in *Hall v. De Cuir*, 95 U. S. 485, the state, exercising its power to secure equal civil rights in the matter of transportation, undertakes to prescribe the privileges a passenger shall enjoy, it is void, although congress has not acted upon that matter, and the passenger be going only between points in the same state. If, again, the state undertake, beyond the scope of vital necessity, to exclude or regulate the entrance of diseased cattle into the state, it is void. *Railroad Co. v. Husen*, 95 U. S. 465. And if, under the disguise of an inspection law—the power of inspection being especially reserved to

the states in the federal constitution—the state attempt to exclude or regulate the introduction of passengers thought to be paupers, criminals, etc., it is void. *People v. Co. Gen. Transatlantique*, 107 U. S. 59; S. C. 2 Sup. Ct. Rep. 87. And these examples might be multiplied.

It does not advance the argument to invoke the *police power* of the state to support this act of the legislature; for, with noticeable emphasis, it is held in the last two cases cited, as everywhere, that neither in the exercise of its police nor any other power, can the state make a law which is in effect a regulation of interstate commerce. Nor does an appeal to the power of the state over the corporations of its own creation strengthen the argument; for it cannot, by the charters themselves, make regulations of interstate commerce. Such regulation is as void there as elsewhere. *Telegraph Cases*, 96 U. S. 1. If control over the rates be desired by the state under all circumstances, it might possibly secure it by prohibiting its corporations from engaging in interstate commerce in any other way than as domestic roads, and confining them absolutely to the business of transportation within the state, if this would not of itself be an invalid prohibition as a discrimination against interstate commerce. Possibly, when incorporators ask a grant of franchises to enable the company to engage in interstate commerce, and, in consideration of the grant, *agree* not to charge more than a certain *maximum*, or to establish a certain schedule of rates for the transportation of commodities carried in such commerce, they would be bound by it; but not, be it remembered, because there has been a lawful exercise by the state of a municipal power to prescribe such rates,—for that would be none the less a regulation of interstate commerce, and *as such* void,—but because the incorporators, as owners, with power, in the absence of paramount regulation by law, to prescribe their own rates, have established these. *Consensus facit jus*.

It is obvious, however, in such a case, that the contract cannot be subsequently changed *qua* contract without the consent of both parties, and the remedies for its violation would be those available for a breach of the contract; and where, in the absence of congressional legislation, the consent of the carrier is wanting to any change in the charter, it is inoperative to bind him, not so much because the legislature cannot impair the obligation of a contract as because, without his consent as owner, there can be no regulation at all by state legislation. It being in such case a matter of contract simply, and not of municipal law to regulate the rates, there can grow out of it no enlarged power over interstate commerce, whatever else may grow therefrom. The act *qua* a regulation of interstate commerce is as invalid in the charter of a transportation company as elsewhere in any statute, and necessarily as invalid in any subsequent statute, no matter how full the reservation of power over the charter may have been made.

We need not say that, as to the power to regulate the domestic or local commerce of the company chartered, other principles may come into play. There is no doubt that the fact that our railroads, until recent years, and before the day of consolidations, combinations, trunk lines, and continuous rails were regarded as purely *local* institutions, beginning and ending within the boundaries of a single state, and the further fact that they were all owned by corporations whose migratory capacity was limited and almost denied, have done much to intensify the notion of their still being mere local agencies of commerce. But by active state legislation had for the purpose they have now, for the most part, become continuous avenues of commerce among the states, sweeping over state lines as easily as the Mississippi river rolls along them, and stretching quite as far. We do not see why this fact should not have the same influence it had in *Hall v. De Cuir*, *supra*, and the other cases, and which was suggested by Mr. Justice MILLER in *Gray v. Clinton Bridge*, 7 Amer. Law Reg. (N. S.) 149.

The supreme court of Iowa denied validity to the law of that state on the same ground we take, as did also the circuit court of the United States for that state. *Canton v. Illinois Cent. R. Co.*, *supra*; *Kaiser v. Illinois Cent. R. Co.* 18 FED. REP. 151. The case of *Georgia R. R. v. Com'rs*, (not yet reported,) did not touch this question, nor does the case in the circuit court of the United States for that state mention it. *Tilley v. Railroad Com'rs*, 4 Woods, 427; S. C. 5 FED. REP. 641.

The scope and extent of the principle we are enforcing with the distinctions we have endeavored to point out between the characteristics of federal power over commerce between the states, and the domestic power of the state over the instrumentalities thereof found within its borders, find an illustration in the power of the federal congress, on the one hand, over canals owned and constructed by the state itself, and wholly within it, and on the other, of the state legislature over ships and watercraft in the establishment of liens for domestic supplies furnished in the home port. *In re Boyer*, 3 Sup. Ct. Rep. 434; *The B. & C.* 18 FED. REP. 543; *Escanaba Co. v. Chicago*, 107 U. S. 678; S. C. 2 Sup. Ct. Rep. 185; *The Lottuwanna*, 21 Wall. 558; *The Illinois*, 2 Flippin, 383.

It is not necessary to go into any more elaborate examination of the cases in the supreme court on this particular subject of interstate commerce, for we are relieved of that necessity by an eminent writer, who has, by his thorough and superior authorship, distinguished himself above the mere book-makers of this day. He has carefully examined and classified the cases in a useful manner, and evidently laments that he cannot find in the rulings of the court any larger jurisdiction for the states over this subject of interstate commerce than he thinks they establish. The cases since Mr. Pomeroy wrote will be cited in a foot-note to this opinion for convenience of consultation. 4 South. Law Rev. (N. S.) 357. See, also, 7 South. Law Rev. 377; 3

South. Law Rev. (O. S.) 656; 13 Amer. Law Reg. (N. S.) 1, 185; 23 Amer. Law Reg. 81; 12 West, Jur. 17; 12 Cent. Law J. 194; Pierce, R. R. 468.

The whole list, from *Gibbons v. Ogden*, 9 Wheat. 1, and *Brown v. Maryland*, 12 Wheat. 419, to the latest, point with reasonable certainty to the line between valid and invalid legislation by the states. The *Granger Cases* must take their places in this line and conform to it, for there is not the least indication of any purpose to overrule the other cases, and an abundant manifestation in subsequent cases of adherence to them. They show that the states may tax, inspect, police, and in other abundant ways, by the exercise of any kind of power they possess, regulate the agencies and instrumentalities of interstate commerce; they may dig canals, build railroads, improve rivers and harbors, establish ferries, build wharves, construct dams and bridges, and control pilotage; or they may authorize persons and corporations to do these things, and regulate them after they are constructed or established; but neither in their taxation, their inspection, their policing, or other exercise of power, can they by their regulations act directly on the commerce, as these cases define it, between the states. As to that, until congress acts, the commerce must be free.

We do not overlook the argument that this act leaves the carriers free to charge what they please, so long as it is not unreasonable and unjust. Nevertheless it prescribes regulations for determining what is unreasonable and unjust, based on an assumed power over the subject which we have endeavored to show does not exist. The character of the regulation is immaterial where you cannot regulate at all. Carriers cannot charge more than is reasonable and just, but if there be needed any legislation to more effectively determine what is unreasonable and unjust, and to prevent discrimination, it must come from congress in cases like this. We hold, without the least hesitation, after this examination of the subject, that an act of the legislature which attempts, as this does, to regulate, no matter how, *all* transportation over the railroads in this state, and to revise *all* tariffs of charges for transportation over those roads, is, so far as it relates to the plaintiffs in these cases before us, an attempt to control the compensation to be charged by them for the transportation of commodities and persons in transit between two or more states, for that portion of the route lying within this state, and therefore invalid as a regulation of interstate commerce, acting, as it does, in the most direct way possible on that commerce itself. This act makes no discriminations whatever in this regard, and we cannot, by judicial action, insert them in the act by limiting our injunction in respect of the interference of defendants with the charges by plaintiffs for fares and freights in any way. This would be to legislate by judicial decree, for there is nothing in the act to guide us in fixing our limitations. It does not appear that the legislature would have passed this law, or any law, confining its power as we have suggested it is

confined by the federal constitution, or the interpretation we here give that instrument. If the legislature cannot legislate as it has proposed to do, we do not know that it wishes to legislate at all. *Cooley, Const. Lim. (4th Ed.)* 214-219; *Packet Co. v. Keokuk*, 95 U. S. 80; *Neely v. State*, 4 Baxt. 174. Hence, we must take the statute as we find it, and restrain the defendants from any action under it as to these plaintiffs.

There are other grounds of fatal objection to this legislation which have been stated by the learned circuit judge in which we all concur; and other questions have been ably argued by counsel, but we do not deem it essential to express any opinion on them because their determination, either way, would not affect our decision on this motion.

Consult *Turner v. Maryland*, 107 U. S. 88; S. C. 2 Sup. Ct. Rep. 44; *People v. Co. Gen. Transatlantique*, 107 U. S. 59; S. C. 2 Sup. Ct. Rep. 87; *Wiggins v. East St. Louis*, 107 U. S. 365; S. C. 2 Sup. Ct. Rep. 257; *Transp. Co. v. Parkersburg*, 107 U. S. 691; S. C. 2 Sup. Ct. Rep. 732; *Telegraph Co. v. Texas*, 105 U. S. 460; *Bridge Co. v. U. S. Id.* 470; *Packet Co. v. Catlettsburg*, Id. 559; *Webber v. Virginia*, 103 U. S. 344; *Tiernan v. Rinker*, 102 U. S. 123; *Lord v. Steamship Co.* Id. 541; *Vicksburg v. Tobin*, 100 U. S. 430; *Packet Co. v. St. Louis*, Id. 423; *Guy v. Baltimore*, Id. 434; *Machine Co. v. Guge*, Id. 676; *Trade-mark Cases*, Id. 82; *Transp. Co. v. Wheeling*, 99 U. S. 273; *Beer Co. v. Massachusetts*, 97 U. S. 25; *Cook v. Pennsylvania*, Id. 566; *The Telegraph Case*, 96 U. S. 1.

KEY, J. I have not thought it necessary to prepare any opinion in these cases, and am content to announce that I concur in the opinions just read.

ESTES and others v. SPAIN and others.

(District Court, N. D. Mississippi, W. D. March 3, 1884.)

DEED OF ASSIGNMENT BY INSOLVENT—VALIDITY—BURDEN OF PROOF.

A deed of assignment *prima facie* good may be impeached for circumstances connected with, and conduct of the insolvent at and about the time of, the execution of it. In such cases the burden of proof is on the grantor or his beneficiaries under the assignment to show the validity of the deed.

In Equity.

R. H. Taylor, J. G. Hall, and Luke Wright, for complainants.

Sullivan & Sullivan and E. Mayes, for defendants.

HILL, J. This cause is submitted to the court upon bill, answers, exhibits, and proofs, from which the following facts appear:

S. H. Gunter, a merchant of the town of Sardis, in this state, was, on the twenty-fifth day of March, 1882, largely indebted to the complainants, and other merchants,—a number of whom are made defendants to the bill,—and on that day executed a deed of general assignment, purporting to convey all

of his property, real and personal, and all his notes, books of account, and other assets of every description, to S. G. Spain, as trustee, for the purpose of paying his debts, which, it is admitted on the face of the assignment, he was unable to pay in full, reserving, however, from the conveyance the property owned by him exempt by law from execution and sale, a schedule of which is given. Soon before, and about the same time, said Gunter executed another conveyance, conveying to J. B. Boothe, as trustee, certain real estate described therein, to secure and save harmless his sureties upon a note which he owed to the Sardis Bank; and at or about the same time said Gunter transferred and delivered to a number of his clerks and employes certain notes and accounts in payment of an alleged indebtedness to them; and shortly before this time, and at a time when, from the proof, he contemplated conveying away and dispossessing himself of all his visible means, he delivered to his wife the sum of \$900 in payment of an alleged indebtedness to her for money which it is claimed by him he received from the estate of his wife's grandfather, and belonging to his wife, in the year 1858. Within a short time after these conveyances were made and money paid, defendants Bickham and Moore, and other creditors, sued out attachments in this court and caused the same to be levied by the marshal on the goods and assets in the hands and possession of said Spain, the trustee to whom they had been delivered under the assignment. Complainants, who are by far the largest creditors, who are preferred under the assignment, filed this bill, alleging, among other things, that the assignee was unwilling further to execute the trust conferred upon him by said assignment, and had abandoned the same; that the amount of the debts upon which attachments had been levied upon the property far exceeded its value, and that unless the trustee, or some one else interested, would give a claimant's bond, the property would be sold at a great sacrifice; and alleged that the assignment executed to said Spain was made in good faith, valid, and a binding security for the debt due to complainants; and prays that these attaching creditors be enjoined from proceeding further with their said attachment suit; that said deed of assignment be, by decree of this court, declared a valid assignment; and that a trustee or assignee be appointed to execute the trusts created by it, in the room and stead of said Spain, the assignee therein.

The answers deny that the assignment was made in good faith, and is a valid and legal transfer of the property and assets therein conveyed for the purposes expressed, as against the defendants, who were creditors of the assignor before the assignment was made, and deny that complainants are entitled to the relief prayed for in their bill. The question of the validity of the assignment is the main question to be determined. If there is any provision on the face of the assignment, or if there is any provision wanting in it, which renders it fraudulent and void in law, or if the facts as shown by the evidence show a purpose on the part of the grantor to reserve a benefit to himself, or to hinder or delay his creditors, or any of them, in the collection of their debts, then the assignment must be declared fraudulent and void and the bill dismissed. As the debt due complainants is an antecedent debt, under the well-settled rule in this state, they or the assignee do not occupy the position of a *bona fide* purchaser without notice; so that if the assignment is fraudulent and void for any reason, as against the grantor, the beneficiaries under it can take nothing by it.

The first question to be considered is, does the assignment on its face contain any provision, or omit any provision, which, in its effect, will or may hinder and delay the grantor's creditors, or work an injury to them, not sanctioned by law? The assignment was evidently drawn by a skillful lawyer, with unusual care, and most of the provisions and omissions which are most usually relied upon and sustained in holding such conveyances fraudulent and void are in this assignment avoided, and at first view there would appear no objection to it, appearing on its face. The clause in the assignment providing for the disposition of the moneys arising from the collection of debts and the sale of property, after providing for the payment of the costs and expenses of executing the trust, and for the payment of the preferred creditors, provides that the supplies, if any, shall be paid *pro rata* to the unsecured creditors, whose names are given and the amount due to each, as stated in a schedule annexed to the assignment, and made part of it, and to any other creditors who are omitted therefrom, but does not mention a time in which these omitted creditors shall present their claims, nor the mode in which they shall be established. The assignee is directed to make the distribution with convenient speed, but fixes no limit of time in which it should be done. It is insisted by defendants' counsel that these omissions leave it to the discretion of the assignee, who is the assignor's confidential friend, former book-keeper, and wife's present partner, to postpone the distribution to an indefinite period, and to the delay and hinderance of the creditors in collecting their debts.

It has been held by the supreme court of this state in the case of *Mayer v. Shields & Mulhally*, 59 Miss. 107, and by this court in the recent case of *Bickham & Moore v. Lake & Austin*, that, whenever, in a general deed of assignment by an insolvent debtor, it is required that something must be done by the debtor in order to participate in the funds, that a reasonable time, not too long nor too short, must be given, in which to do the thing required to be done, and that the want of such a provision will enable the assignee to unduly postpone the distribution to the hinderance and delay of the creditors, and thereby render the assignment in law fraudulent and void. In this case nothing is required of the omitted creditors to be done in order to participate in the funds to be distributed, and it is a matter of some doubt whether this defect alone renders the conveyance void; but these omissions are circumstances to be taken in connection with the proof in the cause to determine whether or not there existed fraud, in fact, in the execution of the assignment. The assignment further provides that if any property or debts have been inadvertently or by mistake omitted, the assignees shall place them upon the proper schedules; and this, it is claimed, renders the assignment void. The indebtedness mentioned means the debts due to the assignor, and not those due by him, and this provision was right and proper, and could not in any way prejudice the creditors; but the contrary.

Admitting the assignment to contain nothing on its face to invalidate it, the next question is, does the evidence show a fraudulent purpose in the grantor in making it? The proof abundantly shows that the grantor was hopelessly insolvent, and that for 12 days, by his own testimony, he knew it, and contemplated making a general assignment of all his property and assets, saving his exemptions. Hence, all he did subsequent to that time in the disposition of his property, assets, and money must be considered in determining this question. The proof shows that the goods and merchandise were sold mostly for cash, and at low rates. The proof further shows that subsequent to that time he paid his wife the sum of \$900, which he claims he was advised by his counsel to do, in payment of a debt which he claims he owed her for money received from her grandfather's estate in Alabama in the year 1852. There is proof tending to show that his wife repeatedly took money from the drawer during this time, and that more goods than usual were taken to his residence from the store.

If all this was fair, it might have been explained by the testimony of Mrs. Gunter. She was present when her husband's deposition was taken; yet she was not examined. The rule is that the transactions between husband and wife are to be strictly scrutinized, and if there are even slight circumstances going to impeach the *bona fides* of the transaction, the burden of proof is thrown upon those claiming under it, to establish the fairness and validity of the transaction. Coupled with this is the rule that when suspicious circumstances are shown against the fairness of the transaction, and the party required to explain it, if fair, fails to produce proof to establish its fairness, the presumption is that the transaction was unfair, or that it is to be taken against its fairness. This rule applies to the facts of this case with no little force. Notwithstanding the assignor in his testimony refers to the records of the courts in Alabama and in this state, it was the duty of the complainants to produce the proof, and not that of the defendants to disprove it. As part of the same scheme to dispose of all his means, the assignor disposed of part in the payment of what was due his clerks. This he had a right to do, as well as to pay a *bona fide* debt due his wife. The only question in either case is, was the debt due and owing, and that received for it reasonable in value, and the payment made in good faith and free from fraud? The proof further shows that upon the same night that the assignment was executed, acknowledged, and delivered to the clerk for record, there was another deed executed by the assignor in the form of a deed of trust, for the declared purpose of securing his sureties upon a note due to the Bank of Sardis for \$1,000. This deed being executed, evidently, as part of the same purpose and scheme of an entire disposition of his means by the assignor, and as the assignment provided for the payment of the same debt as a preferred claim, and also embraces the same property conveyed in the trust deed, subject to the provisions of the trust deed, the two instruments must be considered together, and the trust deed, under the circumstances of

their execution, must be considered as a partial assignment of the property of said Gunter, and controlled by the same rules of law applicable to the deed of assignment to Spain.

The liability of the sureties was on an antecedent debt to the bank. There was no new consideration to sustain it. The grantor was then hopelessly insolvent, and at the time of its execution was then in the act of transferring all of his property and assets of every description. The conveyance provided that the grantor should retain possession of the property until the maturity of the debt, which did not take place until December 1, 1882, and not until the beneficiaries in the trust deed should request the trustee to take possession of the property conveyed, and sell the same. Unless the property should become endangered as a security for the indebtedness, when the trustee might take possession of it and hold it until the debt and costs were paid, or the property was sold, but until possession should be demanded by the trustee, the grantor should hold the same subject to the trust deed. If this had been a general assignment, this reservation of the use of the property would unquestionably render it fraudulent in law. The assignment conveys the same property to secure the same debt, as a preferred debt, but subject to this trust deed. According to the trust deed a sale could not take place until the first of December, 1882, and not then until the trustee was notified in writing by the beneficiaries to take possession of and sell the property, unless there was danger of its being lost; and, as the property is real estate and immovable, it is difficult to see how this contingency could arise; and, in the mean time, the grantor was to hold and enjoy the use of the property. It is difficult to determine that this delay would not have the effect of hindering and delaying Gunter's other creditors; and were this all that is in the case, I am of opinion it would establish the fraudulent character of the conveyance. It will not do to say that the property might have been sold subject to the trust deed, for in that event the value of the interest sold would be too uncertain for the purchaser to pay any but a small sum.

But the complainants allege in their bill that the conveyance was made in good faith and free from all fraud, and claim affirmative relief. This allegation is denied under oath by the answer, and throws the burden of establishing the averment upon complainants. To grant to complainants all that they here claim, that is, that the conveyance is *prima facie* valid, and free from fraud; yet, when circumstances are proved casting a doubt upon the validity of the conveyance, the burden is thrown upon the complainants to establish its fairness and freedom from fraud. When all the circumstances already stated, and others shown from the proof, are considered, occurring before and at the time of the execution of this assignment, I am satisfied that the conveyance must be held as fraudulent and void, and that complainants are not entitled to any relief under their bill.

The result is that the injunction heretofore granted must be dissolved, and the bill dismissed, at complainants' cost.

MULLER and another v. NORTON and others.¹

(Circuit Court, N. D. Texas. February, 1884.)

1. ASSIGNMENT TO CREDITORS.

An assignment for the benefit of creditors, under the laws of Texas, wherein the assignor has expressly reserved an interest to himself, to the exclusion of his creditors, is null, void, and of no effect.

Lawrence v. Norton, 15 FED. REP. 853, followed.

2. SAME.

Such an assignment is a contract between the assignor and assignee, which, while it may be aided by the law, must be taken and construed by the terms and provisions expressly stipulated therein; and any stipulation therein which is intended to hinder or delay non-consenting creditors must find warrant therefor in the law, or the assignment to such creditor is null and void.

Donoho v. Fish, 58 Tex. 167, and *Keevil v. Donaldson*, 20 Kan. 168, followed.

On Demurrer.

Wright & Wright, for plaintiffs.

Crawford & Crawford, for defendants.

PARDEE, C. J. It was held by this court, in *Lawrence v. Norton*, that an assignment for the benefit of creditors, under the laws of Texas, wherein the assignor has expressly reserved an interest to himself, to the exclusion of his creditors, is on its face null, void, and of no effect, (see 15 FED. REP. 853;) and in that case we also held, considering the act of 1879 in relation to assignments, that, under the third section of that act, assignments for the benefit of preferred creditors, who are preferred on their own election, under stress of a penalty forfeiting their whole claim, are not in terms aided by the law, and are not favored by the courts. We still adhere to the correctness of our conclusions in that case, and now, as then, we see no antagonism between them and the decisions of the supreme court of the state of Texas in relation to the same law.

In the case now under consideration, it seems to us, the following propositions are equally well taken, and can be equally supported on principle and authority. The assignment in favor of creditors, under the act of 1879, is a contract between the assignor and assignee, which, while it may be aided by the law, must be taken and construed by the terms and provisions expressly stipulated therein. *Donoho v. Fish*, 58 Tex. 167; *Keevil v. Donaldson*, 20 Kan. 168. That when an assignment is made, under the third section of the act of 1879, any stipulation therein which is intended to hinder and delay non-consenting creditors must find warrant therefor in the law, or the assignment as to such creditors is null and void. *Keevil v. Donaldson*, *supra*; *Lawrence v. Norton*, *supra*; *Bryan v. Sundberg*, 5 Tex. 423. See, also, *Jaffray v. McGehee*, 107 U. S. 361; S. C. 2 Sup. Ct. Rep. 367.

¹Reported by Joseph P. Hornor, Esq., of the New Orleans bar.

The assignment in this case, which is under the third section, provides: "And for said purpose the said Fred. Muller and A. Jacobs are hereby authorized and directed to take possession at once of the property above conveyed and convert the same into cash as soon and upon the best terms possible for the best interest of our creditors." This provision authorizes the assignees, in their discretion, to dispose of the assigned property on credit. See *Moir v. Brown*, 14 Barb. 39; *Schufelt v. Abernethy*, 2 Duer, 533; *Rapalee v. Stewart*, 27 N. Y. 311; *Hutchinson v. Lord*, 1 Wis. 286; *Keep v. Sanderson*, 2 Wis. 31. For other authorities see Burrill, Assign. § 222. It is a badge of fraud. *Carlton v. Baldwin*, 22 Tex. 731; and see Burrill, Assign. § 221. Such provision is not authorized by law, the said act of 1879 being silent as to the method of disposing of assigned property. The non-consenting creditors being compelled, under the law, to submit to a forced stay of execution until the consenting creditors are paid in full, it follows that a sale on credit, the same not being authorized by law, hinders and delays such non-consenting creditors beyond the sanction of the law, and consequently defrauds them. It is urged that the assignee need not sell on credit, and, unless he does, the creditors are not hurt. This may be true, but the creditors are not obliged to await the event. The assignment placed it in the power and discretion of the assignee to prolong the execution and closing of the trust for an indefinite period. This was not only unauthorized by law, but was against the policy of the law, for it cannot be denied that the policy of the law is to secure a speedy settlement of the trust and distribution of the assigned property. An assignment in favor of creditors which in effect authorizes the assignee to sell the property conveyed in a method not permitted by the statute, must be void; for contracts and conveyances in contravention of the terms or policy of statute will not be sanctioned. See *Jaffray v. McGehee*, *supra*.

It is further claimed in argument that to give effect to the objections urged against the assignment, and to hold the same invalid for fraud apparent on its face, is to sanction and permit the very evil which is the subject of complaint—that is, to give the attaching creditors a preference, and a preference, too, over creditors who have been snared and entrapped by the law. To this it is sufficient to answer that the court is compelled to decide between two sets of preferred creditors—the consenting creditors and the attaching creditors. The one may be as meritorious as the other; but while the former may be open to the charge of collusion, and the latter to the charge of rapacity, the law favors the diligent and vigilant. The trouble arises with the debtor who wants to go further than the law of 1879 warrants, in driving creditors to abandon their just claims and demands.

The demurrer should be sustained; and it is so ordered.

MCCORMICK, J., concurs.

STADLER and others v. CARROLL, Garnishee.¹

(Circuit Court, S. D. Texas. February, 1884.)

ASSIGNMENT.

An assignment which authorizes the assignee to sell the assigned goods on credit, which undertakes to distribute the remnant after paying consenting creditors, in opposition to the terms and provisions of the law, and by which the assignees, by such distribution, exclude from the benefits of the assignment their individual creditors, and reserve an interest for themselves, is unauthorized by law. *Lawrence v. Norton*, 15 FED. REP. 853, and *Muller v. Norton*, ante, 719, followed.

On Demurrer to Answer of Garnishee.

Crawford & Crawford, for plaintiffs.

Wright & Wright and *J. A. Carroll*, for garnishee.

PARDEE, J. The assignment in this case, which is under section 3 of the act of 1879, is attacked for fraud apparent on its face, to-wit: (1) It prefers creditors for rent, taxes, and assessments. (2) It authorizes the assignee to sell the assigned goods on credit. (3) It undertakes to distribute the remnant after paying consenting creditors, in opposition to the terms and provisions of the law. (4) The assignors, by such distribution, exclude from the benefits of the assignment their individual creditors, and reserve an interest for themselves.

The case of *Lawrence v. Norton*, 15 FED. REP. 853, and *Muller v. Norton*, ante, 719, gives sufficient reasons for sustaining the second, third, and fourth grounds. On the first ground it is not necessary to pass.

The demurrer is sustained.

McCORMICK, J., concurs.

MALVIN and others v. WERT, Assignee.¹

(Circuit Court, N. D. Texas. February, 1884.)

ASSIGNMENT TO CREDITORS.

An assignment for the benefit of all the creditors, without proof or suggestion of insolvency, where there is no attempt to prefer any creditor, but a decided attempt to hinder and delay them all, is unauthorized by law.

On Demurrer to Answer.

Ray & Stanley and *L. T. Smith*, for plaintiffs.

Wright & Wright, for defendant.

¹ Reported by Joseph P. Hornor, Esq., of the New Orleans bar.

PARDEE, J. In this case, which is one of assignment for the benefit of all the creditors, there is no attempt to prefer any creditor, but a very decided attempt to hinder and delay them all. Without any suggestion of insolvency, or contemplation of insolvency, the assignor provides that his assignee shall dispose of the assigned goods, consisting of wares, liquors, and merchandise, in the customary course of trade, for 60 days, and then, if there is anything left undisposed of, the remaining goods shall be sold at public auction for cash, after advertising during the time provided by law for the sale of property seized under execution, and providing that during the delay of advertising the assignee shall continue the disposition of goods at private sale. The assignee is given no option. The course laid out in the assignment is the one he is bound to follow. The time required by law for advertising goods to be sold under execution is not less than 10 days. The assignment, then, without any suggestion of insolvency, compels the creditors to a forced stay of 70 days. If the assignor can compel a stay of 70 days, why not for 7 times 70 days? We find no authority in the law of 1879 for such provision. We are aware that assignments that make no preferences, but provide for an equal distribution among all the creditors, should be favored. "Equality is justice." It is with this view that we lay no stress on the objections urged against this assignment, that the deed does not show the maker's insolvency, nor assign in terms all the property that the debtor may have subject to the demands of his creditors. If the debtor has property concealed within the state, the law aids the assignment, and if the property can be found it passes to the assignee. See *Blum v. Welborne*, 58 Tex. 157. If the debtor has property beyond the state it can be reached by creditors who may so choose, just as well as if the assignment had not been made, for the assignment compels the discharge of no debt, nor the release of the debtor. But with this disposition to favor and sustain this assignment, we are unable to see our way clear to sanction the enforced stay of execution which hinders and delays all creditors, and, being unauthorized by law, consequently defrauds them all.

The demurrer is sustained.

MCCORMICK, J., concurs.

UNITED STATES v. WHITE, Receiver, etc.

*Circuit Court, N. D. New York. March 13, 1884.)***TAXATION—NOTES USED FOR CIRCULATION—NOTES REDEEMABLE IN GOODS.**

The tax imposed by the act of congress of February 8, 1875, § 19, upon "notes used for circulation," is a charge upon such notes only as are intended to circulate as money. The act bears no reference to the so-called notes issued by mercantile firms to be redeemed in goods.

At Law.

Martin I. Townsend, U. S. Atty., for the United States.

John L. White, for defendant.

WALLACE, J. This is a writ of error to the district court for the Northern district of New York, brought to review a judgment of that court in favor of the defendant. The first question presented by the bill of exceptions is whether certain obligations issued by the firm of Aldrich, Sweetland & Co. are liable to taxation under section 19 of the act of congress of February 8, 1875, entitled "An act to amend existing customs and internal revenue laws, and for other purposes." Section 19 reads as follows:

"Every person, firm, or association other than national bank associations, and every corporation, state bank, or state banking association, shall pay a tax of ten per centum on the amount of their own notes used for circulation, and paid out by them."

The firm of Aldrich, Sweetland & Co., merchants, had issued, paid out, and put into circulation, in the neighborhood of their place of business, their obligations or promises to pay in goods at their store, varying in amount from 5 cents to \$5 each, and amounting in the aggregate to nearly \$5,000, in form as follows: "Due the bearer one dollar in goods at our store. Kennedy, N. Y., Oct. 14, 1878. ALDRICH, SWEETLAND & Co."

If the meaning of the term, "notes used for circulation," could not be satisfactorily ascertained by a reference to other acts of congress *in pari materia*, the question presented would be a more doubtful one, because, although such promises to pay are not negotiable notes, inasmuch as they are not payable in money, they are notes within the generally-accepted meaning of the word. A literal reading of the section would subject to taxation every note an individual might execute and deliver, unless there is some special meaning to the term, "used for circulation;" yet no one would contend that the section was designed to have this extended application. More especially would such a construction be a startling one, in view of the provisions of section 20 of the same act, which imposes a tax of 10 per centum on the notes of any person, firm, or corporation used for circulation by all other persons, firms, and corporations. It is not to be supposed that congress intended by the act in question to subject all promissory notes circulating in the business of the country to a tax of 10

per centum—a tax double that imposed in 1862 to meet the exigencies of the war to preserve the Union. It is therefore necessary to look for some more restricted meaning of the term, “notes used for circulation.” That meaning may be found by a reference to other provisions in the laws of congress *in pari materia*, which, upon familiar rules of construction, should always be considered in solving questions of interpretation of statutes. By such reference it will appear that “notes used in circulation,” “circulating notes,” and “circulation,” as that word is used in relation to the instrumentalities of banking operations, are equivalent and synonymous terms.

Section 21 of the act in question provides how the tax imposed by section 19 shall be returned and collected, and, instead of the words “notes used in circulation,” uses the words, “circulating notes.” The context of the three sections, 19, 20, and 21, shows plainly that the taxes, within the contemplation of congress and the subject-matter of the legislation, are those relating to banking capital in the hands of corporations and individuals. According to the scheme of the existing internal revenue laws, those taxes are imposed not only on the capital directly employed, but also upon the deposits and circulation incident to banking operations. The word “circulation,” in this connection, is defined by the lexicographers as “currency; or circulating notes or bills current for coin.” Webster. That this is the subject of taxation in the sections in question is obvious, because these sections in the act of 1875 are a substitute for the pre-existing provisions of law, respecting the taxation of banks and bankers, as found in the third clause of section 3408, Rev. St. That clause imposed a tax of “one twenty-fourth of one per centum each month upon the average amount of circulation issued by any bank, association, corporation, company, or person, *including as circulation all certified checks and all notes or other obligations calculated or intended to circulate or to be used as money.*” In lieu of the tax of one twenty-fourth of one per centum a month, upon notes “calculated or intended to circulate for money,” thus imposed, the act of 1875 imposes a tax of ten per cent. per annum on “notes used for circulation.” Both the earlier and the later law deal with the same persons, and the same subject of taxation; but the later act, in harmony with the general legislation of congress since, lightens the burden imposed. It thus seems clear that the “notes used for circulation,” taxed by the act of 1875, are notes calculated or intended to circulate for money. That obligations or notes of the character put forth by the makers here are not obligations intended to circulate as money was distinctly held by the supreme court in *U. S. v. Van Auken*, 96 U. S. 366. In that case the defendant was indicted for paying out and circulating similar obligations, under an act of congress declaring that no private corporation, firm, or individual, should make, issue, circulate or pay out any note or other obligation for a less sum than one dollar, *intended to circulate as money*, and the court decided that, as such obligations were not

solvable in money, but only in goods, there was no offense within the meaning of the statute.

As the obligations in question were not circulating notes, or notes used for circulation, as that term is used in the act imposing the tax, it is unnecessary to consider the other questions which are presented by the bill of exceptions, and the judgment of the court below is affirmed.

Only negotiable promissory notes payable in money are subject to taxation as "notes used for circulation." *Hollister v. Zion's Co-operative Mercantile Inst.* 4 Sup. Ct. Rep. 263.—[ED.]

RICH v. TOWN OF MENTZ.

(Circuit Court, N. D. New York. March 17, 1884.)

1. MUNICIPAL BONDS—STATUTORY REQUIREMENTS—CERTIFICATE OF JUDGE.

The act of 1871, of the New York legislature, authorizing municipal corporations to aid in the construction of railroads, requires the petition to show to the satisfaction of the county judge that the petitioners are a majority of the tax-payers, "not including those taxed for dogs or highway tax only." *Held*, following the case of *Cowdrey v. Town of Caneadea*, 16 FED. REP. 532, that municipal bonds issued under the act are void unless the record shows that the county judge was satisfied of the sufficiency of the petition.

2. SAME—TAX-PAYERS—DEFINITION BY STATUTE.

The act of 1871 defines the term "tax-payer," "when used in this act," to mean such tax-payers as are not assessed for dogs or highway tax only. But, *held*, that this definition did not cure a petition which merely showed the consent of "a majority of tax-payers," where the act explicitly required the approval to appear of "a majority of tax-payers, not including those taxed for dogs or highway tax only."

At Law.

Jas. R. Cox, for plaintiff.

F. D. Wright, for defendant.

Before WALLACE and COXE, JJ.

WALLACE, J. The same questions arise in this case as were presented in *Cowdrey v. Town of Caneadea*, 16 FED. REP. 532, where it was ruled that the bonds of the town were void because the county judge did not adjudicate that the requisite majority of tax-payers had consented to the creation of the bonds. No reasons have been advanced in the arguments of counsel that are deemed sufficient to change the conclusions reached in the *Caneadea Case*. It is proper, however, to advert to an argument that was urged in that case, and considered, but not discussed in the opinion, and which has been urged again here. It is insisted that because the amended act of 1871 defines the term "tax-payer" "when used in this act," to mean such tax-payers as are not assessed for dogs or highway tax only, it is not

necessary to comply with the explicit language of the act as to the form and substance of the petition. The petition is the basis and groundwork of the whole bonding proceeding. When the amended act was passed many of these proceedings had been set aside by the courts of this state because of defects of form in the petition; and it was the well-settled law of the state courts that any such defect was jurisdictional, and rendered the whole proceeding futile. Speaking of the act of 1869, the court of appeals said in *People v. Smith*, 45 N. Y. 772: "The authority conferred by the act must be exercised in strict conformity to, and by a rigid compliance with, the letter and spirit of the statute." The first section of the amended act provides, in language as explicit as could be employed, that the petition, verified by one of the petitioners, shall set forth that the petitioners are a majority of tax-payers of the town who are taxed or assessed for property "not including those taxed for dogs or highway tax only." It subsequently provides that the word "tax-payer," "when used in this act," shall mean "any corporation or person assessed or taxed for property, * * * not including those taxed for dogs or highway tax only." Section 2 makes it the duty of the county judge "to proceed and take proof as to the said allegations in the petition;" and if he finds that the requisite majority of tax-payers have consented, he shall so adjudge. If there were no express provision requiring it to appear in the petition that the tax-payers who apply are a majority of the designated class, the petition would doubtless be sufficient if it alleged that they were a majority of the tax-payers of the town; and, in this view, there was no need of amending the act of 1869 in this behalf. If the argument for the plaintiff is sound, this explicit provision is meaningless. It is not to be assumed that the legislature did not mean anything by the language which they so carefully employed. It is not difficult to apprehend what the legislature meant by defining the word "tax-payer." It occurs several times in the act. It was defined for convenience, in order to avoid repetition of description whenever the word was used in the act, and in order that there should be no room for doubt what kind of a tax-payer was meant whenever the word was used.

As it seems to me the real question in this case is not whether the county judge made an adjudication which is binding upon the defendant, under the rules of law which control a court or officer exercising a special statutory power, and which require every step to be in strict conformity with the statute which confers the power, but whether the acts of the legislature are not to be treated as creating a jurisdiction of a special character which cannot be assailed collaterally, in which all errors of fact and of law, even those respecting the existence of jurisdictional conditions, are to be corrected in the proceeding itself upon a review by the appellate tribunals. There is much to be said in support of the latter suggestion. *Munson v. Town of Lyons*, 12 Blatchf. 539.

As one of the cases now pending in this court, and presenting the same questions as this, involves a sufficient sum to be reviewed by the supreme court, and is to be presented to that court, all proceedings in this case will be stayed, and no judgment be entered, until the decision of that case on writ of error, or until the further order of this court.

COXE, J. I concur in the disposition made of this case; but, for the reasons heretofore stated by me, (*Rich v. Town of Mentz*, 18 FED. REP. 52, and *Chandler v. Town of Attica*, Id. 299,) I cannot agree with the circuit judge in the construction placed by him upon the act of 1871.

COGHLAN v. STETSON.

(Circuit Court, S. D. New York. March 17, 1884.)

1. CONTRACT—RULES OF INTERPRETATION.

Where a contract is ambiguous, contradictory, or obscure in its language, and is capable of two interpretations, it must be given that construction which inclines most nearly to justice and common sense.

2. SAME—ESTOPPEL.

Where an actor is employed by a manager who agrees that the actor shall appear at least seven times a week and be paid \$100 for each appearance, which stipulation the manager violates by failing to provide employment for the actor for a period of three weeks, the actor waives none of his rights by subsequently appearing under the contract and receiving pay pursuant to its provisions.

3. SAME—IMPLIED AGREEMENT.

Where an employe agrees to work during a definite period for a stipulated sum, and enters upon the discharge of his duties under the contract, and renders services which are accepted by the employer, the law implies an agreement upon the part of the latter to furnish employment to the servant and pay for it as stipulated in the agreement.

4. PLEADING—AMENDMENT.

Amendments will be allowed to correct errors in pleading when the opposite party is not misled and substantial justice so requires. It is not the policy of modern procedure to defeat a party who has a meritorious cause of action because he has not declared in the right form.

Trial by the Court.

Olin, Rives & Montgomery, for plaintiff.

A. J. Dittenhoefer, for defendant.

COXE, J. On the thirty-first day of August, 1883, the parties to this action executed the following contract:

"This agreement, made and entered into this thirty-first day of August, in the year of our Lord one thousand eight hundred and eighty-three, by and between John Stetson of Boston, in the county of Suffolk and commonwealth of Massachusetts, manager of Fifth Avenue Theater of New York, of the first part, and Charles F. Coghlan, of London, England, of second part; witnesseth, that the said party of the second part contracts that he shall give his professional services as leading man of the Fifth Avenue Theater, New

York, in such dramatic performances as shall be given in said theater, also in such theater in cities in the United States and Canada as said party of first part may direct for a season beginning October 8, 1883, and ending Saturday evening, May 3, 1884. It is understood and agreed that when said party of second part shall play in any theater outside of New York, he shall have his name featured on all printing and advertisements, and be recognized as the stock star of said Fifth Avenue Theater Company. Said party of second part agrees to furnish all his costumes and to pay his own fare and expenses to New York. Said party of first part agrees to pay railroad fares for party of second part, including sleeping cars and transportation of luggage, should party of second part be required to play in any other theater outside of New York during this engagement. Said party of the second part agrees to report for rehearsal in New York, on or before Monday, September 24, 1883, and be in readiness to perform Monday, October 8, 1883. It is understood and agreed that seven performances each week shall constitute a week's business, but wherever it is customary in theaters to give more than that number, said party of second part shall give that number of representations. Said party of the first part shall have the selections of the plays to be presented at each entertainment, in which party of second part shall appear. Said party of first part agrees to pay party of second part the sum of one hundred dollars (\$100) for each performance in which he shall appear, settlement to be made on the regular salary day of the theater. Said party of second part agrees that he will not perform in any theater in the United States or Canada till this contract shall have been faithfully fulfilled.

"In witness whereof, we have hereunto set our hands and seal.

"JOHN STETSON.

"CHARLES F. COGHLAN. [L. S.]

"It is further understood that said Stetson can continue this contract for six weeks by giving said Coghlan notice to that effect on or before March 1, 1884."

The plaintiff came to this country in September, 1883, commenced acting at the Fifth Avenue Theater, New York, on the eighth of October, and continued until the tenth of November, a period of five weeks. On the evening of the latter day, having discovered that his name was omitted from the play advertised for the ensuing week, he called upon the defendant, and was informed that his services would not be required for an indefinite period. The plaintiff protested, and notified the defendant of his entire willingness to play, and that if he was compelled to remain idle through the defendant's neglect, he should insist upon being paid at the rate of \$700 per week. The plaintiff was not permitted to play for three weeks. He demanded his salary for this period and was refused. Subsequently he appeared at Boston under the defendant's auspices. This action is to recover \$2,100, alleged to be due under the contract for the three weeks aforesaid, commencing Monday, November 12, 1883.

It is argued that the plaintiff cannot recover for the reasons: *First*. He did not "appear" during the period aforesaid, and the defendant was not required by the contract to permit him to appear. *Second*. Having subsequently accepted payment at the rate of \$100 for each performance in which he appeared the plaintiff is estopped from claiming payment when he did not appear. *Third*. The de-

fendant does not agree to employ the plaintiff, the agreement is by the plaintiff alone to render services for the defendant. *Fourth.* In any event, the complaint is defective, the action should have been for damages.

The principal controversy arises upon the construction of the written contract and must be determined by that instrument alone. The interpretation contended for by the defendant is so harsh, so unfair, so wanting in reciprocity that the court should not hesitate to reject it provided the instrument is susceptible of any reasonable construction. According to the defendant no obligation rests upon him to do anything. The plaintiff, on the contrary, who, to use the language of the defendant's brief, is "an actor of fame and success in England," is required to leave his home and his profession there, cross the Atlantic at his own expense, pay his board in this country from September 24th till May 3d, and possibly for six weeks thereafter, furnish his own costumes, remain at the beck and call of the defendant for seven months, and refuse all other employment. To all this the plaintiff is bound, and the defendant is not bound at all. In other words the plaintiff must cross 3,000 miles of ocean, lose time, money and reputation, and if it suits the fancy or whim of the defendant to put some other actor in his place, he is wholly remediless, he cannot compel the payment of a single dollar. The charge that this interpretation is severe is not strenuously denied by the defendant, but he insists that the contract is one which the plaintiff was at liberty to make and having made it, he must abide the consequences. Undoubtedly, this is so. If the plaintiff made such a contract he cannot recover. But whether he made it or not is the precise question involved. If the language used clearly establishes the defendant's version it would unquestionably be the duty of the court to enforce it. But where the exact meaning is in doubt, where the language used is contradictory and obscure, if there are two interpretations, one of which establishes a comparatively equitable contract and the other an unconscionable one, the former construction should prevail. In such cases the court may well assume that the parties do not intend that which is opposed alike to justice and to common sense. Unless the language is so definite and certain that no other interpretation can be upheld a construction should not be adopted which must inevitably cast a reflection upon the sanity of one of the contracting parties.

The contract contains several clauses which read separate and apart from the context sustain the defendant's version, and they have been pressed upon the attention of the court with much learning and ingenuity. But taken as an entirety, read as one instrument, read in the light of surrounding circumstances it must be said that the plaintiff's construction is the true one. The contract provides, among other things, that the plaintiff is to be leading man in such dramatic performances as shall be given in the Fifth Avenue Theater

during the season of 1883-84. It is then mutually agreed that seven performances each week shall constitute a week's business. The plaintiff agrees to appear seven times a week and the defendant agrees that he will employ the plaintiff at least seven times a week. This provision is as binding on one of the parties as on the other, neither can avoid it. The defendant agrees to pay the plaintiff \$100 for each performance *in which he shall appear*. The clause italicised is the one upon which the defendant bases his principal argument. It is possible that these words are unnecessary, that the contract would be perfect without them, and yet, taken in conjunction with the stipulation as to the number of performances each week, there is little difficulty in reconciling them with the other clauses. The contract would then read in substance: "The party of the first part agrees to pay the party of the second part the sum of one hundred dollars for each performance in which he shall appear, and it is understood and agreed that seven performances each week shall constitute a week's business." The plaintiff shall be paid for the seven performances but for no more, unless he actually appears in more. The clause referred to was also a wise provision in case the plaintiff through sickness, or otherwise, neglected to appear.

I am unable to see how the plaintiff waived any of his rights by his subsequent appearance at Boston. His action in that regard was entirely consistent with his theory of the contract. By accepting pay under the contract he did not accede to the defendant's interpretation to any greater extent than the defendant acceded to his by paying the amount due.

The objection that the defendant does not agree to employ the plaintiff has already been disposed of. If it were necessary, the law would imply an agreement to employ him during the stipulated period, the plaintiff having entered upon the discharge of his duties under the contract and rendered services for the defendant which were accepted by him. But there is here an express agreement. The contract is not unilateral. The one party agrees to act and the other agrees to pay.

Regarding the objection disputing the plaintiff's right to maintain the action in its present form it is sufficient to say that upon the trial the plaintiff asked leave to amend the complaint so as to meet the criticisms of the defendant. This request should be granted. It is not the policy of modern procedure to defeat a party who has a meritorious cause of action because he has not declared in the right form, especially when all of the facts are disclosed and the opposite party not misled. The fault here pointed out is that the plaintiff seeks to recover a sum of money *as wages* which he should recover as damages. The objection, though quite likely it is well founded, is a formal and technical one. Every element of surprise is wanting. Had the complaint been in the form suggested the result would inevitably have been the same. It is said that the defendant should be permitted to

offer, in mitigation of damages, proof that the plaintiff could have obtained an engagement elsewhere during the time he remained idle. The short answer is, that by the terms of the contract the plaintiff expressly bound himself "not to perform in any other theater." He could not have accepted a position under another management without himself violating the contract. The amendment is within the discretion of the court and is one which clearly should be allowed; to withhold it would simply protract litigation without change of result.

The plaintiff is entitled to the judgment demanded in the complaint.

FLETCHER and others v. NEW ORLEANS & N. E. R. Co.¹

(Circuit Court, E. D. Louisiana. February, 1884.)

ARBITRATION.

Under a contract by which the defendant was to pay plaintiffs for work done upon certificates and estimates of defendant's chief engineer for the time being, the obligation of the defendant does not practically arise until the defendant is satisfied that the plaintiffs are entitled to compensation; and it was held that the defendant may not avail itself of the labor performed by the plaintiffs, and then "wrongfully, arbitrarily, unreasonably, and in bad faith," stand upon the literal terms of the contract and refuse to pay.

On Demurrer.

Thomas J. Semmes, J. Carroll Payne, Henry J. Leovy, and Ernest B. Kruttschmidt, for plaintiffs.

Robert Mott and Walter D. Denegre, for defendant.

PARDEE, J. Under the terms of the contract sued on in this case, the defendant is to pay the plaintiffs for work done, upon certificates and estimates of the defendant's chief engineer for the time being. "The chief engineer for the time being" is the creature of the company. Practically, then, under the terms of the contract, the obligation of the defendant to pay the plaintiffs for work done does not arise until the defendant is satisfied that the plaintiffs are entitled to compensation. The question in this case is whether the defendant, under its contract, may avail itself of the labor performed by plaintiffs, and then may "wrongfully, arbitrarily, unreasonably, and in bad faith" stand upon the literal terms of the contract and refuse to pay. The decisions are to the effect that, "in the absence of fraud, or such gross mistake as would necessarily imply bad faith, or a failure to exercise an honest judgment, his (the umpire's) action in the premises is conclusive." 97 U. S. 402; *Sweeney v. U. S.* 3 Sup. Ct. Rep. 344. In this case "fraud" is not specifically charged, but "bad faith" and "a failure to exercise an honest judgment" are. And it seems to me, with the relation between the umpire and the defend-

¹ Reported by Joseph P. Hornor, Esq., of the New Orleans bar.

ant existing as seen above, that charging the action of the umpire to be arbitrary, unreasonable, wrongful, and in bad faith would include all the charges of fraud, collusion, and gross mistake necessary. In *Chapman v. Lowell*, 4 Cush. 378, it is held that in cases like this the umpire must not act arbitrarily, capriciously, and unreasonably. In a Wisconsin case similar to this it was held: "If fraud in the arbiter can ever be established by proof that he refused to certify the execution of the work when the same has been duly and properly performed, it can only be in those cases where the refusal is shown to have been palpably perverse, oppressive, and unjust, so much so that the inference of bad faith and dishonesty would at once arise were the facts known." *Hudson v. McCartney*, 33 Wis. 331. The difference in meaning between "perverse, oppressive, and unjust," in the Wisconsin case, and "arbitrary, unreasonable, and wrongful," in this case, is so little that the two cases may be considered as identical. Without undertaking to determine now how much the plaintiff may be required to prove on the trial of the case of arbitrary, unreasonable, and wrongful action in order to avoid the action, or failure of action, on the part of the defendant's "chief engineer for the time being," I am satisfied enough is alleged in the petition to put the company on its defense.

The exception that plaintiffs cannot demand further payment from the company without showing that all laborers, subcontractors, and material-men have been paid, and that no liens are recorded against the company, does not seem to be well taken. The suit is for damages in a large sum, as well as for balance due under the contract. The petition alleges that what, if anything, is due to such laborers, etc., is primarily due from the company, and plaintiffs reserve their rights to sue for it, if they are compelled to pay. Any rights the defendant may have in this regard may be brought in defense.

The exception will be overruled; and it is ordered.

In re SCHREYER, Bankrupt.

(District Court, S. D. New York. February 20, 1884.)

GUARANTY—CONSIDERATION—ASSIGNMENT OF MORTGAGE—INTENT OF PARTIES— BANKRUPTCY—PROOF OF DEBT.

Where V., a builder, agreed with G., owner, by contract in writing, to build the latter a house for \$8,175, and G. agreed to pay B. therefor \$8,175, lawful money, as follows: when topped out, \$5,000, by the assignment of a bond and mortgage held by one S. on certain premises named, and \$3,175 when the buildings were completed; and when the buildings were topped out, V. refused to proceed unless the bond and mortgage were guarantied by S., reasonable doubt having arisen as to the value of the mortgage, and S. having thereupon assigned the mortgage with his guaranty for the consideration of \$5,000, expressed in the assignment, and the mortgage security having turned out worth-

less, and S. becoming bankrupt, a claim upon his guaranty being presented to the register by the representatives of V. after his death, and disputed on the ground that it was given without any actual consideration; and the attorney who drew the assignment having testified that S. stated at the time that he intended to make the mortgage as good as cash, and that V. ought to have his money: *held*, that the guaranty should be sustained, as given in accordance with the actual intention of the parties, as upon a modification of the original agreement to that effect, and as supported, therefore, by the consideration named in the assignment; and that the claim upon the guaranty should be allowed to be proved in bankruptcy against the estate of S.

In Bankruptcy.

T. M. Tyng, for Vanderbilt.

A. O. Salter and *John L. Lindsay*, for bankrupt.

BROWN, J. In the case of *Vanderbilt v. Schreyer*, 91 N. Y. 392, it was held to be competent for the defendant to show by parol evidence that the guaranty of the mortgage assigned by him to Vanderbilt was without consideration, although the guaranty was expressed in the instrument of assignment, stating a consideration of \$5,000 for the whole transaction. Without in the least questioning the correctness of this decision, the counter proposition is also obvious: that it is competent for Vanderbilt also, or his representatives, to show by parol evidence that there was a consideration for the guaranty. Had the original agreement between Gebhardt and Vanderbilt, whereby the latter was to take an assignment of the mortgage in part payment for erecting the building contracted for, provided that the mortgage should be guaranteed by the assignor, no question could exist that the consideration of \$5,000, mentioned in the assignment of the mortgage, would be deemed a consideration for the guaranty as well as for the assignment. So, also, if such had been the actual intention of the parties to the original agreement, although the agreement, as reduced to writing, omitted the stipulation for the guaranty, there could be no question that the guaranty, when given in execution of the actual agreement and understanding of the parties, would be deemed a part of the original agreement, and would be sustained by the same consideration named in the written assignment of the mortgage, of which the guaranty forms a part. That, in substance and effect, is what the evidence of McAdam, though brief, sufficiently shows to have been the fact. He testifies that Schreyer, when directing him to draw the assignment, told him that there was a difficulty with Vanderbilt about the value of the mortgaged property; that he, Schreyer, intended to make it as good as money, and therefore ordered his guaranty to be inserted on the agreement; that on the next day, when Schreyer called to execute the assignment, it was all read over to him, and that he then said the guaranty was right, and that he intended to make the mortgage as good as money; that Vanderbilt's work was well done, and that he ought to have his money. That it was the intention of Vanderbilt to have the equivalent of money there can be no doubt, so far as Schreyer's guaranty could make it so. The case is one, therefore, in which both the parties

represented here agree as to what the intention was. Schreyer had received from Gebhardt the full amount of the mortgage in money, or its equivalent. The written agreement between Gebhardt and Vanderbilt was therefore defective in not fully expressing the actual intention of these parties as to the transfer of the mortgage. In a court of equity, if such a mutual intention was admitted, the agreement would be reformed by inserting the proper provision requiring Schreyer's guaranty. The case is one in which the maxim of equity is applicable, that that will be deemed done which ought to have been done; namely, the constructive insertion in the original agreement of a provision for the guaranty of the mortgage by Schreyer, according to the actual intention.

The agreement itself contains strong evidence that Vanderbilt was to have the equivalent of money. He first contracts to build a house, not for a bond and mortgage, whatever they may be worth, but for so much *money*, viz., \$8,175; next, Gebhart agrees to pay him therefor that same amount of *money*; and he finally agrees to pay Vanderbilt \$5,000, by Schreyer's assignment to him of the bond and mortgage in question. Had the agreement been to pay \$5,000 by the delivery of a certain horse, instead of assigning a bond and mortgage, and the horse had died before the time of delivery, it is well settled that Gebhardt could not have tendered the dead animal in payment. In such a case the law presumes conclusively that the intention of the parties was the delivery of a living horse, and not of a dead carcass. So, if at the time when this bond and mortgage were to be assigned they had become utterly worthless, through the bankruptcy of the bondsman, and the cutting off of the lien of the mortgage by the foreclosure of prior mortgages, the presumption of law would, I think, have been equally conclusive that Vanderbilt was entitled to an existing bond and mortgage, having value, and not to two worthless pieces of paper. The law looks at the intention of the parties, to be gathered from the agreement itself, or from the surrounding circumstances.

In the present case, Vanderbilt might also have shown that he was deceived in the agreement to take the mortgage; or that it was agreed to be guarantied; or that he was to take no risk of depreciation between the time of the contract and the time of the assignment. The written agreement is silent as to who should bear the risk of such depreciation meantime. But the agreement shows so clearly a general intention to give the equivalent of money in the assignment of the bond and mortgage, that an ambiguity arises concerning the risk of depreciation, such, as it seems to me, would admit parol evidence even to supply the defect in the written agreement. The evidence shows that Vanderbilt refused to take the assignment of the mortgage without additional security, and stopped work on the buildings. He is dead, and his side of the controversy cannot now be fully known. But as the mortgage was found, not long after, to be worth-

less, there was evidently just ground for Vanderbilt's hesitation. I see no reason to question the fact that whatever dispute or controversy there was at the time was a *bona fide* controversy, based upon probable grounds, on Vanderbilt's part. An adjustment of such a controversy, made by the parties themselves, must be presumed *prima facie* to have been made in accordance with their actual, original intention; and this intention is moreover shown, by the testimony of McAdam, to have been in accordance with the settlement made. It was at all times competent for the parties to modify their original agreement by adding a new clause providing for the guaranty. Such a modification would have been sustained as part of the original intention. No other consideration than that intention would have been necessary to sustain it. When an adjustment of a *bona fide* controversy on such a point has been fully executed, it should be sustained as being, *prima facie*, done upon a modification of the original written contract to accord with such intention; precisely as if the original agreement had at the same time been modified accordingly. Schreyer, it is true, denies the statements of McAdam; but the latter is sustained by the evidence of the acts and conduct of Vanderbilt, and his testimony should, I think, be followed.

For these reasons the proof of debt on the guaranty is directed to be allowed.

LYMAN v. MAYPOLE and others.

(Circuit Court, N. D. Illinois. February 11, 1884.)

1. PATENTS FOR INVENTION—PERFECTING DEVICE—PUBLIC USE.

The law permits an inventor to construct a machine which he is engaged in studying upon and developing, and place it in friendly hands for the purpose of testing it and ascertaining whether it will perform the functions claimed for it, and if these machines are strictly experiments, made solely with a view to perfect the device, the right of the inventor remains unimpaired: but when an inventor puts his incomplete or experimental device upon the market, and sells it, as a manufacturer, more than two years before he applies for his patent, he gives to the public the device in the condition or stage of development in which he sells it. In such case his patent cannot be allowed to relate back and cover forms which he gave to the public more than two years before he applied for a patent.

2. SAME—PATENT NO. 179,581 CONSTRUED—INFRINGEMENT.

The Wilfred C. Lyman patent of July 4, 1876, No. 179,581, construed, and held not to be infringed by a condenser head having an enlarged drain-pipe instead of a hand-hole, and not having inside cones with turned rims or edges.

In Equity.

George P. Barton, for complainant.

Banning & Banning and Charles C. Linthicum, for defendants.

BLODGETT, J. This is a bill to enjoin an alleged infringement by the defendants of a patent issued to the complainant for an "improve-

ment in traps for exhaust steam pipes." The object and scope of the invention is set out by the patentee as follows:

"The object I have in view is to provide the top of the exhaust pipe of a non-condensing steam-engine with a head which will not only trap off the water of condensation carried up the pipe with the exhaust steam, but also the grease used for lubricating the cylinder, and carried up by the exhaust steam. The invention consists in the peculiar construction of the cap and the combination therewith of the deflectors and conduits, and a hand-hole in one side of the cap, through which access is had to the interior for removing grease and solid matter settling therein."

The general scope of this invention is, that the steam, carrying with it some spray or water, and the melted grease or oil ejected with the steam, reaches by the exhaust pipe the arrangement shown in the condensing head; there the steam is deflected, sent around the cold edges of the large surface, where the water, which has already become condensed, is caught upon the deflectors and upon the head of the cap of the condenser, and is condensed, so that the water falls into some of the receptacles for it; it either is condensed and passes into the lower skirt, which is inverted, and runs down and passes into the channels and flows through the outlet pipe, or it is held by the upturned edges, which are shown by the model, so that whatever steam is discharged is mainly dry steam that will not readily condense, and passes into the air without depositing any water or grease on the adjacent roofs or buildings.

The defendants deny the infringement of the complainant's patent, and also insist that the complainant made, and sold, and put in public use condensers, in the form now made and used by the defendants, more than two years prior to the complainant's application for a patent and the issue of his patent. It is insisted that by such public use the complainant has lost the right to cover a device so given to the public by his patent. The proof in the case, which I will not stop to read, is briefly this: Some years ago, in 1870, 1871, and 1872, the complainant commenced the manufacture of these condensing heads. He began by manufacturing a condenser head something like that shown in the proof marked, "Lyman's Old Head," which is admitted to be a substantially correct illustration of what the defendant now makes. In 1872 he manufactured several of these, at least four of which he sold and put in public use. They were not experimental heads, in the strict sense of the word, such as are allowed within certain limits to be made and used by an inventor as experiments. The law permits an inventor to construct a machine which he is engaged in studying upon and developing, and place it in friendly hands for the purpose of testing it, and ascertaining whether it will perform the functions claimed for it; and if these machines are strictly experiments, made solely with a view to perfect the device, the right of the inventor remains unimpaired; but when an inventor puts his incomplete or experimental device upon the market and sells it, as a manufacturer, more than two years be-

fore he applies for his patent, he gives to the public the device in the condition or stage of development in which he sells it. The proof in this case shows that during the year 1872, and forepart of 1873, complainant made and sold at least four of these condenser heads, made in all respects like the "Exhibit Lyman's Old Head." They were not experiments, but were made, sold, and put in use by complainant in his business as a manufacturer. In the mean time the complainant continued his experiments, and after a time increased the size of the upper deflector so that it overhung the lower one, and turned up the edges of the upper, and turned down the edges of the lower deflector, so that they have the shape shown in his final patent; and in April, 1876, he applied for his patent, which was issued a few months afterwards, in which he specifically describes his device, including the upturned edges of the upper deflector, and the down-turned edges of the lower deflector. His claims specifically call for the deflectors with the edges turned as described. The claims are as follows:

"(1) The combination of the cap, B, B', escape pipe, A', deflectors, C, C', and conduits, c, D, said deflectors and conduits provided with curved outer rims or edges, with the exhaust pipe of a non-condensing engine, substantially as and for the purpose set forth.

"(2) The combination of the cap, B, B', escape pipe, A', deflectors, C, C', conduits, c, D, and hand-hole, E, with the exhaust pipe, A, of a non-condensing steam-engine, substantially as and for the purpose set forth."

Both these claims, as I construe them, call for these deflecting plates with turned edges.

The complainant's device also shows a "hand-hole" for the purpose of removing the grease, soot, or other solid matter which may collect in the condenser. The defendants, instead of using a "hand-hole" located as shown in the patent, insert a large screw plug near the lower end or apex of the inverted cone, through which plug the drain pipe passes, and by unscrewing and removing this plug, a hook or wire can be inserted and used to clean out the solid matter. This is not a "hand-hole," as called for by the specifications of complainant's patent, but is a mere enlargement of the drain or discharge pipe. I find, therefore, that in the general features of the condensers made by defendants, they conform to those which complainant made and gave to the public at least three years before he applied for his patent; and, in construing complainant's patent, I must hold him bound by the state of the art as he developed it up to 1872 and 1873, and that his patent cannot be allowed to relate back and cover the forms of condensers which he gave to the public more than two years before he applied for his patent. The complainant's bill must be dismissed for want of equity.

Prior to 1836 our patent laws contained no provision in reference to abandonment or dedication of an invention to the public by uses or sales before the filing of an application for a patent. The supreme court, however, decided
v.19,no.10—47

in 1829 that an inventor might abandon his invention to the public by such uses or sales, and, speaking through Justice STORY, said: "Upon most deliberate consideration we are all of opinion that the true construction of the act is that the first inventor cannot acquire a good title to a patent if he suffers the thing invented to go into public use, or to be publicly sold for use, before he makes application for a patent. His voluntary act or acquiescence in the public sale and use is an abandonment of his right, or rather creates a disability to comply with the terms and conditions on which alone the secretary of state is authorized to grant him a patent."¹ This doctrine, which had been previously announced by Justice STORY² and by Justice WASHINGTON,³ was reiterated by the supreme court in 1883.⁴ And "at common law the better opinion, probably, is that the right of property of the inventor to his invention or discovery passed from him as soon as it went into public use with his consent; it was then regarded as having been dedicated to the public as common property, and subject to the common use and enjoyment of all."⁵

The act of 1836 provided that a patent should not be issued for an invention which was, "at the time of his [the inventor's] application for a patent, in public use or on sale with his consent and allowance." The act of 1839 changed this so as to allow uses or sales for not "more than two years prior to such application for a patent;" and, so far as regards time, this provision has been frequently re-enacted, and is still in force. It has never been considered, however, that this rule, first announced by the supreme court,⁶ and afterwards made the subject of legislation, has the least application to uses purely experimental, made in good faith for the purpose of testing or perfecting an invention. The question, how far an invention may be used for the purposes of experiment or test, is often a difficult one, but the general rule on this subject, particularly when the question of sales comes in, is well stated by Judge BLODGETT in the foregoing opinion: "The law permits an inventor to construct a machine which he is engaged in studying upon and developing, and place it in friendly hands for the purpose of testing it, and ascertaining whether it will perform the functions claimed for it, and if these machines are strictly experiments, made solely with the view to perfect the device, the right of the inventor remains unimpaired; but when an inventor puts his incomplete or experimental device upon the market, and sells it, as a manufacturer, more than two years before he applies for his patent, he gives to the public the device in the condition or stage of development in which he sells it." And so it is always to be borne in mind that there is a clear distinction between mere experiments and ordinary uses or sales made for other purposes than testing or perfecting an invention.

EXPERIMENTS ENCOURAGED. Patents are only to be granted for useful inventions, and to prevent their being issued for crude, imperfect, or impracticable ones, the law encourages, not to say requires, an inventor to make proper experiments to fully test and determine the practical utility of his invention before applying for a patent. "He is the first inventor, in the sense of the act, and entitled to a patent for his invention, who has first perfected and adapted the same to use; and until the invention is so perfected and adapted to use it is not patentable. An imperfect and incomplete invention, resting in mere theory, or in intellectual notion, or in uncertain experiments, and not actually reduced to practice, and embodied in some distinct machinery, apparatus, manufacture, or composition of matter, is not, and in-

¹ Pennock v. Dialogue, 2 Pet. 22.

² Mellus v. Silsbee, 4 Mason, 108; 1 Rob. 509.

³ Treadwell v. Bladen, 4 Wash. 703; 1 Rob. 539.

⁴ Shaw v. Cooper, 7 Pet. 292.

⁵ Nelson, J., in Wilson v. Rousseau, 4 How. 674. See, also, American Leather Co. v. American Tool Co. 4 Fisher, 294; Dudley v. Mayhew, 3 N. Y. 9.

⁶ Pennock v. Dialogue, supra.

deed cannot be, patentable under our patent acts; since it is utterly impossible under such circumstances to comply with the fundamental requisites of those acts." ¹ Justice CLIFFORD quotes this language in *White v. Allen*,² but first says: "While the suggested improvement, however, rests merely in the mind of the originator of the idea, the invention is not completed within the meaning of the patent law, nor are crude and imperfect experiments sufficient to confer a right to a patent; but in order to constitute an invention in the sense in which that word is employed in the patent act, the party alleged to have produced it must have proceeded so far as to have reduced his idea to practice, and embodied it in some distinct form."³ Mere discovery of an improvement does not constitute it the subject-matter of a patent, although the ideas which it involves may be new; but the new set of ideas, in order to become patentable, must be embodied into working machinery and adapted to practical use."⁴

"The relation borne to the public by inventors, and the obligations they are bound to fulfill in order to secure from the former protection and the right to remuneration, by no means forbid a delay requisite for completing an invention, or for a test of its value or success by a series of sufficient and practical experiments; nor do they forbid a discreet and reasonable forbearance to proclaim the theory or operation of a discovery during its progress to completion, and preceding an application for protection in that discovery. The former may be highly advantageous, as tending to the perfecting the invention; the latter may be indispensable, in order to prevent a piracy of the rights of the true inventor."⁵

"It is when speculation has been reduced to practice; when experiment has resulted in discovery, and when that discovery has been perfected by patient and continued experiments; when some new compound, art, manufacture, or machine has been thus produced, which is useful to the public,—that the party making it becomes a public benefactor, and entitled to a patent."⁶

"When the idea first enters into the mind of the inventor, it is almost necessarily in a crude and imperfect state. His mind will naturally dwell and reflect upon it. It is not until his reflections, investigations, and experiments have reached such a point of maturity that he not only has a clear and definite idea of the principle, and of the mode and manner in which it is to be practically applied to useful purposes, but has reduced his idea to practice and embraced it in some distinct form, that it can be said he has achieved a new and useful invention."⁷

"The terms 'being an experiment,' and 'ending in experiment,' are used in contradistinction to the term 'being of practical utility.' Until of practical utility, the public attention is not called to the invention; it does not give to the public that which the public lays hold of as beneficial."⁸

"If he has been practicing his invention with a view of improving it, and thereby rendering it a greater benefit to the public before taking out a patent, that ought not to prejudice him."⁹

"Crude and imperfect experiments are not sufficient to confer a right to a patent; but in order to constitute an invention the party must have proceeded so far as to have reduced his idea to practice, and embodied it in some distinct form."¹⁰

¹ Story, J., in *Reed v. Cutter*, 1 Story, 590; 2 Rob. 90.

² Fisher, 446.

³ Gaylor v. Wilder, 10 How. 498; Parkhurst v. Kinsman, 1 Blatchf. 494; (Curt. Pat. § 43.

⁴ Sickles v. Borden, 3 Blatchf. 535.

⁵ Daniel, J., in *Kendall v. Winsor*, 21 How. 328.

⁶ Grier, J., in *Roberts v. Reed Torpedo Co.* 3 Fisher, 631.

⁷ Jones, J., in *Matthews v. Skates*, 1 Fisher, 606.

⁸ Sprague, J., in *Howe v. Underwood*, 1 Fisher, 166.

⁹ Morris v. Huntington, 1 Rob. 455.

¹⁰ Seymour v. Osborne, 11 Wall. 552. As to this general question of experiments,

DILIGENCE REQUIRED. Although an inventor is thus allowed and encouraged to make such experiments as will fully test and determine the practical utility of his invention, still he must exercise due diligence, and not be unreasonably slow in making them. "If an inventor should be permitted to hold back from the knowledge of the public the secrets of his invention; if he should for a long period of years retain the monopoly, and make and sell his invention publicly, and thus gather the whole profits of it, relying upon his superior skill and knowledge of the structure, and then, and then only, when the danger of competition should force him to secure the exclusive right, he should be allowed to take out a patent, and thus exclude the public from any farther use than what should be derived under it during his fourteen years, it would materially retard the progress of science and the useful arts, and give a premium to those who should be least prompt to communicate their discoveries."¹

"The question of diligence is not an absolute but a relative one, and must be considered in reference to the subject-matter of the experiments. Could the value and practical utility of such an invention be sooner ascertained?"² It must also be considered with reference to the position and circumstances of the inventor. "The law means, by invention, not maturity. It must be the idea struck out, the brilliant thought obtained, the great improvement in embryo. He must have that; but if he has that he may be years improving it—maturing it. It may require half a life. But in that time he must have devoted himself to it as much as circumstances would allow. * * * You would not trip up a man of genius, who had made a discovery, in consequence of a want of means to prosecute his labors to their final consummation, if you thought he intended to persevere."³ "There must be what we would consider reasonable diligence, looking at all the facts of the case."⁴ "But mere forbearance to apply for a patent during the progress of experiments, and until the party has perfected his invention and tested its value by actual practice, affords no just grounds for any such presumption" of abandonment.⁵ "The question of abandonment * * * is a question of fact, and to be determined by the evidence. Lapse of time does not, *per se*, constitute abandonment. It may be a circumstance to be considered. The circumstances of the case, other than mere lapse of time, almost always give complexion to delay, and either excuse it or give it conclusive effect. The statute has made contemporaneous public use, with the consent and allowance of the inventor, a bar, when it exceeds two years. But in the absence of that, and of any other colorable circumstances, we know of no mere period of delay which ought, *per se*, to deprive an inventor of his patent."⁶

"It should always be a question submitted to the jury, what was the intent of the delay of the patent, and whether the allowing the invention to be used without a patent should not be considered an abandonment or present of it to the public.⁷ But "the objection rests upon the principle of forfeiture, and is

see, also, *Whitely v. Swayne*, 7 Wall. 637; *Draper v. Potomaska Mills Corp.* 3 Ban. & A. 215; *N. W. Fire Exting. Co. v. Philadelphia Fire Exting. Co.* 1 Ban. & A. 189; *Albright v. Celluloid Harness Trimming Co.* 2 Ban. & A. 635.

¹ *Pennock v. Dialogue*, 2 Pet. 19; *Kendall v. Winsor*, 21 How. 330.

² *Nixon, J.*, in *American Nicholson Pavement Co. v. City of Elizabeth*, 6 Fisher, 432.

³ *Woodbury, J.*, in *Adams v. Edwards*, 1 Fisher, 7, 11. See, also, *Smith v. Good-year D. V. Co.* 93 U. S. 491; *Sprague v. Adriance*, 3 Ban. & A. 124.

⁴ *Drummond, J.*, in *Cox v. Griggs*, 2 Fisher, 177.

⁵ *Agawam Co. v. Jordan*, 7 Wall. 607; *Jones v. Sewall*, 6 Fisher, 365; *Locomotive Engine Safety Truck Co. v. Pennsylvania R. Co.* 1 Ban. & A. 483; *Miller v. Smith*, 5 Fed. Rep. 364; *Webster v. New Brunswick Carpet Co.* 1 Ban. & A. 91; *Kelleher v. Darling*, 3 Ban. & A. 443.

⁶ *Woodruff, J.*, in *Russell & Erwin Manufg. Co. v. Mallory*, 5 Fisher, 641; *Benedict, J.*, in *Andrews v. Carman*, 2 Ban. & A. 295.

⁷ *Morris v. Huntington*, 1 Paine, 348; 1 Rob. 455; *Shaw v. Cooper*, 7 Pet. 316.

not to be favorably regarded. Every reasonable doubt should be raised against it." ¹

KINDS OF EXPERIMENTS. Of course, the character of an inventor's tests or experiments must depend largely on the nature of his invention. "Some inventions are by their very character only capable of being used where they cannot be seen or observed by the public eye. An invention may consist of a lever or spring hidden in the running gear of a watch, or of a ratchet, shaft, or cog-wheel covered from view in the recesses of a machine for spinning or weaving. Nevertheless, if its inventor sells a machine of which his invention forms a part, and allows it to be used without restriction of any kind, the use is a public one. So, on the other hand, a use necessarily open to public view, if made in good faith, solely to test the qualities of the invention and for the purpose of experiment, is not a public use within the meaning of the statute." ²

"When the subject of invention is a machine, it may be tested and tried in a building either with or without closed doors. In either case such use is not a public use, within the meaning of the statute, so long as the inventor is engaged in good faith in testing its operation. He may see cause to alter it and improve it or not. His experiments will reveal the fact whether any and what alterations may be necessary. If durability is one of the qualities to be attained, a long period, perhaps years, may be necessary to enable the inventor to discover whether his purpose is accomplished. And though during all that period he may not find that any changes are necessary, yet he may be justly said to be using his machine only by way of experiment; and no one would say that such a use, pursued with a *bona fide* intent of testing the qualities of the machine, would be a public use within the meaning of the statute. So long as he does not voluntarily allow others to make it and use it, and so long as it is not on sale for general use, he keeps the invention under his own control, and does not lose his title to a patent. It would not be necessary, in such a case, that the machine should be put up and used only in the inventor's own shop or premises. He may have it put up and used in the premises of another, and the use may inure to the benefit of the owner of the establishment; still, if used under the surveillance of the inventor, and for the purpose of enabling him to test the machine, and ascertain whether it will answer the purpose intended, and make such alterations and improvements as experience demonstrates to be necessary, it will still be a mere experimental use, and not a public use within the meaning of the statute." ³

"Nor has it any bearing upon the case that Smith's experiments were made in public, and that his experimental engines were run upon a railroad that was a public highway. Thus only could the invention be tested. *There is an*

¹ *Birdsall v. McDonald*, 1 Ban. & A. 167; *Henry v. Francestown Soap-stone Stove Co.* 2 Ban. & A. 224; *American Leather Co. v. American Tool Co.* 4 Fisher, 291; *Jones v. Sewall*, 6 Fisher, 368; *Jennings v. Pierce*, 3 Ban. & A. 365; *Graham v. McCormick*, 11 Fed. Rep. 863; 5 Ban. & A. 249; *Emery v. Cavanaugh*, 17 Fed. Rep. 243; *Hovey v. Henry*, 3 West. Law J. 153.

As to effect of delays in the patent office after an application has been filed, see *Planing Machine Co. v. Keith*, 4 Ban. & A. 100; 101 U. S. 479; *Adams v. Jones*, 1 Fisher, 527; *Bevin v. East Hampton Bell Co.* 5 Fisher, 23; *McMillin v. Barclay*, Id. 200; and for particular cases in which use has been held not to have been experimental, but sufficient to invalidate patent,

see *Shaw v. Cooper*, 7 Pet. 322; *Watson v. Bladen*, 1 Rob. 514; *Sanders v. Logan*, 2 Fisher, 167; *Worley v. Tobacco Co.* 104 U. S. 340; *Sisson v. Gilbert*, 5 Fisher, 112; *Perkins v. Nashua Card & Glazed Paper Co.* 2 Fed. Rep. 451; 5 Ban. & A. 398; *Edgerton v. Furst & Bradley Manuf'g Co.* 9 Fed. Rep. 450; *Clark Pomace-holder Co. v. Ferguson*, 17 Fed. Rep. 79; *Manning v. Cape Ann Isinglass & Glue Co.* 2 Sup. Ct. Rep. 860; *Kells v. McKenzie*, 9 Fed. Rep. 234.

² *Woods, J.*, in *Egbert v. Lippmann*, 104 U. S. 336. See, also, *Elizabeth v. Pavement Co.* 97 U. S. 126; *Shaw v. Cooper*, 7 Pet. 292.

³ *Bradley, J.*, in *Elizabeth v. Pavement Co.* 97 U. S. 134.

obvious distinction between a public use, or a use by the public, and an experimental use in public. In many cases it has been decided that a use in public, for test or experiment, is not such a public use as was contemplated by the act of congress, nor such a use as can be held evidence of dedication to the public. The *Nicholson Pavement Case* was notably one."¹ "Public use in good faith for experimental purposes, and for a reasonable period, even before the beginning of the two years of limitation, cannot affect the rights of the inventor."² "I agree his acts are to be construed liberally; that he is not to be estopped by licensing a few persons to use his invention to ascertain its utility, or by any such acts of peculiar indulgence and use as may fairly consist with the clear intention to hold the exclusive privilege."³ "It is clearly immaterial whether the experiment be made by himself or by others; the only question being, is he the original inventor of an art not before known or used?"⁴ "It does not appear to me that the submitting of an invention to the test of examination by experts, in competition with other inventions, is the public use to which the statute refers. A use for the mere purpose of competitive examination, experiment, and test, is not a public use."⁵

"I consider it too nice a point to say that the future patentee, when he permits a person to test his tool by a short use with a view to interest him in its being patented, is not testing his tool, but only the mind of the borrower. I do not know that an inventor is bound to satisfy his own mind alone by his experiments. The question to be determined is, not only whether the tool will work, but in what modes and with what advantages over old tools; how well it will work, and how cheaply; and I am of opinion that he may, in such a case as this, test not only its patentability, but the degree of it, if I may so say; that is, whether it is worth while to patent it. I must not be understood as speaking of a case in which the tool or thing patented has been sold more than two years before the application."⁶

"The evidence does not show any such public use or sale, with the consent of Dodge, for two years prior to his application, as would work a forfeiture of his patent. There is one case only of a sale clearly proved before February 14, 1855, and no evidence tending to show more than two or three sales before that time, and all of them accompanied with a notice of an intention to apply for a patent, and all of these during the time when he was experimenting upon and before he had perfected his invention, and attained sufficient perfection in the castings to satisfy him that his invention was practically successful. As in most, if not in all, of these instances the stoves were delivered on trial, to be returned if the invention did not work satisfactorily, they are to be regarded rather in the light of such practical tests as the law permits an inventor to make, than as such public sales as would tend to show abandonment, or mislead the public into a belief that the inventor had made a dedication to the public."⁷ On a rehearing of this case Judge LOWELL took a different view as to the effect of these sales, and held that the mere fact that they were conditional did "not, without further explanation, prove that they were experimental," and that "the evidence should be unequivocal that a test of the invention was one of the purposes of the seller."⁸

¹Strong, J., in *Locomotive Engine Safety Truck Co. v. Pennsylvania R. Co.* 1 Ban. & A. 484.

²Birdsall v. McDonald, 1 Ban. & A. 167; Henry v. Francetown Soap-stone Stove Co. 2 Ban. & A. 224.

³Story, J., in *Mellus v. Silsbee*, 4 Mason, 108; 1 Rob. 509. See, also, *Jones v. Sewall*, 6 Fisher, 364.

⁴Washington, J., in *Pennock v. Dialogue*, 4 Wash. 538; 1 Rob. 472.

⁵Shipman, J., in *U. S. Rifle & Cartridge Co. v. Whitney Arms Co.* 2 Ban. & A. 501.

⁶Lowell, J., in *Sinclair v. Backus*, 4 Fed. Rep. 542; 5 Ban. & A. 84.

⁷Shepley, J., in *Henry v. Francetown Soap-stone Stove Co.* 2 Ban. & A. 224.

⁸Henry v. Francetown Soap-stone Stove Co. 2 Fed. Rep. 80; 5 Ban. & A. 110. See, also, *Kells v. McKenzie*, 9 Fed. Rep. 284.

"It is manifest that the only machine made in 1863, which is distinctly proved to have been sold, was delivered on trial and warranted, and should be regarded rather in the light of a use of the invention for such practical tests as the law permits an inventor to make, than as such a public sale or use as is contemplated by the statute. At that stage of the inventor's work his invention was largely in experiment and trial. It could only be tested by practical use in the field, and it was essential that it should be so tested by farmers on their farms. The inventor was then struggling, as inventors often do, to establish the success of his invention. It was necessary that thorough experimental tests should be made, and that he should have the assistance of others in making them; and it is manifest, we think, that the machines of 1863 were not yet so perfected as to be practical machines, capable of successful work."¹

"If it was merely used occasionally by himself in trying experiments, or if he allowed only a temporary use thereof by a few persons, as an act of personal accommodation or neighborly kindness for a short and limited period, that would not take away his right to a patent."² "The law permits an inventor to construct a machine, * * * and place it in friendly hands for the purpose of testing it and ascertaining whether it will perform the functions claimed for it."³ "The use of an invention by special permission of the patentee is not a use of it by the public. * * * A right abandoned to the public, doubtless, cannot be resumed; but a license restrained to individuals is not an abandonment."⁴ "But if the inventor allows his machine to be used by other persons generally, either with or without compensation, or if it is, with his consent, put on sale for such use, then it would be in public use and on public sale within the meaning of the law."⁵ And "to constitute the public use of an invention it is not necessary that more than one of the patented articles should be publicly used."⁶

"He is not allowed to derive any benefit from the sale or the use of his machine without forfeiting his right, except within two years prior to the time he makes his application."⁷ But "it would be a harsh limitation of the statutory rights of an inventor which should give to a naked infringer the privilege of using an invention because the patentee had attempted, in good faith and in secrecy, to incidentally make his experiments of some pecuniary benefit, while he was patiently endeavoring, amid many failures, to remedy the defects of the machine, test its value, and ascertain whether it could be used advantageously, and whether it ever would be of any benefit either to himself or to the public."⁸ And "whilst the supposed machine is in such experimental use the public may be incidentally deriving a benefit from it."⁹

"When an inventor puts his incomplete or experimental device upon the market and sells it, more than two years before he applies for his patent, he gives to the public the device in the condition or stage of development in which he sells it. * * * His patent cannot be allowed to relate back and cover the forms of condensers which he gave to the public more than two years before he applied for his patent."¹⁰

¹ Drummond, J., in *Graham v. McCormick*, 11 Fed. Rep. 862; 5 Bann. & A. 249; and Dyer, J., in *Graham v. Geneva Lake Crawford Manufg. Co.* 11 Fed. Rep. 142.

² Story, J., in *Wyeth v. Stone*, 1 Story, 273; 2 Rob. 30.

³ Blodgett, J., in *Lyman v. Maypole*, supra.

⁴ *McKay v. Burr*, 6 Pa. 153.

⁵ *Elizabeth v. Pavement Co.* 97 U. S. 135.

⁶ *Egbert v. Lippmann*, 104 U. S. 336; *Consolidated Fruit-jar Co. v. Wright*, 94 U. S. 94; *Manning v. Cape Ann Isinglass*

& Glue Co. 2 Sup. Ct. Rep. 860; *Worley v. Tobacco Co.* 104 U. S. 343; *Jones v. Barker*, 11 Fed. Rep. 597; *Clark Pomace-holder Co. v. Ferguson*, 17 Fed. Rep. 83.

⁷ *Nelson, J.*, in *Pitts v. Hall*, 2 Blatchf. 235. See, also, *Consolidated Fruit-jar Co. v. Wright*, 94 U. S. 94; *Jones v. Sewall*, 6 Fisher, 364.

⁸ *Shipman, J.*, in *Jennings v. Serece*, 3 Ban. & A. 365.

⁹ *Elizabeth v. Pavement Co.* 97 U. S. 135.

¹⁰ *Blodgett, J.*, in *Lyman v. Maypole*, supra.

AS TO DESIGN PATENTS. These rules also apply to design patents. "The law applicable to this class of patents does not materially differ from that in cases of mechanical patents. * * * The same general principles of construction extend to both."¹ "An inventor is not permitted to exhibit his skill and taste in decorative art by the publication of elegant designs through a course of years, and then debar the public from any further use by obtaining letters patent for the same."²

It will be observed that I have simply collated the authorities, and made but few comments and no criticisms. The language of some of the cases, particularly when they speak of the inventor's "consent and allowance," should be understood with reference to the law then in force or governing the decision; but this does not affect their bearing on the general question of experiments. As to this question the following principles may be considered as fully established: (1) The law permits and encourages proper experiments to test and determine the practical utility of an invention; (2) these experiments must be made with reasonable diligence, considering all the circumstances of the case; (3) they may be made secretly or in public, by uses or sales, and by the inventor personally or through others; (4) they must not be for profit, but for the honest purpose of testing and perfecting the invention; and (5) where improvements are added within the two years, the patent cannot be allowed to relate back and cover forms previously given to the public.

EPHRAIM BANNING.

Chicago, March, 1884.

¹Brown, J., in *Northup v. Adams*, 2 Ban. & A. 588; *Blodgett, J.*, in *Western Electric Manuf'g Co. v. Odell*, 18 Fed. Rep. 322.

²Nixon, J., in *Theberath v. Celluloid Harness Trimming Co.* 15 Fed. Rep. 230.

DOYLE v. SPAULDING and others.

ILLINGWORTH v. SAME.

(Circuit Court, D. New Jersey. March 15, 1884.)

1. PATENT—INFRINGEMENT.

Infringement of patent for the manufacture of combined ingots of iron and steel by means of moulds and a mechanism producing a variable cavity in the moulds.

2. SAME—INVENTION IN A FOREIGN COUNTRY.

The use or knowledge of the use of an invention in a foreign country by persons residing in this country will not defeat a patent which had been granted to a *bona fide* patentee who, at the time, was ignorant of the existence of the invention or its use abroad.

In Equity.

J. C. Clayton, for complainants.

Francis Forbes, (with whom was A. Q. Keasbey,) for defendants.

Nixon, J. These two cases will be considered together, for reasons which will hereafter appear. On March 5, 1881, the complainant, Illingworth, commenced a suit in this court against the defendants for infringement of letters patent No. 166,700, dated August 17,

1875, for "improvements in moulds for ingots." The defendants answered, setting up, among other things, that said letters patent were void (1) on account of prior knowledge and use of the alleged invention; (2) because every substantial and material part of the invention was described and claimed in letters patent No. 99,299, and granted to one Patrick Doyle, February 1, 1870, for "improvement in moulds for making combined ingots of steel and iron," and in English letters patent No. 3,801, issued to William Moore by the queen of Great Britain and Ireland, dated November 21, 1873, and sealed May 19, 1874; and (3) denying the right of the complainant to recover, because the defendants were the assignees and owners of letters patent No. 240,727, granted to one Alfred E. Jones, and were entitled to use the invention therein described and shown, notwithstanding the letters patent of complainant, on which the suit was brought.

It appears in the testimony that for several years previous to the filing of the bill, two of the defendants, Fitzsimmons and Jennings, were in the employ of the complainant's firm, and these became familiar with the use of moulds made under the Doyle patent, which is set up as anticipating the alleged invention of Illingworth. It also appears that the complainant used the Doyle patent for several years previous to 1875, in the manufacture of iron and steel ingots, the inventor Doyle, during the time being in business with the complainant; that the above patent was obtained by Illingworth in view of the fact Doyle was about going out of the firm, after which, it was supposed, that the continued use of his patent would not be allowed; and that he went out and remained away from the complainant from 1875 to 1880, when he returned and became the superintendent of his works.

On the seventh of May, 1881, Patrick Doyle began his suit against the defendants for the infringement of the letters patent, which had been set up in the former action as anticipation of the Illingworth patent. The answer of the defendants denies (1) that Doyle was the original and first inventor of the improvements therein claimed, and (2) alleges that every substantial and material part of the invention was known to several persons now residing in this country, and by whom it had been used in Sheffield, England, during their residence there.

Pending the taking of testimony in these suits, two applications were made to the court by the respective parties—one by the defendants in the Illingworth suit, asking that they might be allowed to amend their answer by inserting the allegation that the invention claimed by Illingworth was known to certain persons residing in this country, who used it in the city of Sheffield, England, before coming hither; and the other by the complainant in the Doyle suit, who moved to strike out the said allegation in the answer filed therein. The questions involve the interpretation of the clause, "not known or used by others

in this country," in section 4886 of the Revised Statutes, which first appeared in section 24 of the act of July 8, 1870, and which had never received judicial construction. Being willing to afford the parties an opportunity, without embarrassment, to correct any mistake which the court might fall into in deciding a matter of first impression, we allowed the allegation to stand in the answer in the Doyle suit and to be inserted in the Illingworth answer, and directed the parties to make their proofs of the facts and to present their views more fully at the final hearing. See *Illingworth v. Spaulding*, 9 FED. REP. 611. After a careful consideration of the provisions of the three sections of the patent act which bear upon the subject, (sections 4886, 4920, and 4923, Rev. St.,) we are of the opinion that the use, or a knowledge of the use, of an invention in a foreign country by persons residing in this country will not defeat a patent which has here been granted to a *bona fide* patentee who at the time was ignorant of the existence of the invention or its use abroad.

When the parties began to take the proofs they united in a stipulation that the evidence should be entitled in both causes, and that the two should be argued together. The defendants also admitted in writing, in each of the cases, that before the commencement of the suits, and since the granting of the letters patent, respectively, they had manufactured combined ingots of iron and steel in the following manner and for the following purposes:

(1) By means of a mould made in conformity to letters patent of the United States, No. 240,727, granted to them April 26, 1881, as assignees of Alfred E. Jones, a copy of which is hereto annexed, marked Complainants' Exhibit "Jones' Patent."

(2) By means of a mould made with two covers, in all respects like that shown in the above-named letters patent, except that there were two covers instead of one, and the slide was omitted. The covers are so made that a part of the cover first used projects into the mould. The process is as follows: The mould being clamped together, the first metal to be cast is poured into it, and, when sufficiently set, the cover is removed and a second one, perfectly flat, is inserted in its place. When this is done there remains a space between the newly-cast metal and the side or cover of the mould into which is cast the remaining part of the ingot. The mould is shown in the model, complainants' Exhibit E, where both covers are used and the slide is omitted—one cover having a projection into the mould and the other being flat.

(3) By means of a mould of three parts, each part being composed, as usual, in two-part moulds, of three sides rising from a closed base. The operation of the mould is as follows: The two parts of the mould are joined together in the usual manner by rings and wedges, and an ingot is cast therein in the usual way. Immediately that the metal is set, one side of the mould is removed and another, a little larger, is fixed by rings and wedges in the place of the side removed. Into the space thus made, adjacent to the glowing ingot of metal, the molten metal, to complete the ingot, is poured. When sufficiently cooled the combined ingot is removed, as is usually done in ingot moulds of two parts. This mould is represented by complainant's Exhibit F. The size and proportions of the parts, however, are not correct; only the arrangement and operation of the parts are intended to be illustrated.

(4) By means of a mould of two parts, in which one of the parts is like the

ordinary two-part mould, viz., with three sides and a bottom, the other part being made flat on one side, and with a projection on the other, so arranged as to project between the sides and into the other part, when the two are joined together. The operation of the mould is as follows: The two parts of the mould being joined together by rings and wedges, in the usual way, (the projecting part of one side extending into the recess in the other,) the metal is cast into it; and when the metal is set, the side with the projection is removed and turned so that its flat side is towards the center of the mould; there is thus left an open space in the mould into which is cast the metal which is intended to complete the ingot. The combined ingot is removed in the ordinary way of removing single ingots. This mould is represented by complainant's Exhibit G. The same limitation is made in regard to this exhibit as to Exhibit F, above.

(5) By means of a mould similar to that last described, with the exception that instead of one cover there are two—one being flat, and one having a projection on its inner surface, as just described. The operation is the same as of Exhibit G, with the exception that instead of turning the cover so that the projection shall be outermost, the flat cover is used. This mould is represented by Exhibit H. The same limitation is made to this exhibit as to Exhibit F, above.

FRANCIS FORBES,

Solicitor for the Defendants in the Above Causes.

Newark, New Jersey, October 8, 1881.

The subject-matter of the controversy has reference to the use of moulds in casting combined ingots of iron and steel. The patent oldest in date for the employment of mechanism for such a purpose was granted to Patrick Doyle on February 1, 1870, and numbered 99,299. The patentee says that his invention relates to improvements in moulds for making ingots of iron and steel in a manner so as to dispose of the one metal on one or more sides of the other, and to secure a perfect union of the two; and that it consists of a vertical mould of four or other number of plain sides, one or more of which may be detachable and clamped to the others by strong bands, in which a strong thick plate of metal is arranged to fit near one side, from top to bottom, snugly, to occupy a part of the space when the metal, of which the greater part of the ingot is to be composed, is poured in, and to remain until the same has solidified sufficiently to retain its position, when it is withdrawn, leaving a space for the other metal, which, being poured in, unites perfectly with the first, and forms the required composition ingot.

In introducing his specifications, the patentee speaks of his invention as an *improved* mould for making combined iron and steel ingots, thereby implying that other moulds were in use, of which he regarded his as an improvement. Not only the scope of this patent, but the validity of the subsequent issues to Illingworth and Jones, must be determined by the state of the art at the time when the Doyle patent was granted. The evidence on this subject is meager. After looking through the testimony with care, we fail to find anything relating to the state of the art, except the statement of Mr. Illingworth, that he had been engaged in the steel business for 17 years; that prior to Doyle's invention he had never seen any moulds or other

mechanism with which skate metal, which was a combination of steel and iron, could be made; that the only mode of manufacturing such a combination, of which he had any knowledge, was to weld together the iron and steel into one bar, and then rolling it out; and that this was the only method then in use at his works.' Accepting this as the state of the art at this time, it must be conceded that there was novelty and value in the Doyle improvement. It was a step from the mere mechanical combination by welding, to a chemical one resulting from the fusion and union of the two metals when in a heated state. It was the introduction of the variable cavity, whereby the amount of the one metal or the other could be accurately adjusted and obtained by the exercise of ordinary mechanical skill. We are confirmed in our view of the novelty of the Doyle patent by the fact that as late as 1873 a patent was granted in England to William Moore, for substantially the same device for making combined ingots of iron and steel, securing the variable cavity by the use of a slide, which would hardly have been applied for if such a method of casting ingots had previously been in use in England as the defendants so earnestly contend.

On the argument, the counsel for the defendants insisted that the complainant had failed to prove any infringement. The reason why specific proof was not offered was doubtless owing to the circumstance that the defendants admitted the performance of acts and the use of instrumentalities which the complainant assumed would be sufficient to satisfy the court of the fact of infringement. For instance, the defendants filed in the cases an admission that they had manufactured combined ingots of iron and steel by means of a mould made in conformity to the letters patent No. 240,727, granted to them April 26, 1881, as assignees of Alfred E. Jones. If we understand the argument of counsel, it is that there was a failure of expert testimony to inform the court whether or not such an act was an infringement of the several patents of the complainants. We fail to see how experts' testimony would be of service. Numerous experts could, undoubtedly, have been found both by the complainant and the defendants who would respectively maintain the views of their employers on a question of that sort, but their evidence would not greatly help the court in deciding what is simply a question of mechanical equivalents. Having in our hands the respective letters patent, the models, and the moulds used, we trust it will not be set down as presumption to add that we have quite as much confidence in our own judgment as we should have in the opinion of experts whether the use of the one was an infringement of the claims of either of the others.

It need not be claimed that Doyle was the first person who used moulds in casting ingots of iron or steel; but the evidence shows that he was the first who manufactured combined ingots of these metals by the use of mechanism which produced a variable cavity in the

moulds. The several patents of Illingworth and Jones reach the same result as to the variable cavity, but Illingworth has changed and, as we think, improved the mechanism. In the Doyle patent the cavity for one of the moulds is made by the use of an iron or steel slide, and in the Illingworth by two covers—one with a plain or straight surface, and the other recessed. If such a substituted instrumentality of the mechanism is not a mere equivalent for the metal slide of Doyle, the patent may be held good for the improvement, although it is valueless except in combination with Doyle's invention, and can no more be used without his consent than Doyle can use Illingworth's improvement without his consent.

The *first* admission of the defendants is their use of moulds made in conformity to the Jones letters patent. We regard this as a clear infringement of the Doyle patent. Their *second, third, fourth, and fifth* admissions embrace the use of instrumentalities which not only infringe the Doyle invention, but also the improvement of the Illingworth patent. There are differences in construction and mode of operation shown, but these are not radical or independent enough to take them out of the category of mechanical equivalents.

Let a decree be entered in favor of the complainant in both cases for an injunction, and the usual order of reference be made for an account.

HICKS v. OTTO and others.

(Circuit Court, S. D. New York. March 18, 1884.)

1. PATENT—VALIDITY OF REISSUE—CLINICAL THERMOMETER.

The original patent for a clinical thermometer, in place of which reissued letters No. 10,189 were taken out, was broad enough to cover a tube in which the mercurial column is magnified by means of a raised ridge having a sharper curvature than the main shaft, even though the column is not placed beyond the mechanical center of the main tube. The reissue, therefore, more specifically describing this device, is valid.

2. SAME—PRIOR USE—LOCATION OF THE BORE.

The characteristic of this patent is that the bore is back of the mechanical axis of the curved surface through which it is viewed. Prior use of a so-called magnifying tube, with the bore at the center or in front of it, does not defeat the patent.

In Equity.

Frost & Coe, for plaintiff.

Briesen & Steele, for defendants.

WALLACE, J. Infringement is alleged of the first and second claims of reissued letters patent No. 10,189, granted August 29, 1882, to L. Peroni, assignor of James Joseph Hicks, for an improvement in thermometers. The invention of Peroni was patented in England, January 24, 1878, and the original patent here was issued December 9,

1879. It relates to the class of thermometers known as clinical thermometers, in which it is desirable that the bore should be as small as possible in order that the column of mercury may respond rapidly to changes of temperature at the bulb. The employment of a bore almost microscopic in its caliber necessitates the use of a magnifying lens; otherwise it is very difficult to detect the exact point in the bore at which the mercury stands. Peroni's improvement is directed to such a construction of the glass tube surrounding the bore for the mercury column as will increase the lens power of the tube.

The defenses principally relied upon, besides that of non-infringement, are: (1) That the reissue is void, being for that which was abandoned on the application for the original patent, and as enlarging the claim of the original; (2) anticipation by description in prior foreign publications; (3) prior public use.

The specification of the original patent follows *verbatim* that of the English patent. The invention is substantially described as consisting in locating the bore for the mercury in the glass tube beyond the mechanical center or axis of the magnifying curves of the tube. This involves discarding the circular glass tubes commonly used, and employing those in which there is a convex surface so located as to be eccentric to the bore. Several illustrations are given to show how the bore is located when the magnifying surfaces of the tube differ in their form and location, and all of which exhibit how the scientific fact is utilized, that the apparent size of an object is magnified more when it is beyond the mechanical center of the convex face through which it is viewed than when it is located at the center of the arc formed by the convex face. There were two claims in the original: (1) A thermometer tube having its bore out of or beyond the mechanical axis or center, as and for the purposes described. (2) A thermometer tube having its bore out of or beyond the center thereof, and a curved portion or portions for magnifying said bore, substantially as set forth.

It is insisted for the defendants that these claims are intended to emphasize the theory that the invention consisted of a tube, in which the bore was to be outside the center of the tube, and were intended to limit the patent to such an invention, and that this was done in order to obviate the danger that the claims would otherwise be anticipated by the Negretti and Zambra English patent of 1852, although the language of the claims, read without a careful analysis of the specification, would seem to limit them to a tube in which the bore is out of or beyond the center of the tube itself. The first claim is certainly capable of a construction as broad as the invention described in the specification, and, if the case were now here upon that claim, such would be the construction which it would receive. The mechanical axis or center referred to in the claim would be construed to refer to the mechanical axis or center of the convex or curved surface of the tube. There was nothing in the prior state of the art to

require a more limited construction to the claim. The Negretti and Zambra patent merely describes a thermometer with a flat glass tube, instead of a round one. It nowhere suggests the existence of any magnifying effect by reason of the change in the form of the tube or the location of the bore. So far as appears, Peroni was the first to suggest this. A reference to Peroni's English patent shows that in the claim he specifically stated the nature of his invention to consist in making tubes in which the bore is out of or beyond the mechanical axis or center of the magnifying curve. In the specification of his original patent here he describes one form of tube, which has a curved top and perpendicular sides, and another in which the curves are located between the top and the sides, which he states, "by reason of the bore being beyond the mechanical center or axis of such curves act as magnifying curves or lenses, and thus magnify the appearance of the bore more than is the case when the bore is placed in the mechanical center or axis of the tube or of the curved portion of the tube." Again, he represents a different section of tubing, with his invention applied thereto, and states:

"In this case the tube is mainly circular in section, and the bore is in the center of the main portion thereof, but the tube is formed with a curved portion standing up above the general surface of the tube, and, by reason of the bore of the tube being beyond the mechanical axis or center of such raised curved portion, the latter acts as a lens or magnifying curve, and greatly magnifies the appearance of the bore."

All this is quite inconsistent with a construction of the first claim that would limit the invention to one in which the bore is out of or beyond the mechanical axis or center of the tube itself.

In the reissue the specification has been amended so as to express clearly what was plainly suggested, but left to be spelt out by inference in the original. This has been done by a statement of the principle of his invention and a more specific description of the means employed to carry it out. The first claim of the reissue is: "A thermometer having its bore in rear of or beyond the mechanical axis or center of the convex surface through which it is viewed, as and for the purpose described." The second is: "A thermometer having a convex or lens front for magnifying the bore, formed of a smaller curve than that of the body of the thermometer, substantially as set forth." The second claim, as also the third, (which is not involved in this suit,) cover details of construction described in the specification, but the first claim is broadly for the principle and means of producing the magnifying effect as described in the specification. While any uncertainty which existed in the first claim of the original patent is eliminated by the first claim of the reissue, it is not a broader or a different claim, upon a fair and reasonable construction of that claim in the original. What has already been said concerning the Negretti and Zambra patent disposes of any defense of anticipation resting upon that patent.

Reliance is also placed on a printed publication, which was a catalogue circulated by the defendant in 1876, in which he advertised thermometers for sale. One of these, designated as No. 450, is described as one "with an oval back and front." Another (No. 451) is described as one "with flat back, the front made in the form of a lens, so as to magnify the mercurial column." Neither of these descriptions suggest a tube in which the bore is so located as to be beyond the center of the lens or curved surface through which it is to be viewed.

The defense of prior use is not satisfactorily established by the evidence. So far as it rests upon the thermometer of Hicks, sold in this country, those of the class described as No. 450 in his catalogue, and which were made with a flat back and front so that they would not roll off a table when in use, if they magnified the column at all, they did so in a hardly appreciable degree, and were of no practical utility in that behalf. The class described as No. 451 was passed upon by the patent-office before granting the reissue, and held not to show the invention of Peroni. Although they had been described in complainant's catalogue as magnifying the mercurial column, the proofs show the bore to have been located between the lens surface and the center of the arc of the lens, and consequently the magnification was much less than that produced by Peroni, and did not involve his principle. As to the thermometers made and sold by Adolph Bayer, the evidence indicates that although he made half a dozen or a less number on one occasion, they were made experimentally, and the result was not sufficiently encouraging to induce him to repeat the experiment. He was a manufacturer and dealer in the article. The Peroni thermometer was a success as soon as it was introduced to the trade, while Bayer's fell still-born upon the current. The proof is not satisfactory that they were a practical success, but, on the contrary, indicates that they belong to the catalogue of abandoned experiments. The specimen exhibited was made years later, for the purpose of meeting a motion for an injunction in a suit brought upon the complainant's patent. Without considering with particularity the other instances of prior use relied upon, it suffices to say that the defendants' case fails to meet and overthrow the presumption arising from the grant of the patent by such cogent and satisfactory proof as the rule of law applicable to the defense requires.

The more difficult question in the case is as to infringement. The defendant is manufacturing ostensibly under the letters patent granted to Henry Weinhagen October 19, 1880, and reissued January 16, 1883. The claim of the original was for a thermometer tube having a flat bore and a flat back, and sides forming acute angles with said back, and converging towards and joining each other at an acute angle opposite the flat bore, so as to form a prismatic front. The theory of the invention is that the magnifying power is due to the refracting action of the prismatic sides in combination with the flattened bore in a plane at right angles to the line of view. Indeed, it

is insisted by the experts for the defendants that the substantial and practical magnifying effect found in the Peroni thermometer is not due to the lens action of the cylindrical tube, whether the bore of the tube be placed in its axis or beyond that axis, or beyond the axis of curvature of any part of the tube, but is due to the refracting action of the sides; and an attack is made upon the complainant's patent as containing a false and deceptive specification in this regard. A careful consideration of the evidence taken, in connection with the experimental tests made upon the hearing, has led to the conclusion that the theory of the defendants' experts is not correct. In his original specification, Weinhausen states "that his tube is made as sharp as possible at its junction, and forms a prismatic portion or front," and "that the prismatic sides join each other at an acute angle opposite the bore." If the defendants' thermometer tubes were in fact of this description they would not infringe the complainant's patent. The magnifying curve, which is the convex surface of Peroni's, would be absent, and the two inventions would not involve the same principle. But it is believed that Weinhausen found it necessary to adopt the principle of Peroni's invention. In his reissue the feature of the acute angle in front of the bore, formed by making the tube as sharp as possible at its junction, is modified by a description of the mode of making the tube which results in the angles remaining "slightly rounded." This configuration of the angle appears quite clearly in the photographic representations of a section of his tubes. These present a "slightly rounded" angle or lens surface, which is substantially the same as is shown in figure 2 of the drawings of complainant's patent. The bore is located beyond the center of the magnifying curve. It is therefore held that the defendants infringe.

A decree is ordered for the complainant.

SHAW RELIEF VALVE CO. v. CITY OF NEW BEDFORD

(Circuit Court, D. Massachusetts. March 12, 1884.)

PATENTS HELD PERSONAL PROPERTY.

A patent-right is personal property, and goes to the executor. Section 4884 of the Revised Statutes, providing for the grant of a patent to the patentee, "his heirs and assigns," does not change the law by which executors and administrators take the title to a patent on the death of the owner: as appears by other sections of the same chapter.

In Equity.

Chas. H. Drew, for complainant.

C. J. Hunt, for defendant.

LOWELL, J. This bill is brought upon two patents, and the demurrer of the city of New Bedford raises several objections, all but
v.19,no.10—48

one of which, it is agreed, can be, and may be, removed by amendment. A question which cannot be thus disposed of, and which has been argued with earnestness, and is pending in at least one other circuit, is whether the complainant's title to an undivided part of one of the patents is sufficient. It seems that this title comes through an administrator of the patentee; and the defendant contends that the grant of a patent, by Rev. St. § 4884, is to the patentee, "his heirs and assigns," and that by force of these words a patent descends directly to the heirs, without the intervention of the administrator. This is a new and somewhat surprising proposition. It has never been doubted before that a patent is personal property, which follows the ordinary course, and goes to the executor or administrator in trust for the next of kin. The cases take this for granted, and when any question has been mooted, it has had reference to the due qualification of the executor or administrator, or something of that sort, as in *Rubber Co. v. Goodyear*, 9 Wall. 788. The text-writers treat of patent-rights as personal property which goes to the executor. Norman, Pat. 145; Schouler, Ex'rs, § 200. The defendant argues that the statute of 1870 changed the rule, by omitting the words "executors and administrators" from what is now section 4884, intending to make a sort of real estate of this incorporeal right. He has not argued that the widow can be endowed of it, but I suppose that will follow. A grant of personal property to a man and his heirs, without further qualification, means to him and his next of kin, according to the statute of distributions. 4 Kent, Comm. (5th Ed.) 537, note *d*, and cases; *Vaux v. Henderson*, 1 Jacob & W. 388*n*; *Gittings v. McDermott*, 2 Mylne & K. 69; *Re Newton's Trusts*, L. R. 4 Eq. 171; *Re Gryll's Trusts*, L. R. 6 Eq. 589; *Re Stevens' Trusts*, L. R. 15 Eq. 110; *Re Thompson's Trusts*, 9 Ch. Div. 607; *Houghton v. Kendall*, 7 Allen, 72; *Sweet v. Dutton*, 109 Mass. 589. Such a grant is simply a limitation of an estate of inheritance, having no reference one way or the other to the administrator. He takes in trust for the next of kin, because the estate is more than a life estate.

The acts of congress have not been drawn with technical accuracy in this particular. Down to 1836 the word "executors" was omitted, and patents were issued to the patentee, his "heirs, administrators, or assigns," (St. April 10, 1790, § 1; 1 St. 110; St. Feb. 21, 1793, § 1; 1 St. § 321;) but no one ever doubted that executors would take the title. In 1836 executors were added, and the grant was to the patentee, his "heirs, administrators, executors, or assigns." St. July 4, 1836, § 5; 5 St. 119. In 1870, administrators and executors were left out. This omission is not significant. The law was not changed by it; the proof of which is that executors and administrators are mentioned as taking title in five of the sections of the Revised Statutes which re-enact the law of 1870. Thus, by section 4896, if an inventor dies before a patent is granted, the right to obtain it devolves on his executor or administrator, in trust for his heirs at law, (that

is, his next of kin, as we have seen,) or to his devisees, as the case may be, which, technically, should be legatees. By section 4898 every patent shall be assignable, and the patentee and his assigns, "or legal representatives," may, in like manner, grant, etc. Now, legal representatives usually means executors or administrators, (*Price v. Strange*, 6 Madd. 159; *Re Gryll's Trusts*, L. R. 6 Eq. 589;) and it has that meaning in this statute; for by section 4896, above mentioned, by which the executors or administrators are authorized to apply for a patent, it is provided that when the application is made "by such legal representatives," the oath shall be varied to meet their situation. By section 4900 it is made the duty of all patentees and their assigns, and "legal representatives," to do certain acts by way of informing the public that the article they make or sell is patented. By section 4922, when a patentee has innocently claimed more than his invention, he, his executors, administrators, and assigns may maintain a suit on the patent, notwithstanding the mistake. By section 4916, if a patentee is dead, without having assigned the patent, and there is occasion for a reissue, it shall be made to his executors or administrators. From a comparison of these sections it is made clear that a patent-right, like any other personal property, is understood by congress to vest in the executors and administrators of the patentee, if he has died without having assigned it. It is really of no consequence whether they hold in trust for heirs or for next of kin, so long as they take the legal title.

It was argued that congress may have intended to express by the word "heirs" that a patent should not be assets for the payment of debts. But they have not only not exempted patent-rights from being taken for the debts of the owners, but have required that they should be so taken by assignees in bankruptcy, (Rev. St. § 5046;) and the supreme court have failed to discover such an intent, for they hold that, by due process in chancery, a patent-right may be applied to such payment. *Ager v. Murray*, 105 U. S. 126. Indeed, section 4898 is decisive of this question, for it expressly provides that the legal representatives of the patentee may assign. Even if this were a mere statutory power, the authority would be sufficient; but it is, of course, a recognition of a fact, and not a new grant of power.

Demurrer overruled.

FREYER, Jr., v. MAUBER.

(Circuit Court, S. D. New York. March, 19, 1884.)

PATENTS—TILING—PREVIOUS STATE OF THE ART.

Reissue No. 5,174, for a sectional arch of hollow tiles having plane joints, to be used underneath the floors of fire-proof buildings, is void for lack of patentable novelty. All of the features except the plane *voussoirs* were incorporated in previous foreign patents, and the use of plane *voussoirs* for analogous purposes was not new.

In Equity.

Geo. W. Van Siclen, for complainant.

Gen. John A. Foster, for defendant.

WALLACE, J. The invention described in the complainant's patent (reissue No. 5,174 granted December 3, 1872, to Balthazar Kreisler, original granted March 21, 1871) relates to an improvement in tiling used in fire-proof buildings under the floors. The specification describes it as consisting in a hollow sectional tile combined with the girders of the building in such a manner that the tiling spans the space between opposite girders, the end sections being supported upon or against the girders, and the middle section forming a key to bind the sections together, the whole having a flat under-surface. Considered with the aid of the drawings, the invention may be more intelligently understood as being an arch composed of sections of hollow tiles, and supported by girders against which it abuts at either side, the intrados having no curve, and the sections being *voussoirs* radiating to a center, and the points of the section being plane; and, as an incidental arrangement for supporting the arch, the end sections are provided with a recess, where they rest upon the flanges of girders for receiving and interlocking with the flanges. The arch may be so formed on the upper side as to furnish air spaces for ventilation under the flooring; and it may also be provided with recesses in the sections at the joints, on the upper side of the arch, into which the sleepers may be inserted; but neither of these features is essential, and neither enters into the claims as one of their constituents. The claims are as follows:

(1) In combination with supporting beams or girders, a sectional hollow tile, whose end sections abut against opposite beams or girders, and whose middle section forms a key, and so constructed that the under side of the tile forms a flat surface, substantially as described. (2) A hollow tile made in sections, one of which forms a key for the end-sections, which are provided with recesses to catch over the flanges of the girders, substantially as described.

The several publications relied on by the defendant as anticipating the patent are ineffectual for this purpose, because none of them describe an arch of hollow tiles in which the several sections have plane joints, or are supported merely by the wedging power of the plane *voussoirs*. These publications, however, contribute important in-

formation concerning the prior state of the art, and materially assist the argument for the defendant that there was no invention in what Kreischer did. In considering them the drawings are of great assistance, as they illustrate clearly what the descriptive words alone would fail to point out adequately. These publications show that it was not new to employ an arch of hollow tiles made in sections, supported by girders in either side between the stories of fire-proof buildings. The French letters patent to Vincent Garcin, of October 11, 1867, and amendment of October 9, 1868, show such an arch having a flat under surface or intrados. The *voussoirs* are, however, interlocked by indented joints, so that the sections support each other by this means. The key-stone has also an indented joint. The French letters patent to Roux Freres, of March 24, 1868, show the same thing. They also show a recess in the end sections of the arch where they rest upon the flanges of girders for receiving the flanges and air spaces for ventilation, on the upper side of the arch. Every substantial feature of the complainant's patent is here shown except the plane joints of the arch, the sections in the Roux Freres patent having indented joints, but indented differently from Garcin's construction. Other publications show very similar arches which are supported by rods or bolts instead of interlocking joints.

It is common knowledge that the flat arch, in which the joints are plane and the intrados has no curve, is old. It was generally employed in door-ways, fire-places, and windows. If Kreischer had been the first to introduce the plane joints of this arch into tiling for spanning the space between the girders of buildings, the case would resolve itself into the single question of fact, whether the substitution of the plane joints for the indented joints of Garcin and Roux Freres was such an obvious thing as not to involve invention. But the English provisional specification of George Davis, of July 10, 1868, for filling pieces for iron floors and ceilings, describes a filling of hollow bricks, in which the pieces which abut against the joists have one side perpendicular and the other oblique, the intermediate pieces have parallel sloping sides, and the center filling piece is of a tapering or wedge form, "so that when the filling pieces are fitted together between the iron beams or joists they form a self-sustaining flat arch, of which the center piece is the key." It thus appears that Kreischer was not the first to employ the plane joints in an arch of tiling for spanning the space between the girders of buildings. Such joints having been used for this purpose, it was not invention to employ them for the same purpose in the arches of Garcin and Roux Freres. This was merely improving a known structure by introducing a known equivalent for one of its features.

The bill is dismissed

CHICAGO MUSIC Co. v. J. W. BUTLER PAPER Co.

(Circuit Court, N. D. Illinois. February 24, 1884.)

PLEADING—INFRINGEMENT OF COPYRIGHT—NECESSARY ALLEGATIONS.

In a suit to recover for the infringement of a copyright, the declaration must set out in detail a substantial compliance with the various requirements of the copyright laws.

Demurrer to Amended Declaration.

Frank J. Bennet, for plaintiff.

McCoy, Pope & McCoy, for defendant.

BLODGETT, J. This is a demurrer to the amended declaration, in which there are five counts. It is a suit for the alleged infringement of a copyright. The allegation in each of these counts is that the plaintiff was proprietor of a certain musical composition entitled "I will meet her when the sun goes down," words and music by William Welch; that on October 19, 1882, plaintiff caused the same to be recorded in the office of the librarian of congress, and afterwards published divers copy of this musical composition, with the words "Copyrighted by the Chicago Music Company" printed on each copy; and that the defendant, since the recording of the said work in the office of the librarian of Congress, has infringed upon the plaintiff's exclusive right so secured to him by virtue of the copyright laws of the United States.

The question made by the demurrer is whether the plaintiff has sufficiently set out his title as the holder and owner of this copyright by this averment. The law authorizes the owner, author, or proprietor of a book, musical composition, etc, to copyright the same, and it is to be copyrighted by delivering at the office of the librarian of congress, or by depositing in the mail addressed to said librarian, before publication, a printed copy of the title of such book or musical composition; and also, within 10 days from the publication of such book or musical composition, the author or owner of the copyright must deliver at the office of the librarian of congress, or deposit in the mail addressed to such librarian, two copies of such book or composition. These are the steps which must be taken to secure the copyright in a musical composition like this. This exclusive right to authors is a monopoly for the term of the copyright, and in order to secure it there must be a substantial compliance with the terms of the statute. It is not like a patent in this: that an applicant for a patent applies to the commissioner of patents, setting out his claim, and a *quasi* judicial proceeding is instituted before the patent-office. An examination is made as to the novelty and usefulness of the invention, and if the allegations of novelty and usefulness are adjudged to be sustained, the patent-office issues a patent, which is *prima facie* evidence of both the novelty and usefulness of the device, and that the patentee

is the first inventor thereof. But the librarian of congress possesses no power in the premises; he simply receives the title when it is delivered or forwarded to him, and makes a record of it in his office, and receives the two copies of the publication when published, and which must be forwarded to him within 10 days after the publication is made, and makes a record of the receipt of the copies. The librarian issues no certificate, or anything in the nature of a patent; he simply makes a record, and whenever called upon has to make a certificate of whatever the records of his office show towards a compliance with the terms of the law. The rights of the party holding a copyright, therefore, depend wholly on whether he has in fact complied with the terms of the law or not, and not upon the fact that he has obtained a certificate from the librarian. In this case the five counts in the declaration are barren of any averment of compliance with the terms of the law. The plaintiff alleges he was proprietor of this musical composition, but he does not state how he became proprietor; he does not state except inferentially who was the author of the composition in question. He says that he was proprietor of a musical composition known by a certain title, the words and music by William Welch, but how he acquired the proprietorship from William Welch, or whether William Welch was the author, is only, as I said, inferentially to be obtained from any statement in the declaration. Nobody but the author, or some person who has acquired the author's right to a copyright, can obtain a copyright under the law; and I think that where a person attempts to copyright as proprietor, and avers that he has copyrighted as proprietor, he must show how he became proprietor, because no intendment will be made in favor of an exclusive monopoly of this character. The plaintiff must show that he has taken the steps required by law. Here there is no statement in the first place, as I have already said, that he ever was either the author or proprietor by virtue of having acquired the rights of the author; there is no averment that he ever filed with the librarian of congress, before publication, the title of the work, and that within 10 days after publication he delivered or forwarded to the librarian of congress the two copies required by the law which make his copyright complete.

The demurrer to this amended declaration must therefore be sustained.

THE MARINA.

(District Court, D. New Jersey. March 8, 1884.)

1. CONDITIONAL SALE—ATTACHMENT.

An engine was furnished to a steam-lighter under a written contract of sale, by which it was to remain the property of the vendor till paid for. The engine was attached by screws to the vessel. The contract was made in New York, but the lighter afterwards went into New Jersey, where an attempt was made by the creditors of the vessel to attach the engine. *Held*, that the engine remained the property of the vendor, and could not be attached.

2. SAME—NOT A CHATTEL MORTGAGE.

An agreement by which goods delivered to the vendee are to remain the property of the vendor till paid for is a conditional sale, and not a chattel mortgage, within the meaning of the registration acts. In the absense of fraud the vendor's title will prevail over an attachment.

3. CONFLICT OF LAWS—LEX SITUS.

Such is, at all events, the law of New Jersey, (*Cole v. Berry*, 13 Vroom, 308;) and property brought into a state becomes subject to its law and policy, which will govern the construction of contracts made elsewhere with regard to the transfer and disposition of the property.

In Admiralty.

John Griffin, Jr., (with whom was *Bedle, Muirheid & McGee*,) for libelants.

Hyland & Zabriskie, for petitioner.

NIXON, J. On the twenty-ninth of July, 1880, the Lidgerwood Manufacturing Company furnished to the steam-lighter *Marina* a double hoisting engine, at the request of her owner, J. A. Cottingham, upon the terms specified in a paper, of which the following is a copy:

"NEW YORK, July 29, 1880.

"*Lidgerwood Man. Co. Machine Ware-rooms, No. 96 Liberty street, New York*—GENTS: Please furnish and ship to steam-lighter *Marina*, to remain as your property until fully paid for by me in cash as below stated, the following: One double hoisting engine, same as provided me for steam-lighter *Joseph Hall*, at \$450. To be paid for as follows: Fifty dollars in equal monthly payments. And unless so paid for, you are authorized to enter and retake the same into your possession, wheresoever she may be found. The same to be held fully insured by me against loss or damage by fire, and to be kept in good order. J. A. COTTINGHAM, 11 Dey St., New York."

The engine was placed on board the steam-lighter, attached to the deck by screws, and used since that date in her ordinary business of lighterage. In this condition of affairs a number of libels *in rem* were filed, and monitions issued out of this court against the said steamer, her engines, and tackle, in favor of creditors claiming liens for supplies, repairs, labor, etc. The marshal of the district, by virtue of said writs, seized the vessel, her engines, tackle, and apparel, and, by order of the court, has advertised her for sale for the satisfaction of alleged liens amounting to about \$7,000. The Lidgerwood Manufacturing Company has demanded of the marshal the surrender of the possession of the hoisting engine, claiming the same as its property.

This has been followed by a petition to the court, and a motion that the marshal be ordered to deliver up to said company the custody of the same before any sale of the vessel and her tackle takes place. There seems to be no dispute about the facts, and the proctors of the respective parties have stipulated, in writing, as follows:

It is admitted that the hoisting engine in question was delivered to Mr. James A. Cottingham by the Lidgerwood Manufacturing Company, under and in accordance with the terms of a paper, a copy of which is hereto annexed, and marked Exhibit A; that \$250 has been paid by Cottingham on account of said engine, and that he has made default in the payment of the balance of the sum specified in said paper, according to the terms thereof, and that he had made such default prior to the incurring of the claims herein; that the libelants herein did not know at the time they performed the repairs and labor, and furnished the materials and supplies in question, that the said hoisting engine was claimed to be owned by any company or person, other than the owner or owners of the steam lighter Marina, and that they at such times never inquired, and said Cottingham never told them, who claimed to own said engine; that during all the times referred to in said libels said Cottingham was a resident of Jersey City, New Jersey; that none of the labor, supplies, or materials in question were performed upon or supplied to said hoisting engine itself; that while said repairs were being made, or a portion thereof, the said engine, which prior thereto had been attached to said vessel, was removed, and afterwards replaced thereon and reattached thereto; that the rent usually charged by the Lidgerwood Manufacturing Company for the use of an engine such as this is fifty dollars a month, in a case where they rent one; that said engine is attached to the vessel by $\frac{3}{4}$ or $\frac{7}{8}$ inch wood screws passing through the deck and into the deck-beams of the vessel about four inches.

The paper referred to in the foregoing admission of facts, as marked Exhibit A, is the above-quoted writing addressed to the Lidgerwood Manufacturing Company by Cottingham. The question presented is whether the contract shown in the writing is a conditional sale, which did not pass the ownership until the condition was performed, or whether the title passed by the contract and what was reserved was a mere lien or security for the payment of the price of the engine. If the former, then the engine remains the property of the vendor, and is not subject to seizure by creditors claiming liens against the vessel. If the latter, the reservation is void as contrary to the provisions of the chattel-mortgage act of the state, requiring a record of all chattel-mortgages, and *bona fide* creditors or purchasers without notice may hold it discharged of the claim of the manufacturing company. The question is not without difficulty, which arises chiefly from the conflicting views of the courts as to whether the instruments of writing evidencing the sales of chattels are within the registration laws of the state. This much, however, I think has been settled by the supreme court, that the federal tribunals will follow the decisions of the state courts in determining whether or not the registration act of the particular state includes a conditional sale. *Hart v. Barney & Smith Manuf'g. Co.* 7 FED. REP. 552.

Is the instrument of writing under which the transfer of the en-

gine took place a mere conditional sale of the property, liable to be defeated if the purchaser fails to pay the purchase money, or is it "a conveyance intended to operate as a mortgage," which is void as to creditors because not recorded? The contract between the company and the owner of the vessel was executed in New York, and the proctors of the petitioner invoke the application of the usual rule that it must be interpreted, and its validity determined by the laws and judicial decisions of that state. It is undoubtedly the settled doctrine of most, if not all, civilized countries that personal property has no locality, and that it is subject to the law which governs the person of the owner, both with respect to its disposition and transmission. Out of this principle has grown the rule in the construction of contracts that, where they relate to movables, they are construed according to the law of the place where they are made, and not according to the local law where they are attempted to be enforced. But this rule is not without its exceptions. It is founded in comity, and must yield when the legislation of a state in which the property happens to be has prescribed a different rule. Story, Conf. Laws, § 390. Thus the supreme court in a series of cases (*Green v. Van Buskirk*, 5 Wall. 307; *S. C.* 7. Wall. 139; and *Hervey v. Locomotive Works*, 98 U. S. 671) have held that every state has the right to regulate the transfer of property within its limits, and that whoever sends property into it impliedly submits to the regulations concerning its transfer in force there, although a different rule of transfer prevails in the jurisdiction where he resides, or where the contract was entered into.

The present case comes within the exception to the general rule; and as the controversy has arisen in New Jersey, I must look to the statute and the decisions of the courts of this state, rather than New York, for the construction of the contract. The statute of New Jersey (Rev. 709, § 39) enacts that every mortgage or conveyance intending to operate as a mortgage of goods and chattels, which shall not be accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things mortgaged, shall be absolutely void as against the creditors of the mortgagor, and as against subsequent purchasers and mortgagees in good faith, unless the mortgage or a true copy thereof be filed in the clerk's office of the county, etc. Supplements to the same have been approved on March 19, 1878, (P. L. 139,) on April 5, 1878, (P. L. 347,) and on March 12, 1880, (P. L. 266,) none of which affect the original act, so far as any questions arise in the present case, except the last recited supplement, which requires a record of the mortgage in the place of filing. This statute being in force, the supreme court of New Jersey, in the case of *Cole v. Berry*, 13 Vroom, 308, had occasion to construe an instrument of writing substantially similar to the one under consideration. Cole, the plaintiff, being the owner of a Domestic sewing-machine, sold the same to one Gustave Wetzels, and gave him possession. While thus possessed, Berry, the defendant,

one of the constables of the county of Hunterdon, seized and sold it by virtue of a writ of attachment issued against said Wetzel. Cole brought an action of trespass against the constable, and claimed the ownership of the machine under the following written agreement, entered into by Wetzel at the time of the purchase :

"ANNANDALE, June 26, 1876.

"Whereas, the subscriber has this day purchased of Josiah Cole one Domestic sewing-machine for the sum of fifty-five dollars, for which I have given fifteen dollars in cash and my note for forty dollars, payable in installments of five dollars a month, and I have allowed him to take the machine in his possession. Now, it is agreed that the said machine is to be and remain the property of the said Cole, and be subject to his control, until the same is actually paid for in cash.

GUSTAVE WETZEL."

The learned judge (DEPUE) who spoke for the whole court, in the course of an able opinion, stated the law in New Jersey in regard to the conditional sale of chattels to be as follows :

"(1) Delivery of possession under a conditional contract of sale, which stipulates that the goods shall remain the property of the vendor until the contract price be paid, will not pass title to the vendee until the condition be performed. (2) A vendor who delivers the possession of a chattel under an executory contract of sale, on condition that the property shall not pass until payment of the contract price, may forfeit his property by conduct which the law regards as fraudulent. But where the case presents no other features than that the vendor has entered into a contract of sale on credit, and has delivered the goods to the vendee upon an agreement that they shall remain the property of the vendor until payment of the purchase money be made, the transaction is not fraudulent *per se*, and the property in the goods will remain in the vendor until payment be made, without being subject to execution at the suit of creditors of the vendee."

This would seem to be decisive in the present case, and the more so as the decision is in accord with the best elementary writers on the subject.

Thus Kent in his Commentaries, vol. 2, p. 497, says :

"When there is a condition precedent attached to a contract of sale and delivery, the property does not vest in the vendee on delivery, until he performs the condition, or the seller waives it; and the right continues in the vendor, even against the creditors of the vendee "

Story, Sales, § 313, says :

"A sale and delivery of goods on condition that the property is not to vest until the purchase money is paid or secured, do not pass the title to the vendee until the condition is performed; and the vendor, in case the condition is not fulfilled, has a right to repossess himself of the goods, both against the vendee and against his creditors; and, also, if guilty of no laches, the vendee may reclaim the goods so sold and delivered, even from one who has purchased them from his vendee in good faith and without notice."

Benjamin, in his work on Sales, in the chapter on the "Sale of Specific Chattels Conditionally," (book 2, c. 3, § 320,) adds to Judge BLACKBURN's two rules, a third rule, as follows :

"Where the buyer is, by the contract, bound to do anything as a condition, either precedent or concurrent, on which the passing of the property de-

pend, the property will not pass until the condition be fulfilled, even though the goods may have been actually delivered into the possession of the buyer."

To the same effect, also, is the opinion of Mr. Justice WASHINGTON, in this circuit, in the case of *Copland v. Bosquet*, 4 Wash. C. C. 588, and of Judge SHIPMAN, in the second circuit, in the case of *Bauendahl v. Horr*, 7 Blatchf. 548.

It may seem at the first glance that the foregoing view is in conflict with the circuit court of Kentucky in the case of *Hart v. Barney & Smith Manuf'g Co.* 7 FED. REP. 543, and with the supreme court of the United States in the cases of *Hervey v. Rhode Island Locomotive Works*, 93 U. S. 664, and *Heryford v. Davis*, 102 U. S. 235.

It will be found, however, on a more careful examination that these decisions turned upon the statutes and the adjudications of the state courts of the respective states, in regard to their registration laws. In the case first stated, the learned judge, after quoting the Kentucky act, said that he must follow the Kentucky courts, and that their later decisions were all to the effect that agreements that are usually called conditional sales were within the law, and therefore void without registration. In *Hervey v. Rhode Island Locomotive Works*, *supra*, the parties to the contract of sale lived respectively in New York and Rhode Island, and it was insisted that it must be interpreted by the laws of the state where the contract was made. But the court held that the property, the ownership of which was in dispute, was in Illinois, and that the courts of that state should be followed in determining the controversy, and that these courts had uniformly decided that the policy of the law in Illinois would not permit the owner of personal chattels to sell them, either absolutely or conditionally, and still continue in the possession of them. In *Heryford v. Davis*, *supra*, the court admitted, at least by implication, that the chattel-mortgage act of Missouri allowed conditional sales of personal property, and conceded that if the contract under consideration was found to be of that character the court must give it effect. Mr. Justice STRONG, speaking for a majority of the court, said: "If the contract was only a conditional sale, which did not pass the ownership until the condition should be performed, the property was not subject to levy and sale under execution at the suit of the defendant against the company." But, on examining the terms of the agreement, the court found that it lacked the necessary elements of a conditional sale, but, on the other hand, contained every element of an absolute sale and transmission of ownership. Promissory notes were given for the stipulated price of certain railway cars sold, and these notes were to be paid to the vendor in any contingency. If not paid, the vendor reserved the right to take the property into its own possession, and sell it, but was bound, after retaining the sum remaining due upon the notes, to pay the surplus, if any, to the vendee. In view of these provisions, the court determined (Judge BRADLEY dissenting) that it was the intention of the parties, manifested by the agreement, that the ownership of the

cars should pass at once to the vendee, in consideration of its becoming debtor for the price, and that, notwithstanding the efforts to cover up the real nature of the contract, its substance was the hypothecation of the cars to secure a debt due the vendor for the price of a sale.

It only remains to inquire whether the case exhibits any conduct on the part of the vendor which the law regards as fraudulent. If so, I fail to perceive it. If any exist it was the duty of the petitioner to show it. The engine was delivered over to the lighter, to be used, doubtless, for loading and unloading cargoes; but it was to continue the property of the vendor until fully paid for in cash "in equal monthly payments of fifty dollars." That ownership was not forfeited because the vendee attached the engine to the deck of the vessel by wood screws, in order to its more convenient or more efficient use, whether such attachment was made with the knowledge and consent of the vendor or not. He never performed any act, or made any statement, from which the inference could be drawn that he meant to mislead the public, or individuals, in regard to the ownership.

Let an order be entered directing the marshal, in making sale of the vessel, etc., to except the hoisting engine from the property sold. It is not a case where costs should be allowed.

THE JAY GOULD.

(*District Court, E. D. Michigan. March 10, 1884.*)

1. COLLISION—PROPELLER AND TUG—SIGNALS.

A propeller and tug were approaching each other under signals of one whistle each, and in such relative positions that the propeller was exhibiting her red light to the tug. When about 600 feet apart, the propeller starboarded so far as to show her green light and shut in the red. The tug immediately blew two whistles, starboarded, and continued at full speed, and was struck by the propeller at a right angle and sunk. *Held*, that both vessels were in fault—the propeller for starboarding too far, and the tug for not stopping her engine.

2. SAME—APPROACHING VESSEL—COURSE.

A vessel approaching another is bound to pursue a consistent and steady course, and not to embarrass or confuse the other by unnecessary changes of her wheel.

3. SAME—STEAMER—FAULT.

Wherever by the fault of another vessel a steamer is placed in danger of collision, she is bound to stop or reverse, and will not be excused for a departure from the statutory rule, except upon clear proof that such departure was rendered necessary by the circumstances of the case, or that it could not have contributed to the collision.

In Admiralty.

This was a libel for a collision between the tug Martin Swain and the propeller Jay Gould, which took place about 3 o'clock in the morning of September 27, 1881, in the Detroit river, between the head of Bois

Blanc island and the main Canadian shore. At the head of the island are two range lights, by which vessels coming down the channel from the Lime-kiln crossing, so called, are accustomed to take their course until they turn down the channel between the island and the main land. Nearly opposite these lights, and about 250 feet from the main land is a red can-buoy, marking the easterly limit of the channel. The navigable channel, which at this point is about 1,000 feet wide, lies between the range lights and this buoy, and here the collision occurred. At this point the channel deflects about two points from a straight course, so that a steamer in coming down the river will exhibit her red light to an ascending steamer, while the latter exhibits her green light to the former, until after she passes the buoy. On the night in question the tug was proceeding up the river with the barges Marengo and Maria Martin in tow, and when opposite Amhurstburgh, made the red light of the Jay Gould descending the river. She thereupon gave a single blast of her whistle, to which response was made by a single blast from the propeller, and both ported a little and proceeded, with the understanding that each was to pass to the right, and upon the port side of the other. When they had approached each other within about 600 feet, the propeller's wheel was starboarded to go down the river, and she swung so far to port as to exhibit her green light to the tug, which immediately blew two whistles and put her helm hard a-starboard. The tug swung to port under this order about a point, when the propeller, whose wheel had been put hard a-port, struck her amidships on the starboard side, nearly at a right angle. In two or three minutes the tug stranded or sunk at the head of the island.

Upon the argument the court was assisted by Commander Cooke, of the navy, and Capt. Hackett, of the lake marine, sitting as nautical assessors.

Moore & Canfield, for libellant.

H. C. Wisner, for claimant.

BROWN, J. Much testimony was introduced upon either side, tending, upon the part of the libellant, to prove that the collision took place on the easterly side of the channel, and within two or three hundred feet of the red can-buoy; and, on the part of the claimant, to show that it must have occurred within a short distance of the head of the island, and upon the extreme westerly side of the channel. As usual, each crew swears almost as one witness to its own theory of the case, and in direct conflict to the other, each endeavoring to get his own vessel, as far as possible, toward its own side of the channel. We think, under these circumstances, it is much easier to extract the truth from the admitted facts and probabilities of the case than from any attempt to reconcile these contradictions or determine which of the two crews is more worthy of belief. Assuming that a tow bound up, with a light southerly wind, would naturally keep the center of the channel between Bois Blanc island and Amhurstburgh, we find nothing to in-

dicating that this was not the course actually pursued, except the fact that when opposite Amhurstburgh the tug met the tug Prindiville coming down with a tow, and passed her to the right. This would naturally incline the Swain somewhat to the starboard side of the channel. In support of his theory the learned advocate for the propeller insists that, inasmuch as the tug grounded and sunk at the head of the island, and a little to the west of the ranges, and was keeled over on her port side, she must have received the blow very near there, and was propelled by the immense weight of the propeller to the spot where she was sunk, and was driven over on to her port side. There is much plausibility in this suggestion, as the wound in the side of the tug was a very deep one, and it is impossible that she could have been kept in motion long after the propeller's bow was withdrawn from her side. Upon the other hand, the engineer and some of the tug's crew swear that the coal bunkers, which were against the spot where the propeller struck the tug, prevented the water rushing in with great rapidity, and allowed the engine to be kept in motion long enough to carry the tug some two or three lengths until she grounded at the head of the island. We think this was not impossible. The difficulty with the propeller's theory is that it compels us to believe that the tug executed the wholly inexplicable and improbable maneuver of starboarding and crossing the channel to the wrong side after she had signaled the propeller that she would port and keep to the right. The master of the tug was born at Amhurstburgh; had sailed for 20 years; knew every foot of the river at that point; and we would not believe him guilty of so gross an error without the most convincing testimony of the fact. Upon the whole, we think the collision occurred very near the center of the channel.

We do not, however, deem this question of vital importance, as we are all agreed that the propeller was guilty of fault in exhibiting her green light to the tug, after signals of one whistle had been exchanged between them. The propeller was coming down the channel, exhibiting her red light to the tug. Good seamanship and her signals both required that she should pursue a consistent course, and exhibit her red light, and her red light only, until she had gotten abreast the tug. Assuming that she must leave the ranges and starboard a point or two to take her course down the river, she had no right to swing so far to port as to exhibit a green light to the ascending tug. It was a movement which could not fail to embarrass and confuse the master of the Swain, and was, in our opinion, the primary cause of the collision which ensued. Even if the tug was on the westerly side of the channel, as the propeller insists, and the propeller starboarded her wheel to prevent running upon the island, she was still in the wrong, as she should have stopped long enough to permit the tug to pass her, instead of starboarding so far as to exhibit her green light. We have no doubt that she swung further to port under this order to starboard than her master intended, and that

the accident was due to the bad steering qualities of the propeller. The admissions of her wheelsman, made at Buffalo, that she first swung too far to port, and then too far to starboard, after she recovered herself, are strongly corroborative of this theory. Knowing, as her officers were bound to know, this defect in the propeller, we think it was clearly their duty to have provided against it, and kept so far away from the tug as to prevent the possibility of this occurrence.

The question as to the liability of the tug is a much more difficult one, and depends entirely upon the conduct of her master after the propeller had swung to port so far as to shut in her red and exhibit her green light, and the danger of collision had become imminent. Some minutes prior to this the two vessels had exchanged signals of one whistle, and were proceeding with a perfect understanding that each was to pass upon the port side of the other. The sudden starboarding of the propeller, and the exhibition of her green light, were calculated to create an uncertainty in the mind of Capt. Tormey as to the intention of the propeller. He might draw the inference either that the propeller had starboarded to go down the channel between Bois Blanc island and the mainland, as was actually the fact, or that she had repudiated the understanding, and was endeavoring to take a new course down on the starboard side. Acting upon this hypothesis, he blew two whistles, and starboarded. This would have been a proper maneuver had the intention of the propeller been as he supposed; he was mistaken, however, and the maneuver brought about the collision it was intended to avoid. His proper course was to comply with rule 3 of the Supervising Inspectors, which reads as follows:

Rule 3. "If, when steamers are approaching each other, the pilot of either vessel fails to understand the course or intention of the other, whether from signals being given or answered erroneously, or from other causes, the pilot so in doubt shall immediately signify the same by giving several short and rapid blasts of the steam-whistle; and if the vessels shall have approached within half a mile of each other, both shall be immediately slowed to a speed barely sufficient for steerage-way until the proper signals are given, answered, and understood, or until the vessels shall have passed each other."

The same obligation to slacken speed is contained in the twenty-first sailing rule of the Revised Statutes, (section 4233,) in the following terms:

"Every steam-vessel, when approaching another vessel so as to involve risk of collision, shall slacken her speed, or, if necessary, stop and reverse."

As it is substantially agreed that the propeller was only about 600 feet off when her green light was exhibited, it is at least open to doubt whether the action of the tug did, in fact, contribute to the collision, and whether any maneuver upon her part could have prevented it. The gentlemen by whom I have been assisted upon the argument advise me that, in their opinion, the vessels were then too close together for any efficient action upon the part of the tug. But

to exonerate her for her departure from the rules I apprehend that it must be shown with reasonable certainty that such departure could not have contributed to the disaster which followed. The rule is entirely well settled, both in this country and in England, that the violation of any statutory requirement will be presumed to have contributed to the collision. Thus, in the case of *The Pennsylvania*, 19 Wall. 125, where a bell was rung by a sailing vessel under way in a fog, when the rule prescribed that a fog-horn should be blown, Mr. Justice STRONG, speaking for the supreme court, observes:

"That when, as in this case, a ship at the time of a collision is in actual violation of a statutory rule intended to prevent collisions, it is no more than a reasonable presumption that the fault, if not the sole cause, was, at least, a contributory cause of the disaster. In such a case the burden rests upon the ship of showing not merely that her fault might not have been one of the causes, or that it probably was not, but that it *could not* have been. Such a rule is necessary to enforce obedience to the mandate of the statute. * * * The evidence in the present case leaves it uncertain whether, if a fog-horn had been blown on the bark, it would not have been heard sooner than the bell was heard, and thus earlier warning have been given to the steamer—seasonable warning to have enabled her to keep out of the way. * * * It may be assumed, therefore, that the legislature acted under the conviction that a fog-horn could be heard a greater distance than a bell, and required the use of one rather than that of the other for that reason. To go into the inquiry whether the legislature was not in error—whether, in fact, a bell did not give notice to the steamer that the bark was where she was as soon as a fog-horn would have done—is out of place. It would be substituting our judgment for the judgment of the law-making power."

The obligation to slacken speed whenever by a false maneuver on the part of another vessel a steamer incurs the danger of collision, has been enforced in numbers of cases, and under circumstances very similar to those which existed in the case under consideration. *The Huntsville*, 8 Blatchf. 228, 231; *The Comet*, 9 Blatchf. 323, 329; *The Ogdensburg*, (*Chamberlain v. Ward*,) 21 How. 548, 560; *The Manitoba*, 2 Flippin, 241, 255. By far the most exhaustive discussion of this question is contained in the judgment of the house of lords in *The Voorwarts and Khedive*, L. R. 5 App. Cas. 876. This was a collision in the straits of Malacca. The two steamers were heading upon nearly opposite courses, and appeared about to pass each other safely, green light to green light; but when they were about half a mile apart the Voorwarts suddenly ported her helm and threw herself across the bows of the Khedive and rendered a collision imminent. The captain of the Khedive ordered the helm to be put hard a-starboard and the engineers to stand by the engines. Two minutes afterwards he ordered them to stop and reverse; and a minute and a half afterwards the collision took place. The judge of the admiralty court held that both vessels were in fault. The court of appeal found the Voorwarts solely to blame for the collision, and reversed the judgment of the admiralty court. The house of lords reversed the judgment of the court of appeals and restored that of the admiralty court, v.19,no.10—49

their lordships holding generally that it was the duty of the Khedive to stop and reverse as soon as the Voorwarts threw herself across the bows of the Khedive, notwithstanding the fact that it was shown that the master had acted with ordinary care, skill, and nerve as a seaman, and stopping and reversing at once would not have prevented the collision. It is true that this case was decided under section 17 of the merchant-shipping act of 1873, which declared that "if in any case of collision it is proved to the court before which the case is tried that any regulation for preventing collisions contained in or made under the merchant-shipping acts, 1854 to 1873, has been infringed, the ships by which said regulation has been infringed shall be deemed to be in fault, unless it is shown to the satisfaction of the court that the circumstances of the case made departure from the regulation necessary." I think, however, this statute does not vary the rule laid down in the case of *The Pennsylvania*, *supra*, to any appreciable extent. Their lordships acted upon the opinion of the court of appeal, that the Khedive was not to blame until after the collision was imminent, or, perhaps, inevitable. The court held generally that it was the duty of the Khedive to have stopped and reversed her engines, and that there was nothing in the circumstances rendering a departure from the rule necessary to avoid immediate danger; and that even if it would be, in the absence of a positive rule, proper seamanship to keep way on the ship in order to make her more manageable, which was not clear, the legislature had thought it better to prescribe the course which must be followed. Lord Watson, in his opinion observes:

"It appears to me that it was the deliberate policy of the legislature to compel sea captains, when their vessels are in danger of collision, to obey the rule, and not to trust to their own nerve and skill; and that it was an essential part of the same policy to admit of no excuse for non-observance of the rule, short of satisfactory evidence, either that the captain was constrained to disobey it by other perils of the sea or that he adopted a course which, in the circumstances, was better than that prescribed by the rule. And, for my own part, I cannot think the legislature has acted unwisely in applying a uniform statutory test to all such cases, instead of leaving them to be decided by the variable test of 'fault,' as ascertained in each case, with the aid of nautical opinion."

The same rule was applied to the non-exhibition of lights by the privy council in the case of *The Hochung and Lapwing*, L. R. 7 App. Cas. 512.

There are cases, it is true, in which a master is justified in continuing at full speed even though a collision be imminent; but they are rare and depend upon circumstances wholly exceptional. Such a case was presented at the last term in *The Colwell and Joy*, where a tug having three vessels, with their sails up, in tow, was proceeding down Lake Erie, with a favorable wind, and met another tow coming up, which attempted to cross the bows of the former. We held in this case that the tug was justified in proceeding at full

speed, both because it was her duty to pull her own tow as far away from the other as possible, and because the force and direction of the wind was such that a collision with her own tow would have been almost inevitable in case she had stopped; but it must be made to appear beyond a reasonable doubt, in all cases where the twenty-first rule applies, that the failure to stop or reverse was demanded by the special circumstances of the case; and that collision would in all probability have occurred had the statutory course been pursued. It would be exceedingly dangerous to allow the masters of steam-vessels to exercise their best judgment in all cases in determining whether or not the statute should be obeyed, although we understand this to be the general practice upon the lakes. This is substantially held in the cases above cited. The better rule is to hold the master in fault for the disobedience of the statute in every case where he cannot make it appear that a departure was imperatively demanded.

In the case under consideration, while I differ from the nautical assessors with great hesitation, I am not entirely prepared to concur in their opinion that the collision would still have happened had the tug kept her course and stopped her engines. Considering that the propeller had time, not only to recover from her swing to port, but to swing so far to starboard as to strike the tug at nearly a right angle, although the tug herself swung only one point to port, it seems to me that if the tug had kept her helm and stopped her engine she would have swung clear of the propeller, and the disaster would have been averted. As the tow was proceeding against a current of two or three miles an hour with sails furled, there would have been little, if any, danger of fouling the tug or each other. I have not overlooked, in this connection, the many rulings which hold that an error of the master committed at the moment of collision is not a fault. Such an error is pardonable upon the theory that the master may resort to any maneuver to ease the blow. But I am not aware of any case which holds that a steamer may continue at full speed, unless she can show *beyond a reasonable doubt* that the collision was then inevitable.

There must be a decree adjudging both vessels in fault, and referring it to the clerk as commissioner to assess the damages.

THE LELAND.

(District Court, N. D. Illinois. February 25, 1884.)

1. COLLISION—OBLIGATION OF UNITED STATES NAVIGATION LAWS.

The obligation of the United States navigation laws, relative to the rate of speed allowed a steamer in order to prevent its colliding with other vessels in its path, does not become operative until the vessels are known to be about to meet. Nevertheless, *moderate* speed must *always* be used by steamers in a fog.

2. SAME—MODERATE SPEED.

The criterion of moderate speed is the condition of the steamer to be stopped immediately upon the apprehension of danger ahead.

3. SAME—EVIDENCE—BURDEN OF PROOF.

Proof that the party has violated the navigation laws, and been otherwise negligent, lays upon him the burden of proving that the damage did not result from such violation and neglect.

4. SAME—SCIENTIFIC THEORIES.

Scientific acoustic theories cannot be safely accepted generally in explanation of the failure of fog-horns to be heard.

5. SAME—MEASURE OF DAMAGE.

The originator of the damage whereby the vessel is exposed, more or less helpless, to destruction by the elements, is responsible for the entire damage done.

In Admiralty.

H. W. Magee, for libelant.

Schuyler & Kremer, for respondent.

M. H. Beach, of counsel, for respondent.

BLODGETT, J. This is a libel by the owner of the schooner *E. M. Portch* to recover damages sustained by a collision between said schooner and the steam-barge *Leland*, on the waters of Lake Michigan, on the evening of March 26, 1882, the collision in question having occurred about 17 miles off the west shore of the lake, and nearly opposite a point midway between Manitowoc and Sheboygan. The *Portch* was running light, bound on a voyage from Chicago to Rowley bay for a cargo of railroad ties. The *Leland* was loaded with about 500 tons of pig-iron and some other freight, making a total cargo of about 550 tons, and bound on a voyage from Elk Rapids, Michigan, to Chicago. The libelant charges that this collision was caused wholly by the negligence of those in charge of the *Leland*; and the defense, on the part of the respondent, is that there was either contributory negligence on the part of those in charge of the schooner, or that the alleged negligence on the part of the *Leland* did not cause the collision. The collision in question, as near as it can be determined from the proof, occurred a few minutes before 8 o'clock in the evening; the wind was about south-east, a light sailing breeze of from four to five miles an hour, and the weather very thick and foggy; the course of the *Portch* was about N. by E., and that of the *Leland* S. by E. From a careful study of the proof I conclude that the *Leland* was running at the rate of at least eight miles an hour, and the *Portch* was making from four to five miles an hour, at the time the vessels sighted each other. It must be conceded, I think, from the proof, that neither of the crews of these two vessels was aware of the proximity of the other until they were about 300 feet apart, when they seem to have sighted each other about simultaneously. The proof on the part of the libelant all tends to show that the fog-horn was properly and continuously sounded on the schooner, "as required by the sailing rules, for more than two hours before the collision, and that her rate of speed was not dangerous."

The negligence on the part of the Leland, relied on by the libelant, is (1) that she had not a sufficient steam-whistle; (2) that her steam-whistle was located abaft the funnel, instead of before the funnel; (3) that said steam-whistle was not sounded as required by law, at intervals of not more than one minute; (4) that said steamer was running at too high a rate of speed; (5) that she had not a proper lookout.

It is admitted that the steam-whistle of the Leland was located abaft of the smoke-stack or funnel, and I am satisfied from the proof that this whistle was not as strong and effective as a steamer engaged in the navigation of the lake should carry for the purpose of giving sufficient warning to other vessels in the vicinity. It is true the law does not specify the dimensions or power of the steam-whistle to be carried by a steamer, but it is manifest that the whistle must be such as to give an effective warning to other craft in time, by the use of ordinary care and skillful seamanship, to avoid a collision.

Rule 15 of section 4233, Rev. St., reads as follows:

"Whenever there is a fog or thick weather by day or night, fog-signals shall be used as follows: (A) Steam-vessels under way shall sound a steam-whistle, placed before the funnel, not less than 8 feet from the deck, at intervals of not more than one minute. (B) Sail-vessels under way shall sound a fog-horn at intervals of not more than five minutes."

By a later regulation of the board of marine inspectors, approved by the secretary of the treasury, which gives this regulation the force of a statute, the intervals between the sounding of the fog-horn is reduced to two minutes. The proof on the part of the libelant tends to show that the whistle on the Leland was not sounded oftener than once in eight to ten minutes, and the proof on the part of the respondent does not show that it was sounded more frequently than at intervals of from three minutes to a minute and a half, so that the proof, even on the part of the respondent, shows a disregard of this rule as to the frequency with which the whistle was sounded, as well as of the location of the whistle. Rule 21 provides that "every steam-vessel, when approaching another vessel so as to involve risk of collision, shall slacken her speed, or, if necessary, stop and reverse; and every steam-vessel shall, when in a fog, go at a moderate speed." The obligation imposed by this rule, to slacken speed, or, if necessary, stop and reverse when a steamer is approaching another vessel so as to involve risk of collision, does not, of course, become operative until those in charge of the steamer know that they are approaching another vessel; but the duty of a steam-vessel, when in a fog, to go at a moderate speed is one constantly resting upon her under such circumstances; and it is an undoubted violation of the sailing rules for a steamer to run at a reckless or dangerous rate of speed in a fog. What is a moderate, and what is a dangerous, rate of speed, are, of course, to some extent, comparative terms, depending upon surrounding circumstances. The testimony of the various witnesses in this

case as to the speed of the steamer, at the time she sighted the schooner, varies from seven miles an hour, which is the lowest estimate of respondent's witnesses, to eleven miles an hour, which is the highest estimate of libellant's witnesses. I conclude, however, from the proof that the speed of the steamer was at least eight miles per hour, and may have been eight and a half, at the time the schooner was sighted by those on board the steamer; and this rate of speed, I have no doubt, was too great in a dense fog, in the night-time, upon waters where the liability to collision was so imminent as on the waters of Lake Michigan, even at this early season of the year; as this collision occurred upon one of the great thoroughfares of the lake, where vessels engaged in the lumber trade between ports on this lake are almost constantly passing at all times when navigation is open.

The case of *The Pennsylvania*, 19 Wall. 133, is instructive upon this question. The court, by Mr. Justice STRONG, says:

"The two vessels were not more than two or three hundred feet apart, and the steamer had the bark almost across her bow, yet it is possible that if her helm had been put to starboard, instead of port, when the lookout announced 'bell on the starboard bow,' and had been kept starboarded, the collision might either have been avoided or have been much less disastrous. * * * But if this is not to be attributed to her as a fault, there is no excuse to be found in the evidence for the high rate of speed at which she was sailing during so dense a fog as prevailed when the vessels came together. The concurrent testimony of witnesses is that objects could not be seen at any considerable distance, probably not further than the length of the steamer, and yet she was sailing at the rate of at least seven knots an hour, thus precipitating herself into a position where avoidance of a collision with the bark was difficult, if not impossible, and would have been even if the bark had been stationary, and she ought to have apprehended danger of meeting or overtaking vessels in her path. She was only 200 miles from Sandy Hook, in the track of outward and inward bound vessels, and where their presence might reasonably have been expected. It was therefore her duty to exercise the utmost caution. Our rules of navigation, as well as the British rules, require every steam-ship, when in a fog, 'to go at a moderate rate of speed.' What is such speed may not be precisely definable. It must depend upon the circumstances of each case. That may be moderate and reasonable in some circumstances which would be quite immoderate in others. But the purpose of the requirement being to guard against danger of collisions, very plainly the speed should be reduced as the danger of meeting vessels is increased. In the case of *The Europa*, Jenk. Rule Road, 52, it was said by the privy council, 'This may be safely laid down as a rule on all occasions, fog or clear, light or dark, that no steamer has a right to navigate at such a rate that it is impossible for her to prevent damage, taking all precaution at the moment she sees danger to be possible, and if she cannot do that without going less than five knots an hour, then she is bound to go at less than five knots an hour.'

So, in the case of *The Colorado*, 91 U. S. 692, the supreme court, speaking by Mr. Justice CLIFFORD, said:

"Lights and other signals are required by law, and sailing rules are prescribed to prevent collision, and to save life and property at sea, and all experience shows that the observance of such regulations and requirements is never more necessary than in a dense fog, whether in the harbor or in the open ocean, if the vessel is in the common pathway of commerce.

"Mariners dread a fog much more than high winds or rough seas. Nautical skill, if a ship is seaworthy, will usually enable the navigator to overcome the dangers of the winds and the waves, but the darkness of the night, if the fog is dense, brings with it extreme danger which the navigator knows may defy every precaution within the power of the highest nautical skill. Signal lights in such an emergency are valuable, but they may not be seen; bells and fog-horns, if constantly rung or blown, may be more effectual, but they may not be heard. Low speed is indispensable, but it will not entirely remove the danger, nor will all these precautions in every case have that effect. Perfect security, under such circumstances, is impossible."

In the case of *The Manistee*, 7 Biss. 35, the learned circuit judge of this circuit found from the proof that the rate of speed of the steamer was seven miles per hour, and said:

"Now, without laying down any absolute rule as to speed at which a steamer should run in a fog on these lakes, there can be no question but that when a steamer is running in the fog, surrounded by sail-vessels, as this steamer knew that she was, and in close proximity, that to run at the rate of speed that this propeller was running was a gross wrong—a great risk which she had no right to incur—to the sailing vessels that were near. I know what steam-boat men say, that they must make their time; that they must run in the fog. But they cannot be permitted to run with their usual speed in a fog, surrounded by sail-vessels, against which they are liable to collide at any moment."

The proof as to the want of a sufficient lookout is substantially this: The collision occurred during the captain's watch. There was no second mate to assist the captain. The only persons on deck were the wheelsman inside the pilot-house, the captain who was attending to the sounding of the fog-whistle signals, and a night-watchman by the name of Cook who was doing the duty of lookout and also had charge of the lights and such other duties as devolve upon a night-watchman on board of a steamer. A few minutes before the collision this watchman had been below to call the watch, which was changed at 8 o'clock. And although both he and the captain concur in the statement that he was standing near the captain by the pilot-house just at the moment of collision, yet from the disclosures in the testimony he could have been there but a few moments prior to the time the schooner was sighted; the testimony on the part of the schooner showing that her fog-signals were sounded regularly and continuously, as required by law, it is possible, if not probable, that if Cook or any other competent lookout had been stationed in the proper location upon the steamer, charged with the single duty of looking out for other vessels and listening for fog-signals, he might have heard the fog-horn from the deck of the schooner; and I conclude, therefore, that this steamer at the time of this collision had not a competent lookout, such as the ordinary rules of prudent navigation require. A vigilant lookout, whose sole business it is to look out for other vessels and listen for fog-signals, is deemed absolutely necessary on any vessel running in the night-time, but all the more necessary in a fog.

In *St. John v. Paine*, 10 How. 585, the court said:

"A competent and vigilant lookout, stationed at the forward part of the vessel, and in a position best adapted to descry vessels approaching at the earliest moment, is indispensable to exempt the steam-boat from blame in case of accident in the night-time, while navigating waters on which it is accustomed to meet other crafts."

In *The Genesee Chief v. Fitzhugh*, 12 How. 447, it is said:

"It is the duty of every steam-boat traversing waters where sailing vessels are often met with, to have a trustworthy and constant lookout besides the helmsman. It is impossible for him to steer the vessel and keep the proper watch in his wheel-house. His position is unfavorable to it, and he cannot safely leave the wheel to give notice when it becomes necessary to check suddenly the speed of the boat. And whenever a collision happens with a sailing vessel, and it appears that there was no other lookout on board the steam-boat but the helmsman, or that such lookout was not stationed in a proper place, or not actively and vigilantly employed in his duty, it must be regarded as *prima facie* evidence that it was occasioned by her fault."

In *Chamberlain v. Ward*, 21 How. 570, Mr. Justice CLIFFORD says:

"Steamers navigating in the thoroughfares of commerce must have constant and vigilant lookout stationed in proper places on the vessel, and charged with the duty for which lookouts are required, and they must be actually employed in the performance of the duty to which they are assigned. To constitute a compliance with the requirements of law, they must be persons of suitable experience, properly stationed on the vessel, and actually and vigilantly employed in the performance of that duty, and, for a failure in either of these particulars, the vessel and her owners are responsible."

In *The Colorado*, 91 U. S. 699, the same judge said:

"Lookouts are valueless unless they are properly stationed and vigilantly employed in the performance of their duty; and if they are not, and in consequence of their neglect the approaching vessel is not seen in season to prevent a collision, the fault is properly chargeable to the vessel, and will render her liable, unless the other vessel was guilty of violating the rules of navigation." *Baker v. City of N. Y.* 1 Cliff. 84; *Whitridge v. Dill*, 23 How. 453; *The Catharine*, 17 How. 177.

But it is contended by respondent that, although these acts of neglect may be established by the proof, still the proof fails to show that the collision was occasioned by any one, or all combined, of these violations of the sailing rules or acts of negligence; and it is insisted that the collision in question was an inevitable accident; that the fact that the fog-horn was properly blown on the schooner and the whistles sounded on the steamer at intervals of from one and a half to three minutes, and that these signals were not heard on the other vessel, is proof that the condition of the atmosphere was such that sounds were not transmitted in the usual and ordinary manner, and that hence neither was notified of the proximity of the other vessel; and the well-established rule is invoked by the respondents, that the mere violation of sailing rules, or an act of negligence, is not of itself proof to sustain a claim for damages, or make the party guilty of these acts of negligence liable for damages, unless it appears that the damage or injury was occasioned by reason of such acts of negligence or vio-

lation of the sailing rules. It is also contended by respondents that the schooner was at fault because her lights were placed in the mizzen instead of her fore rigging, thus placing the lights further aft, and thereby diminishing, by the distance between the fore and mizzen rigging, the distance forward at which the lights could be seen; but as the proof shows that the upper sails of the schooner were seen before her lights were discovered on the steamer, owing to the fact that the fog was more dense near the water, I cannot believe that the location of the lights had anything to do with the collision. I think the more correct statement of the point involved in this branch of the case would be to say that where a party sought to be charged with the damage is shown to have been guilty of palpable negligence in seamanship, or to have violated the statutory rules of navigation, such parties should be held responsible, unless it is shown that the damage complained of was not the result of such negligence or violation of the rules of navigation. In other words, proof of violation of the fixed statutory rules of navigation, and of other acts of negligence by the party causing the damage complained of, casts upon such party the burden of proof that such damage was not occasioned by this neglect.

In the case of *The Morning Light*, 2 Wall. 550, Mr. Justice CLIFFORD says:

"Different definitions are given of what is called an inevitable accident on account of the different circumstances attending the collision to which the rule is to be applied. Such disasters sometimes occur when the respective vessels are each seen by the other. Under those circumstances it is correct to say that inevitable accident, as applied to such a case, must be understood to mean a collision which occurs when both parties have endeavored by every means in their power, with due care and caution, and a proper display of nautical skill, to prevent the occurrence of the accident. When applied to a collision occasioned by the darkness of the night, perhaps a more general definition is allowed. 'Inevitable accident,' says Dr. LUSHINGTON, in the case of *The Europa*, 2 Eng. Law & Eq. 559, 'must be considered as a relative term, and must be construed not absolutely, but reasonably, with regard to the circumstances of each particular case; viewed in that light, inevitable accident may be regarded as an occurrence which the party charged with the collision could not possibly have prevented by the exercise of ordinary care, caution, and maritime skill.'

So in the case of *The Grace Girdler*, 7 Wall. 196, the supreme court said:

"While fault is shown on the part of the damaging vessel, it is incumbent on her to show that such fault had in no degree the relation of cause and effect to the accident."

And in reference to the point that these fog-signals were unavailing on account of the peculiar condition of the atmosphere, I can only say that the researches and experiments of scientists, as detailed in later works on acoustics, as well as the common experience of the unlearned, seem to show that the capacity of the atmosphere to transmit sounds is not only much less at some times than others, but at times there is a condition of nearly or quite "acoustic opacity."

Tynd. Sound, Pref. to 3d Ed.; also chapter 7 of same edition. But unfortunately we seem to have as yet no test, except actual experiment at the time, to show or prove when such conditions exist. The "acoustic cloud," as it is called, is not visible to the eye or palpable to the touch. It, as observation would seem to show, may exist only momentarily, and even some sounds may be transmitted and others not. It can hardly be safe, therefore, to accept this assumed scientific theory as a defense upon the mere proof that sound-signals were not heard, at least until the party invoking this defense shows that he has fully complied with all the requirements and conditions of the law in regard to the giving of his signals and the appliances by which they are to be made. It will not do to accept the defense that the atmosphere was acoustically opaque without something more than the proof in this case. The effect of accepting such a defense on such proof would be to hold that in all cases where signals are not heard in a fog, it was attributable to the atmosphere, and not to the negligence of the parties charged by the law with the duty of giving such signals by means of certain instrumentalities, and at certain intervals.

I do not find anything in the record in this case which would justify me in presuming that this condition of the atmosphere existed on the night in question. It was a foggy night; the fog was thick and dense; no high wind was blowing and nothing unusual or out of the ordinary appearance of foggy nights was noticed or observed by any of the witnesses in the case. The mere fact, standing by itself, that the crew on one of these vessels did not hear the signals upon the other before the vessels sighted each other, is not, I think, sufficient to sustain the assumed scientific theory invoked by respondents. We must remember these vessels were approaching a common point where their courses intersected at a very oblique angle, and at the rate of at least 12 miles an hour. Assuming, as I think we are justified in doing, from the evidence, that the whistle was not sounded oftener than once in three minutes, the two vessels might have been 2,100 feet, or two-fifths of a mile, apart at the time the last blast was given from the whistle of the steamer prior to the collision; and from the proof in regard to the distance at which it could be heard on the night in question, it is extremely doubtful whether the sound from the whistle would have penetrated this dense fog in face of whatever breeze was blowing, to a distance of one-third of a mile on the night in question, without assuming that a phenomenal atmospheric condition prevailing at the time prevented these signals from being heard. The fog-horn on the schooner probably could not have been heard over 300 to 500 feet; and with the vessels approaching a common point at the velocity shown by the proof, the last blast from the fog-horn might have been properly blown and yet not have been heard on the steamer before the vessels were in sight of each other and in peril of collision.

It is urged that if the schooner had heard the whistle of the steamer she could have only done precisely what she did do, and that is, keep her course; and that as the two vessels were approaching each other upon courses which would bring them together, the collision might have occurred, although the schooner did hear the fog-signals on the steamer. The answer to this is that if the schooner had heard the fog-signals on the steamer they might have displayed a torch or flashlight, which would have penetrated the fog a greater distance, and given the steamer notice of the proximity of the schooner; and it is also worthy of suggestion that, if the schooner had heard the fog-signal on the steamer, and the steamer, by reason of the density of the fog, or from any other reason, had not heard the signal from the schooner, the schooner would have been bound by rule 24 to have done all she could to avoid the immediate danger, which she could readily have done, as soon as the locality of the steamer was determined, by sounds from her fog-signals. So, also, if the steamer had been going at a moderate rate of speed, say four to five miles an hour, she would not have crossed the course of the schooner in time to have brought the two vessels together. It required just the speed at which the steamer was running, combined with the course and speed of the schooner, to bring about a collision between the two vessels at the point where their courses crossed, and if the steamer had been going slower, the collision would not have occurred; but the main reason in my mind for insisting that the speed was too great in this case, is the fact, disclosed in the proof, that when the master of the steamer sighted the schooner, when the two vessels were about 300 feet apart, he at once ordered his helm hard a-port, stopped and reversed his engine, and backed, and yet he was so near to the schooner that this maneuver was ineffectual, and this collision occurred.

The rule, as intimated in the authorities I have cited, would indicate that the standard or criterion of speed at which a steamer can safely proceed in a dense fog, upon a highway of commerce like this, and when the peril of collision is ever present, is only such speed as will enable her to stop, so as to avoid a collision after she sights or hears the signals of a sail-vessel crossing her path. If the condition of the atmosphere is such that approaching vessels can be seen or heard half a mile away, a steamer may run at a rate of speed which will enable her to stop or change her course in a half mile, but if it is so thick or dark that other vessels cannot be seen over 200 feet, then, the steamer's speed must be proportionally slower, so that she can stop or safely change her course so as to avoid the collision after she discovers the sail-vessel. We find then that this steamer directly violated the rules of navigation by locating her whistle abaft her smoke-stack. It must be presumed that congress in expressly enacting that the steam-whistle must be placed before the funnel, did so because the funnel would intercept or break the waves of sound from the whistle and prevent their being projected or sent forward

in the pathway of the steamer, as they should be, in order to prove effective as fog-signals. We find, further, that these fog-signals were not sounded with such frequency as the statute expressly requires. We find, also, that there was no such efficient lookout on the deck of this steamer as common prudence required; and these faults, being clearly brought home to the steamer, I think she must be held responsible as the direct cause of the collision.

But it is further urged that the loss of this schooner was not the direct and necessary consequence of this collision. The proof upon this branch of the case shows that the schooner was struck upon her port bow, and her entire bow broken in down to the water-line. She did not take in water very rapidly at first, however, and the steamer took her in tow and headed, for a time, towards Manitowoc, as by running in that direction away from the wind she did not encounter the waves so heavily but that her pumps could keep her clear. After a time the wind changed somewhat, and her course was shifted, and the schooner was towed nearly opposite the entrance of Sheboygan harbor, where she was let go at about half-past 4 o'clock in the morning after the collision. Attempts were made, by the master and crew of the steamer, to get her towed into the harbor, and the assistance of some light tugs, employed in the fishing business at Sheboygan, was obtained, they being the only tugs available for the purpose there; but by the time the tugs got hold of her, so much water had been taken in that she had sunk so deep as to prevent her being taken over the bar and inside the harbor. The wind shortly afterwards increased in violence, and the result was the vessel was driven on shore, sunk, and broken up. It is contended, from these facts, that the destruction of the vessel was in consequence of the storm which came up after the steamer had towed her to the mouth of Sheboygan harbor, and that the injury from the collision was not the direct and proximate cause of the loss of the schooner. But it seems to me the proper way of looking at the matter is to inquire what would have been the probable effect of this blow upon the vessel if she had been left out in the lake, 17 miles from land, where the collision took place. Would she have probably survived this injury, and could she, by proper seamanship and care, have been taken into a place of safety? With her bows broken open, as is shown by the proof in this case, I can hardly imagine that this vessel could have been safely navigated by herself to a port of safety, and I can only consider her final disaster as occurring in spite of all that was done by the steamer and the crew of the schooner to save her. In my estimation, from the proof, she would have sunk if left out in the lake where the collision occurred. She only sunk and went to pieces upon the shore after she was towed to the mouth of the harbor. What was done to save her was unavailing. If nothing had been done, the same result would have, perhaps more speedily, followed, and she would have more readily waterlogged out in the lake, and either sunk or

drifted upon the shore, and finally fallen a helpless victim of the same gale which drove her ashore and wrought her final destruction; but the helpless condition which made her the victim of this gale was the injury received in the collision. I therefore come to the conclusion that the loss of the Portch is fairly and properly chargeable to the acts of the Leland, and that she should be held responsible therefor.

There is a large amount of testimony in the record in regard to the value of the Portch, and as her loss was substantially total, only about \$600 worth of wreckage having been saved from her, it becomes very material to inquire what was the value of the vessel at the time of the collision. Libellant claims not only the value of the vessel, but the value of the net amount of freight, which she would have earned on the voyage she was then prosecuting, together with nearly \$6,000 which he expended in endeavoring to get her off after she had been driven on shore by the gale. In regard to the claim for freight and the cost of the unavailing efforts to save the vessel, I am clearly of the opinion that none of these items can be allowed, and that the true measure of damages is the value of the schooner at the time of the collision and interest from that time. *The Baltimore*, 8 Wall. 386; *The Falcon*, 19 Wall. 75; *Pajewski v. Canal Co.* 11 FED. REP. 313. The commissioner, from the proof before him, came to the conclusion that the value of the schooner was \$16,800, and so finds by his report. I am of the opinion that this estimate is somewhat high, and that the more reliable proof in the case does not justify the finding of the value to have exceeded \$15,000. It is true, there is a wide range of judgment among the various witnesses as to the value of the schooner at the time of the collision, but a large proportion of the libellant's testimony, in my estimation, gives a speculative value; and while the respondent's testimony seeks to limit the liability to what was considered by the insurance inspectors as her insurable value, I think the more reliable testimony is that of Oliver, Dunham, Holmes, and such witnesses, who were engaged in buying and selling vessels, and who offered to buy this vessel, and would have bought her if they could have got her for \$15,000, but were not willing to pay more than that. I therefore conclude that her value was \$15,000. The exceptions to the commissioner's report are therefore overruled in all respects, except that said report is modified by finding the value of the schooner to be \$15,000 instead of \$16,800. In reaching this conclusion as to the value of the schooner, I am not disposed to make any deduction for the value of the wreckage saved. The libellant expended a large sum of money, as I have no doubt, in good faith, in efforts to get the schooner off after she had gone ashore. This amount being disallowed, I do not think injustice will be done by allowing the benefit of this salvage to the libellant.

A decree will be entered finding the Leland at fault, and finding the libellant's damages to be \$15,000, the value of the schooner, and interest thereon at 6 per cent. per annum from the twenty-sixth of March, 1882, when the collision occurred.

THE C. N. JOHNSON.

(District Court, E. D. Michigan. February 18, 1884.)

1. MARITIME LIEN—CREDITOR ENFORCING LIEN AGAINST VESSEL—DUE DILIGENCE.

The obligation of a creditor to use due diligence in the enforcement of his lien upon a vessel, as against a *bona fide* purchaser, is not always discharged by taking out process in the port or district where the claim accrued and putting it in the hands of the marshal, even though that may be her home port or one she has been in the habit of frequenting. There are circumstances under which he may be bound to follow her into other districts.

2. SAME—BONA FIDE PURCHASER—KNOWLEDGE OF CREDITOR.

A vessel was repaired at Chicago in the spring of 1880, and was soon afterwards taken to Lake Erie. In the spring of 1881 she was sold to a person residing in Buffalo, who had no notice of the claim for repairs, and continued to run upon the lower lakes. The creditor was thereupon informed of such sale, soon after it took place, and of the fact that she was navigating the lower lakes, but made no attempt to enforce his claim until December, 1882. *Held*, that he should have endeavored to seize the vessel at Buffalo, or some other port which she frequented, as soon as he was informed that she had been sold; and that his claim was stale.

In Admiralty.

This was a libel for repairs put upon the schooner C. N. Johnson, at the port of Chicago, in the spring and early summer of 1880, to the amount, including interest, of \$710.84. Defense, stale claim. One Buckley was the real owner of the vessel, though the title stood of record in the name of Joseph Single, of Wausau, Wisconsin. Milwaukee was her home port. After the completion of the repairs, in June, 1880, the schooner made one trip to Green Bay, and was then taken to the lower lakes, where she continued to run until the libel was filed. Payments of money on the work done were made by Buckley to libelants as late as July, 1881. In the fall of 1880 Buckley, representing himself as the real owner of the vessel, began negotiating with one Weeks, the present claimant, to exchange her for the schooner Malta, then known as the Vosberg, stating, as Weeks claimed, that the Johnson was unincumbered, though Buckley denied this. The parties met in March, 1881, at Buffalo, where two or three conversations occurred between them as to their respective vessels, Weeks insisting on \$500 in cash, in addition to the Johnson, for the Vosberg. But he finally concluded to make an even exchange; and mutual transfers took place on April 4, 1881, the outfit of each vessel being excepted from the trade. On the eighteenth of April, Weeks received from Joseph Single a bill of sale of the Johnson, with covenant to defend her against all demands, and executed a like bill of sale of the Vosberg to Single. At the time of the exchange there was a mortgage upon the Vosberg, given by Weeks to Vosberg and Baker, of Buffalo, on which there was due about \$1,000. This Weeks procured to be discharged within a few days after the sale, executing and delivering to the mortgagee, in lieu thereof, a mortgage for the

like amount upon the C. N. Johnson. This latter mortgage Weeks paid in full, in November, 1882.

BROWN, J. Two questions are presented by the record in this case: (1) Whether Weeks, the present owner, purchased the schooner without notice of libelants' claim; (2) whether libelants were guilty of laches in not taking earlier proceedings against the vessel. The claimant, Weeks, is sought to be charged with notice by the testimony of Buckley, the vendor, who says he told Weeks, on two different occasions, that the Johnson owed a ship-yard bill at Chicago, but did not state the amount, as he did not know himself the balance due to the libelants. Weeks, he says, made no reply. In this connection he states that he told Weeks that if the Malta was as good as represented he would take care of this bill himself. Libelants' proctor also swears that when he presented the bill to Weeks, in December, 1882, he admitted knowledge of it at the time of the purchase. This is all the direct testimony upon the subject of notice. Upon the other hand, Weeks swears positively that he had no notice of the claim, and denies the conversation with the proctor. He is corroborated by his wife, by the witness Edward Smith, and Frederick Emery, all of whom were present at one or more conversations, during which the terms of the sale were settled, and who testified that Buckley represented to Weeks that the Johnson was unincumbered. It is quite improbable, too, that after holding the matter under advisement for several months he should have bought the vessel, knowing there was a claim against her, without inquiring who owned it, or its amount.

Buckley's testimony is open to grave suspicion, as he induced the person who held the legal title to give a bill of sale, in which there was an absolute and unqualified covenant to pay all demands against the vessel. This is a direct contradiction of his assertion that he agreed to pay such demands only in case the Vosberg proved to be as good as represented. He also expressly admits that, by the terms of the sale, the vessels were exchanged even and clear of incumbrances. It is not denied that Weeks carried out his part of the bargain by procuring the release of the Malta from the mortgage running to Vosberg and Baker, who consented to accept, and actually received, from Weeks security upon the Johnson for the debt from which the Malta was released; and that Weeks paid the mortgage before the filing of this libel. I think the probabilities of the case outweigh the testimony of libelant's proctor as to Weeks' admissions to him. While there is nothing to criticise in his credibility as a witness, he may have misapprehended the drift of Weeks' statement. As was said by Judge Betts in *Sunday v. Gordon*, Blatchf. & H. 569-576, too much reliance should not be placed upon the version of conversations given by a witness who is seeking through them the means of maintaining an action in favor of his employer. However honest or commendable his motive might have been, a witness so employed would be exceedingly apt to remember statements favoring the

wishes of his employer, and to forget or not listen to explanations and qualifications made at the time. While there is no impropriety in an attorney taking the stand to make parol proof of uncontested facts, such as the signature to an instrument, or the identification of a public record, the practice of making a case for his client in the character of a witness is not usually favored by the courts, although there is now little question of his competency to testify. *Weeks*, Attys. §§ 124, 125; *Whart. Ev.* § 420; *Potter v. Inhab. of Ware*, Cush. 519-524; *Follansbee v. Walker*, 72 Pa. 230.

The question of laches on the part of the libelants is less difficult of solution. It may be conceded that they were under no obligations to take proceedings during the season of 1880. The sale was made early in the spring of 1881, and the testimony shows conclusively that they were informed of it very soon after it took place. They made no effort, however, to collect of the vessel until December, 1882, when the claim was forwarded to their proctor here for collection, and the vessel was seized a few days thereafter. Their excuse for this delay is that the vessel left Lake Michigan shortly after the repairs were made, and continued upon the lower lakes, out of the reach of process of the district court of Northern Illinois, during all this time. This defense raises the question whether the duty of a creditor to use due diligence in the enforcement of a lien, as against a *bona fide* purchaser, is discharged by taking out process in the district court where the claim accrued, and awaiting the return of the vessel to that district for her seizure. Courts have held in general terms that, as against innocent third parties, the lien will be presumed to have been waived if the creditor has not availed himself of a fair opportunity to enforce it; and in some cases it has apparently been assumed, but I believe never decided, that the creditor need do no more than wait for the return of the vessel to his own port, or take out process in his own district, and put it into the hands of the marshal.

In *The Emma L. Coyne*, 11 Chi. Leg. N. 98, I had occasion to hold that, under the peculiar circumstances of that case, where the lienholder and the owner of the vessel were both residents of the same district, there was no obligation on the part of the former to pursue the vessel into another district to prevent his claim from becoming stale. No opinion, however, was intimated as to the necessity of doing this in case the vessel were sold to an owner living in another state.

In *The D. M. French*, 1 Low. 43, 45, the learned judge for the district of Massachusetts intimated that, with the modes of communication now within reach of every one, lienholders might be required to follow a vessel into another state, at the risk of losing their privilege, though he was not called upon to decide the question.

Where a vessel leaves a port of repair upon a long voyage, and does not return, and, in the mean-time, it is impossible, or very difficult, to ascertain her whereabouts, there is certainly reason for saying

that a creditor would not be chargeable with laches, as against innocent parties, even by the lapse of several years, if he had reasonable expectation of her return. But I find it quite impossible to say that, as a universal rule, the creditor may wait until her return to the port of repair, even though that be her home port, or a port which she has been in the habit of frequenting, without losing the benefit of his lien. A rule of this kind would be particularly inequitable upon the lakes, where the arrival and departure of vessels at all lake ports, from Chicago to Ogdensburg, are noticed in the principal daily papers, and for four months in the year the entire shipping of the lakes is laid up by the ice to await the opening of navigation. I think that a reasonable opportunity to enforce a lien is given, within the meaning of the law, whenever the creditor is able, by the exercise of reasonable diligence, to ascertain the whereabouts of the debtor vessel. Each case must be governed largely by its own circumstances.

In the case under consideration, libelants were not only informed of the sale very soon after it took place, but of the removal of the vessel to the lower lakes, and were notified by Buckley in the spring of 1882, that he should pay nothing more upon the bill, as the Malta was not as represented, and that they must look to the Johnson for the residue. They took no steps, however, even to notify the purchasers of the claim, until December of that year, when it was forwarded to Detroit for collection and the vessel seized within 10 days thereafter. There is nothing in the testimony to show that the vessel might not have been arrested during the season of 1881, or at least in the winter of 1881-82. It is true that no damage was occasioned to the present owner by the libelants' delay after the sale took place, but this objection was disposed of in the case of *The Theodore Perry*, 8 Cent. Law J. 191, and it is unnecessary to repeat what was said upon the subject upon that occasion.

Under the circumstances of this case, it seems to me entirely clear that the libelants were guilty of laches, and that the libel must be dismissed.

THE JOSEPH W. GOULD.

(District Court, W. D. Pennsylvania. February 4, 1884.)

1. COLLISION—NEGLIGENCE—EVIDENCE.

In a case of collision the libelant must show the alleged negligence by a fair preponderance of the evidence.

2. SAME—RUNNING ON OHIO RIVER.

Running on the Ohio river in a fog is not negligence *per se*.

3. SAME—MUTUAL FAULT—APPORTIONMENT OF DAMAGES.

Boats so running should observe great care and caution; but, this being done, the court will not apportion the damages in case of a collision upon the ground that the colliding boats were both in fault in running in a fog. Having voluntarily encountered the hazard of the navigation the loss must lie where it falls in the absence of proof of negligence.

v.19,no.10—50

In Admiralty.

Morton Hunter, for libelants.

D. T. Watson and *F. F. Sneathen*, for respondents.

ACHESON, J. This a suit by the owners of the steam-propellor *Stella McCloskey* against the steam tow-boat *Joseph W. Gould*, to recover damages sustained by the first-named vessel in a collision on the morning of February 2, 1881. At the time of the occurrence both boats were proceeding on short trips down the Ohio river. They left the Pittsburgh wharf at nearly the same time, between 9 and 10 o'clock a. m., the *McCloskey* turning out first and being somewhat in advance of the *Gould*. When the latter was at the Point bridge the former was at Painter's mill, or a little above. Painter's mill is about 460 yards, and the place of collision is some 840 yards, below the bridge. When the boats started out there was a "frost fog" upon the surface of the river above the bridge, rising a few feet only above the water, and not interfering with navigation. But at or about Painter's mill the boats encountered a dense fog which came out of Saw-Mill run, and it was while they were in this "fog-bank," as the witnesses term it, and hidden from each other, that the collision occurred.

The boats were proceeding to points on opposite sides of the river. The destination of the *Stella McCloskey* was Manchester, on the north side, and therefore it was necessary for her to cross the river, following the channel, which here runs in a quartering direction from the south towards the north shore. She was in the act of crossing when the *Gould* ran against her starboard side, about one-third forward of her stern. The effect of the collision was to upset the *Stella McCloskey* or overturn her on her larboard side. Her pilot says she was "shoved over." She sank almost instantly. The saddest thing connected with the disaster was the drowning of her fireman, William Salt. The pilot and engineer, the only other persons upon her, were thrown or jumped into the river, and were picked up by the *Gould*. So sudden was the mishap that the pilot of the *Stella McCloskey* did not see the *Gould* until he was in the water, and the first notice her engineer had of the impending calamity was when he saw "the cabin break, and the nosing of a boat at the glass sky-light just where the cabin broke in." The pilot of the *Gould* testifies that when he discovered the *Stella McCloskey* she was not further away than 35 to 40 feet. He states that he instantly rang his backing bell, and the proof is that the order to back was promptly obeyed. Indeed, the engineer of the *Stella McCloskey*, speaking, as I understand him, of what he observed immediately after the collision, says: "When I came out of the cabin or engine room I suppose the *Gould* was about 25 or 30 feet away from us and abreast of us. *She had been backing*, and her wheel was just stopping." Later on that day the sunken boat was raised by crane-boats, the *Gould* staying by and assisting. The injuries to the *Stella McCloskey*, as the direct result of the collision, were found to be these,

viz: About three feet of her nosing, which was two or two and a half inches thick, was torn off the guard, but the latter was not broken; and there was a break at the corner of the cabin, a foot below the roof, eight or ten inches wide, which, a witness states, "appeared to have been made by a sliding lick from the guard of another boat." The evidence does not disclose the dimensions of either vessel, but it appears that the *Stella McCloskey* was of considerably lighter burden than the other, and was much the smaller boat. She was originally built for a "pleasure boat," but had been changed into a regular passenger boat.

The seventh rule, for the government of pilots on the western rivers, provides that "when a steamer is running in a fog or thick weather, it shall be the duty of the pilot to sound his steam-whistle at intervals not exceeding one minute." Each of the pilots testifies that he obeyed this rule, and each is corroborated, to some extent, by other witnesses. The testimony, corroborative of the pilot of the *Gould*, is especially strong, and, in part, comes from witnesses who were on shore. True, the witnesses who were on the respective boats say they did not hear any whistle but their own. The explanation of this, however, may possibly be that the pilot-houses and engine-rooms were closed, the day being extremely cold, and that the whistles of the two boats were nearly simultaneous.

In respect to the speed of the *Gould*, the testimony of her pilot is that she proceeded under a slow bell, and with great caution. To the same effect testifies the engineer; and of this there is some other direct corroborative testimony. Moreover, the circumstantial evidence that the *Gould* was so running is very strong. The wounds which the *Stella McCloskey* received indicate that the *Gould* had little headway. And then, again, the witnesses on both sides all say that when the boats come together they felt no jar, and heard no crash to denote a collision. There is no direct evidence in the case that the *Gould* was running at an improper rate of speed. Mr. Neeld, indeed, testifies that a boat leaving the Point bridge at the same time another leaves Painter's mill, and overtaking the latter boat at the place of this collision, would have to run twice as fast; and the pilot of the *Gould* states that she ran 2,950 feet while the *Stella McCloskey* ran 1,650 feet; but this does not necessarily imply undue speed on the part of the *Gould*, and much less would it justify such conclusion in the face of the positive testimony to the contrary.

In a case of collision the libellant must show the alleged negligence by a fair preponderance of the evidence; otherwise the libel will be dismissed. *Butterfield v. Boyd*, 4 Blatchf. 356; *The Albert Mason*, 2 FED. REP. 821; *The Edwin H. Webster*, 18 FED. REP. 724. Applying this rule here, there must be a decree dismissing the libel unless, indeed, the *Gould* is to be adjudged guilty of negligence in running at all in the fog. But a charge of culpability in that regard would come with an ill-grace from the *Stella McCloskey*, for she led the way into

the obscurity of the fog, and certainly was equally blameworthy with the Gould, if either herein were censurable. But running in a fog is not negligence *per se*. The above-quoted rule, prescribed for the government of pilots, regulates such running, and, by implication, sanctions it. True, great care and caution should be observed under such circumstances; but, this being done, the court, in case of a collision, will not apportion the damages upon the ground that the colliding boats were both in fault in running in a fog. *The Sylph*, 4 Blatchf. 24. Having voluntarily encountered the hazard of the navigation, the loss must lie where it falls, in the absence of proof of negligence. *Id.*

Let a decree be drawn dismissing the libel, with costs.

THE ALICIA A. WASHBURN, etc.

THE B. K. WASHBURN, etc.

(District Court, S. D. New York. February 21, 1884.)

1. COLLISION—STEAM-TUG WITH TOW—ROUNDING BEND.

A steam-tug with a tow, in going around a dangerous bend, where the tide sets strongly across the river, is not entitled, as a matter of right, to occupy the full half of the river on the right-hand side.

2. SAME—DUTY OF SCHOONER BECALMED.

A schooner rounding such a bend in the opposite direction, becalmed or nearly so, is bound to make use of the customary means of oars, or a small boat ahead, to keep some steerage way in order to avoid collision with other vessels.

3. SAME—CASE STATED.

Where the steam-tug W., with a tow on a hawser, was proceeding northward around West Point in the Hudson river, and met several sailing vessels becalmed, floating down with the tide, a short distance apart, and the W., having overtaken another tow a little below West Point, passed it on the left instead of the right, as she might have done, thereby going round the bend nearly in the middle of the river, when there was abundant room to go to the eastward; and the schooner H., nearly becalmed, drifted down around the bend with the tide, which there set strongly to the eastward across the river, carrying the H. against the W.'s tow, and the schooner used no oars or small boat, as she might have done, to give her some headway and aid in avoiding the tow: *held*, that both were in fault,—the tug for proceeding unnecessarily towards the middle of the river, knowing the strong set of the tide, and the danger to sailing vessels becalmed; and the schooner, for not using customary means to aid in avoiding the collision.

Collision.

Benedict, Taft & Benedict, for libellant.

P. Cantine, for respondent.

Brown, J. On the night of March 31, 1880, the libellant's schooner *Maria E. Hearn*, of about 130 tons burden, with a cargo of 27,000 bricks, came into collision with an ice-barge in tow of the *A. A. Washburn*, on the Hudson river, off the West Point light, and shortly after

capsized and sank. The night was cloudy and dark, but not thick; the wind light, from the north-east; the tide about half ebb, and strong. The Washburn, a powerful steam-tug, was coming up the river, making against the tide about six miles per hour by land, having two ice barges in tow upon a hawser about 450 feet long. When a little way below the West Point light she overtook the steam-tug McDonald, with a large and heavy tow upon a hawser about 500 feet long, making by land about three miles per hour. The Washburn, with her tow, passed on the west side of the McDonald, between Boat-house Point and West Point. The ice-barge on the Washburn's starboard side, in passing, rubbed along against the fenders on the port side of the McDonald, being set against her, doubtless, by the ebb tide, which, in passing around and below West Point, sweeps strongly to the eastward. While the Washburn and her tow were thus passing the McDonald and her tow, three schooners and a sloop were observed coming down the bend, between Magazine Point and West Point, in the following order: the Dubois, the Hearn, the Voorhees, and the sloop, estimated to be respectively from 400 to 500 feet apart, and nearly in line. About the same time the Albany night boat, the St. John, or the Drew, came down past Magazine Point, and sounded two whistles, to which the Washburn at once replied with two. All the sailing vessels had their sails set. The witnesses from them testify that they had not wind enough, between Magazine Point and West Point, to give them steerage way; that they drifted down with the tide, and got wind again after passing West Point. The Dubois passed on the west side of the Washburn and her tow, using an oar at the bows to keep the schooner's head to the westward, but passing so near that they apprehended collision. The witnesses from the Dubois testified that when she passed the tow of the Washburn that tow was about 75 feet distant to the eastward, and that the McDonald was then abreast of the Washburn's tow. The pilot of the McDonald testifies that when this tow was abreast of him he was about due east from the light, and that the collision between the Hearn and the tow was when the latter had gone about 200 feet ahead of him. This fixes very approximately the place of collision, except as respects the distance from the shore, and shows that the Washburn, which was some 450 feet ahead of the place of collision, must have been headed well round towards the westward in the bend. The witnesses from the Hearn testify that they came past Magazine Point nearly in the middle of the river; that they drifted with the set of the tide to within 200 feet of the West Point shore; and that, as they approached the Washburn and her tow, they put their boom to port, and struck the tow of the Washburn when not over 200 feet from the west shore. The main sheet of the Hearn got caught in the samson's-post of the barge, which held her fast for a short time; but, being soon released, the schooner drifted downward and to the eastward, upon and across the port hawser of the McDonald's tow, and

there filled, capsized, and sank. The Voorhees also passed on the west side of the Washburn, being headed in towards the westward, by means of an oar. Her witnesses testify that she narrowly escaped collision with the Washburn's tow, though going within about 30 feet of the rocks on the western shore. The sloop passed to the east of the Washburn and of the McDonald; and the St. John, or Drew, having checked her speed, passed on the east side of all the other boats, the sloop going between the steamer and the McDonald at an estimated distance of about 100 feet from each.

The case has been elaborately considered by counsel on both sides. For the claimants it is urged that no liability exists on their part; because, as they claim, the evidence shows that they were not on the westerly half of the river; and that the collision could have been avoided had the Hearn used an oar, or a small boat rowing ahead, as they allege is customary with sailing vessels becalmed. Very little reliance is to be placed upon the extremely different estimates of the distances of the various boats from shore. Untrustworthy as such estimates at night always are, they are especially so in this case, when the night was so dark, and the testimony is given several years after the occurrence. All that can be done in such cases is to endeavor to arrive at the most probable solution of the case from other circumstances less liable to great mistake.

Without discussing further the numerous points of difference in the testimony, the following facts seem to me sustained by the evidence and the probabilities of the case: (1) That the McDonald was going up not far from the middle of the river. (2) That there was room for the Washburn to pass her on the east side had she wished to do so. This I consider to be clearly established by the subsequent passage of the sloop and of the St. John to the eastward. (3) That the Washburn's tow rubbed against the McDonald in passing on the west side of the latter; and that her port boat was consequently not over 100 feet to the west of the McDonald. (4) That the collision between the Hearn and the Washburn's tow was some 200 feet ahead and somewhat to the westward of the McDonald, as is shown by the fact that the Hearn, after the collision, drifted with the easterly set of the tide down and across the McDonald's port hawser. (5) That there was not sufficient wind between Magazine Point and West Point to give steerage way to the sailing vessels; and that in such circumstances it was customary for sailing vessels to make use of an oar at the bows, or of a row-boat in front, in order to keep steerage-way and to guide their course.

The easterly set of the ebb-tide in coming around West Point; the liability to meet sailing vessels coming from above, as well as their liability to be becalmed between Magazine and West Points; and the risk of meeting tows coming up,—are familiar facts, presumably known to all the parties. The especial danger arising from these circumstances in going around West Point bend, where vessels could not be

seen to each other more than a mile distant, imposed upon both parties alike the obligation of acting with a prudence and caution commensurate with the known danger. The captain of the McDonald testified that between Boat-house Point and West Point "was no place for one tow to pass another," on account of the dangers incident to the place. This case, I think, proves that he is right. I have no doubt that the cause of the collision was the Hearn's drifting with the tide against the tow of the Washburn in going around the bend. A steamer, in going around such a bend, where a sailing vessel is likely to be becalmed, and where the tide has so strong a set across the river, is bound to keep well out of the way, when there is nothing to prevent her doing so, and thus give plenty of room for becalmed and drifting vessels to pass, without danger of collision. There is no rule which allows to a steamer, in such a situation, the full half of the river; nor is it any sufficient defense that she was not on the westerly side, where, from the peculiar set of the tide, the westerly half of the river is not sufficient for sailing vessels, becalmed and drifting, to pass around such a bend with safety. I am satisfied, therefore, that the Washburn should be held in fault because she did not go nearer to the easterly shore of the river, where there was abundant room for her to go. The McDonald herself was further to the westward than was necessary; and tows overtaking each other in that vicinity, unless they are sailing to the extreme right of the river, should forbear attempting to pass each other until they have gone beyond the points of danger.

The Hearn, however, cannot be held blameless. There was no reason why she should not have used oars at her bows, so as to give her some headway, or change her heading, as the other schooners did; or else have made use of a row-boat, as was proved to be frequently done by other vessels for the same purposes; no reason, I say, except, possibly, the fact that she was tardy in discovering the approach of the tug and tow, and her own danger. The evidence is very strong to the effect that her captain did not see the Washburn at all until within 150 feet of her. He states this twice explicitly; although the lookout says that he gave him notice of it at a much greater distance. If the captain is right, his knowledge of the Washburn's approach was, doubtless, too late to enable him to accomplish much by oars or a row-boat. But that would only convict him of another fault, viz., that of not keeping a proper lookout; and upon his own testimony I strongly suspect that that was the fact. Considering the known danger from tugs that might be coming up around that bend while he was nearly becalmed, there is no excuse for his not keeping a sharp lookout, or not being fully prepared for the instant use of oars or a boat, if any danger should be descried; and either of these might have been used effectively if the Washburn was seen at the distance stated by the lookout. From the fact that all the vessels made use of a change in the position of their sails, evidently for the purpose of

making some change in their courses, and particularly from the testimony of the captain of the sloop in this regard, I think there is some doubt whether the sailing vessels in the reach between Magazine and West Points were in fact totally becalmed, and whether they did not have at least some little headway, though it was doubtless slight. The evidence, I think, indicates that the captain of the Hearn was tardy in the change of his boom. In the various particulars above stated it seems to me that he did not act with the watchfulness, alertness, and prudence which the situation reasonably demanded of him, and which, if observed, might have enabled him to avoid the collision; and that the Hearn must, therefore, be held in fault.

As I must find the collision to have arisen, therefore, through fault on the part of both vessels, the damages must be divided, and an order of reference may be taken to compute the amount.

THE ELLA B.

THE RUSSELL SAGE.

(*District Court, N. D. New York. March, 1884.*)

1. NEGLIGENCE—SUDDEN EMERGENCY.

One who, in the confusion of a sudden emergency caused by another's fault, fails to adopt the most prudent measures of safety, is not chargeable with negligence on that account.

2. SAME—COLLISION OF VESSELS.

Accordingly, where a tug-boat was coming down the stream with a canal-boat in tow, and a steam-propeller, whose officers might easily have seen the tug, suddenly and without warning swung out into the stream, thus rendering a collision imminent, and the master of the tug endeavored to pass by in order to escape the danger, *held*, that even though some other course might have been in fact more prudent, the owner of the tug was not answerable for any part of the damage sustained by the canal-boat when struck by the propeller.

In Admiralty.

Benjamin H. Williams, for libelants.

Joseph V. Seaver, for the *Ella B.*

Josiah Cook, for the *Russell Sage*.

COXE, J. On the morning of June 12, 1883, the steam-propeller *Russell Sage* was lying in the Buffalo river at a dock on the north side near the foot of Washington street, her bow being headed up stream. She is 233 feet in length, 33 feet beam, and has a carrying capacity of 1,500 tons. Directly in front of her was a small, low scow, used in pile-driving, from 15 to 20 feet in width. With this exception there was nothing to intercept the view for a thousand feet and more up the river, and as the scow was only half the width of the propeller the view from the starboard bow of the latter was ab-

solutely unobstructed. Diagonally opposite the Sage, and between 200 and 300 feet further up the stream, three boats, aggregating 63 feet in width, were lying abreast at French's dock. In these circumstances the Ella B., a small tug, 35 feet in length and 10 8-10 feet beam, having the canal-boat Henry L. Schutt in tow, started from a slip on the north side of the river, about a thousand feet above the point where the Sage was lying, and proceeded down the river, keeping very near the center. When the tug was 100 or 150 feet from the propeller the latter cast off her head lines and swung her bow into the stream. The tug put her wheel to starboard and opened her throttle-valve hoping to pass in safety. In this she was unsuccessful, for the propeller's stem struck the starboard bow of the canal-boat causing the damage for which this action is brought. The river at the point where the collision occurred is 221 feet wide. The witnesses, with great unanimity, agree that at the time of the accident the tug and tow were about in the center of the river, rather nearer the south than the north side. It follows, therefore, that the propeller in order to have reached the canal-boat must have swung out 110 feet or more. The proof shows no fault on the part of the canal-boat. Indeed, it was virtually conceded on the argument that the libelants are entitled to recover, but each of the libeled vessels contended that the accident occurred solely by reason of the negligence of the other. The controversy is, then, between the Russell Sage and the Ella B., and the court is called upon to decide, if it is found that the accident was not the result of their joint negligence, which of the two was responsible therefor.

There can be no doubt as to the negligence of the Russell Sage. There was no difficulty in seeing the tug the moment she entered the river. The Sage knew, or ought to have known, that the tug, not a powerful one, was coming down the river with a loaded canal-boat, and yet, when they were in close proximity, she swung out so that her stem was nearly, if not quite, in the center of the stream. Had she waited a few moments the tug and tow would have passed by and all danger of collision would have been averted. She had no lookout, and the great weight of testimony is to the effect that she gave no signal. In any view it was unnecessary to swing out so far. Her object was to proceed further up the river, and had she adopted the usual course there would have been ample room between her bow and the center of the stream for the tug and tow to pass in safety. Without apparently taking any precaution to guard against danger, with an utter recklessness as to consequences, the Sage suddenly and unexpectedly let go her head-lines and swung herself half way across a narrow channel directly in the track of an approaching vessel. All this was negligence for which she must be held responsible.

Regarding the Ella B. there is more doubt. The impression entertained at the trial was that her conduct contributed to the accident, but upon a more deliberate and careful examination a different con-

clusion is reached. In determining this question the previous habits of her master should not be considered, in the absence of proof connecting them with the collision or with some dereliction of duty on that occasion. The tug was passing down the river in a careful and prudent manner. No fault as to her rate of speed, her position in the center of the river, or the management of the tow is suggested until she was within about 150 feet from the propeller. She then found herself confronted with sudden and imminent peril. Three courses were open to her; she could reverse, and by going along-side, endeavor to stop the canal-boat; she could sheer off and attempt to haul the canal-boat to the south side of the stream, or she could do as she actually did, make an effort to pass. Each of these courses was attended with danger. The tow-line was about 16 feet or thereabouts in length. In backing with so short a line it is not impossible that the boat might have been forced into a position even more hazardous than the one she actually assumed. So, too, in sheering off, the canal-boat might have been so placed that she would have been struck amid-ships or near the stern where the blow would have been attended with far more serious results. The tug attempted to go clear by turning towards the south and accelerating her speed. In deciding upon this course her master had a right to assume that the Sage would swing out only the usual distance, which is 40 or 50 feet. He could not foresee, and was not required to do so, that the Sage would occupy half the channel in executing an ordinary maneuver. It is not necessary to decide that he took the wisest and safest course, for the reason that he had not time or opportunity to enter into a nice calculation as to which of the dangers which confronted him was the least to be apprehended. He was placed in a position of extreme peril by the sudden and extraordinary action of the Sage. If, in such an exigency, attended as it must have been with excitement and apprehension, he failed to give the most judicious orders or take the wisest course, the failure cannot be imputed to him, but to the vessel which placed him in this hazardous predicament. The conclusion, therefore, reached is that the Sage is solely responsible for the accident.

There should be a decree for the libelants, with costs, and a reference to a commissioner to ascertain and report the amount of the damage sustained. As against the Ella B. the libel must be dismissed, but without costs.

THE COL. ADAMS, etc.

*(District Court, S. D. New York. March 22, 1884.)***1. SALVAGE—VESSEL AND CARGO.**

Where a vessel and cargo, owned by different owners, are libeled for the recovery of salvage, and the different owners file separate answers, claims, and bonds, and one of them claims an apportionment of the salvage, and a sum in gross is agreed upon between the parties, it is the duty of the court to apportion the amount awarded upon the interests of the different owners; it would be error to award a gross sum which might be collected wholly out of the property of either.

2. SAME—APPORTIONMENT.

Where in such a cause all the issues are referred to a commissioner to hear and determine, *held*, such apportionment is a part of the issues referred; and the commissioner's report having been filed without apportionment, it was sent back on exceptions that such apportionment might be made upon the evidence of the respective values of the vessel and cargo.

3. SAME—AVERAGE BOND.

If, as alleged, an average bond has been entered into between the parties, affecting the distribution of the salvage, the apportionment made in this action will be without prejudice to the covenants and obligations of the bond.

In Admiralty.

Jas. K. Hill, Wing & Shoudy, for libelant.

Butler, Stillman & Hubbard and Wm. Mynderse, for cargo.

Owen & Gray, for The Col. Adams.

Brown, J. The libel in this case was filed to recover salvage against the vessel, freight, and cargo, all of which were attached. The vessel and cargo were owned by separate owners, who appeared separately, filed separate claims, and gave separate bonds for their respective interests. The claimants of the cargo, in their answer, demanded that, in the event of the libelant's recovery, the amount of recovery should be apportioned upon the cargo, vessel, and freight. By consent, the action was referred to a commissioner "to hear and determine the whole issue, subject to exceptions upon his report." At the close of the libelant's proofs, the claimants of the cargo and the claimants of the vessel and freight united in an offer of \$8,000, which the libelants accepted, and which the commissioner reports as the whole salvage allowed. The claimants of the cargo demanded of the commissioner that he should apportion the amount properly chargeable against the cargo; and to that end they gave evidence of the values of the vessel, freight, and cargo. The claimants of the vessel objected to such apportionment, and the commissioner ruled it not within the issue referred to him. The former, therefore, gave no evidence of the relative values of vessel and cargo, and the report contains no apportionment of the amount of salvage to be paid by either.

Upon the hearing of the exceptions, the claimant of the cargo states that an average bond has been entered into between the owners of the vessel and cargo, and that the apportionment should, therefore, be left to be adjusted under that bond. The bond, however, was not

put in evidence, and the claimant of the cargo insists that the report is defective for want of apportionment. In a suit for salvage, where there are separate owners of the vessel and cargo libeled, who appear separately to defend their separate interests, the action is essentially for a several and separate demand against the property of each owner. It would be error, therefore, in the court to treat these separate interests as joint and consolidated, despite the separate answers and claims demanding the recognition of the separate rights of each, or to render a decree for the whole salvage in such a form as to make it collectible wholly from either. Under such several claims and pleadings the court is bound to make the apportionment upon the respective separate interests. This was long since clearly announced by the supreme court in the case of *Stratton v. Jarvis*, 8 Pet. 4, where STORX, J., says, (p. 11:)

"It is true that the salvage service was, in one sense, entire; but it certainly cannot be deemed entire for the purpose of founding a right against all the claimants jointly, so as to make them all jointly responsible for the whole salvage. On the contrary, each claimant is responsible only for the salvage properly due and chargeable on the gross proceeds or sales of his own property, *pro rata*. It would otherwise follow that the property of one claimant might be made chargeable with the payment of the whole salvage, which would be against the clearest principles of law on this subject."

The same question has a direct relation to the right of appeal of the claimants to the supreme court, as dependent upon the amount involved, since this right is to be determined according to the amount chargeable against each severally. *Stratton v. Jarvis*, *supra*; *The Connemara*, 103 U. S. 754; *Ex parte Baltimore & O. R. Co.* 106 U. S. 5; S. C. 1 Sup. Ct. Rep. 35, and cases there cited. An apportionment in some form has been the ordinary practice in such cases, and is clearly a substantial right, which it would be error to disregard. *The Minnie Miller*, 6 Ben. 117; *The Cyclone*, 16 F. & D. Rep. 486, 489. The apportionment of the salvage was, therefore, a material part of the issue referred to the commissioner; and as under his ruling the owner of the vessel gave no evidence of value, the case must be sent back that an apportionment may be made upon such proofs as the parties may offer. If an average bond has been entered into between the parties, any apportionment ordered by the court in this action would be without prejudice to the covenants and obligations of such a bond, so far as the subject of salvage is covered by it. An order may be entered in accordance herewith.

THE CURTIS PARK.*

(District Court, E. D. New York. February 19, 1884.)

COLLISION ON ERIE CANAL—RULE OF THE ROAD—BURDEN OF PROOF.

A loaded boat, the B., bound east on the Erie canal, towed by a cable-boat, met a light boat, the C. P., while turning a bend where the cable-boat must keep close to the inside of the turn, which was the tow-path side. The C. P. passed the cable-boat on the outside, and then, in accordance with the rule of the canal, attempted to regain the tow-path side by passing between the cable-boat and the B., over the tow-line of the cable-boat, and in so doing was struck by the B. In an action against the C. P. for the damage done the B., *held*, that the C. P., having taken a course in accordance with the rule of the canal, and the B. having done otherwise, the burden was on the B. to excuse her omission to conform to the rule; and that, as the B. failed to do so upon the evidence, her libel must be dismissed.

In Admiralty.

J. M. Mulchahey, for libellant.

E. G. Davis, for claimant.

BENEDICT, J. This is an action to recover for damages done to the canal-boat E. M. Blazier in a collision with the canal-boat Curtis Park, on the Erie canal, at Middleport bend. The Blazier was a loaded boat, bound east, and being towed by a cable-boat, No. 8. The Curtis Park was a light boat, bound west. The Curtis Park met the cable-boat and her tow just as the cable-boat was turning the bend, and when, owing to the position of the cable, the cable-boat must necessarily keep close to the inside side of the turn, which was there the tow-path side of the canal. Accordingly, the Curtis Park passed the cable-boat on the outside, or heel-path side. It was then her right, according to the rule of the canal, to regain the tow-path side by passing between the cable-boat and the Blazier, thus going over the tow-line of the cable-boat, the same being slackened for that purpose. This course was taken by the Curtis Park; but before she reached the tow-path she was struck by the Blazier. The collision would not have occurred had not the Blazier, instead of keeping towards the berme bank, hauled in towards the tow-path. Her excuse for doing this is that she supposed the Curtis Park would go outside of her, as she had gone outside of the cable-boat. The Curtis Park having taken a course in accordance with the rule of the canal, and the Blazier having done otherwise, the burden is upon the libellant to excuse her omission to conform to the rule.

The assertion in behalf of the Blazier is that the Curtis Park at first hauled to the berme bank, with the intention of passing on the outside, thereby leading the Blazier to haul towards the tow-path side, and afterwards abandoned this intention by direction of the master of the Curtis Park, who came on deck as the boats were passing and directed his steersman to take the tow-path when it was too late to do

* Reported by R. D. & Wylls Benedict, of the New York bar.

so without collision. The evidence has failed to satisfy me of the truth of this assertion. There is very positive testimony from several witnesses that the Curtis Park at no time took the berme bank, but passed along the cable-boat close by; and the fact stated by the libelant's witnesses to show that the Curtis Park would be likely to take the berme bank, namely, that a strong wind was blowing off the tow-path, rendering it impossible for a light boat to regain the tow-path in the manner attempted by the Curtis Park, is contradicted by the libel itself, where it is expressly stated that the wind was light.

Upon the evidence as it stands, I am unable to find that the libelant's boat has proved her excuse for being where she was when the collision occurred, she then being inside of the middle of the canal, instead of nearer to the berme bank, and accordingly I must dismiss the libel, with costs.

THE DAUNTLESS.

(*District Court, E. D. New York. December 31, 1883.*)

PERMISSION TO EXTRACT GUANO—RIGHTS THEREBY ACQUIRED.

One J. obtained permission from the government of Brazil to extract a cargo of guano or mineral phosphate from R. island, and sent out a vessel to get it, but the voyage was broken up. W., learning of this, went to the island with his vessel and obtained the cargo by virtue of a subsequent permission obtained by W. himself. J. filed a libel against W.'s vessel and cargo, claiming as owner to recover the cargo obtained by W. *Held*, that J.'s right of property could only attach to what phosphate he might acquire possession of by extracting it and loading it upon his vessel under the permit issued to him, and that, in the absence of proof of false representations on W.'s part in obtaining his permission that he was acting as J.'s agent, the libel must be dismissed.

In Admiralty.

Dan. Marvin, for libelant.

Goodrich, Deady & Platt, for claimant.

BENEDICT, J. It is conceded on the part of the libelant that there can be no recovery in this action unless the libelant's ownership of the cargo proceeded against has been proved. This has not been done. It has been shown that the libelant, one Jewett, had obtained from the government of Brazil permission to extract, for his own use, from Rat island, a cargo of guano or mineral phosphate. He sent out the brig Katie to obtain such cargo, but she was condemned in Rio Grande do Sul, and her voyage broken up. At the time of the condemnation of the Katie, Williams, the claimant in this action, learned of the destination of the Katie and the object of her voyage, and, acting upon such information, proceeded to Rat island with his vessel, the Dauntless, and there obtained the cargo now proceeded

¹ Reported by R. D. & Wylls Benedict, of the New York bar.

against. But this cargo was not obtained by virtue of the permit that had been issued to the libelant, but by virtue of a subsequent permission which Williams obtained for himself. By the permission issued to the libelant, the libelant acquired no interest in any of the phosphate on Rat island. His right of property could only attach to what he might acquire possession of by extracting it and loading it upon his vessel under the permit issued to him. I am, therefore, unable to see any ground upon which to hold the libelant to be owner of this cargo, which was not extracted by him and was never in his possession. If this cargo had been obtained by Williams through a false representation that in applying for the permission that was given to him he was acting in behalf of the libelant, and he had been allowed to take this cargo as the agent of the libelant, and not for himself, his acts could have been adopted by the libelant, and in such case it might not be open to Williams to deny the libelant's ownership of cargo so obtained. But no such case has been proved. The most that can be said is that the circumstances proved are calculated to cast suspicion upon the account given by Williams in regard to his acts in obtaining this cargo. It is not enough, however, in a case like this, to raise suspicion. The libelant's ownership must be proved. That not having been done, the action must fail.

Let a decree be entered dismissing the libel, with costs.

See opinion on argument of exceptions to libel in same case. *The Dauntless*, 7 FED. REP. 866.

THE J. W. DENNIS.

(District Court, N. D. New York. March 28, 1884.)

RETAINING OF VESSEL BY A SHIP-KEEPER.

A vessel which has been detained by a ship-keeper, pending a controversy, must be delivered up to her owner immediately upon the settlement of the suit. The marshal will not be justified in employing a ship-keeper after the suit has been settled, merely because a formal order of discontinuance has not been entered.

In Admiralty.

This is a motion in the nature of an appeal from the taxation of the marshal's bill of costs, by the clerk. The marshal employed a ship-keeper at \$2.50 per day to take charge of the libeled vessel. The clerk allowed the bill at \$1.75 per day. Various affidavits were submitted by the parties. Some to the effect that the amount was too high; others that it was a very reasonable charge for the work done. It appears from the affidavits that the controversy between the parties has been settled, though no formal order to that effect has been entered. It also appears that since the settlement and the taxation by

the clerk as aforesaid the ship-keeper has retained possession of the vessel and has demanded pay for his services.

George N. Loveridge, for motion.

James A. Murray, opposed.

COXE, J. I have read with care all of the affidavits and papers submitted in this case and have reached the conclusion that the bill of costs and disbursements as taxed by the clerk, February 28, 1884, cannot with propriety be reduced. As the stipulation limits the inquiry to the items of that bill, I express no opinion upon the question as to the right of the ship-keeper to compensation since that day. There should be no delay, however, if the controversy is settled, in discontinuing the action and restoring the vessel to her proper owner.

THE ONTONAGON.

(*District Court, N. D. New York. March, 1884.*)

COSTS—LIBEL IN REM—SETTLEMENT.

The respondent in a suit for seamen's wages cannot avoid the payment of costs by settling with the libelant without the knowledge of his proctors.

Cook & Fitzgerald, for libelant.

Williams & Potter, for respondent.

COXE, J. This is a libel for seamen's wages. The simple question is: can the respondent by a settlement with the libelant avoid the payment of costs? I am clearly of the opinion that he cannot. The libelant was compelled by the respondent's refusal to pay his wages to commence this suit. Costs and disbursements were incurred, due not only to the proctors, but to the marshal and clerk. By paying the libelant the respondent admits that the claim against him was a just one. Why should he not discharge all the debts which his own conduct made it necessary to incur? To permit a party, by means of what Judge BETTS sententiously terms "an out-door settlement," to avoid the payment of such obligations would be to encourage practices which the court should be slow to sanction. Courts of admiralty in actions of this character have seldom failed in similar circumstances to grant protection to the injured party. *The Sarah Jane*, 1 Blatchf. & H. 401, 422; *The Victory*, Id. 443; *The Planet*, 1 Spr. 11; *Angell v. Bennett*, Id. 85; *Collins v. Nickerson*, Id. 126; *Gaines v. Travis*, 1 Abb. Adm. 301.

The libelant's proctors are entitled to recover their costs to be taxed by the clerk.

PHELPS v. CANADA CENT. R. CO.

(Circuit Court, N. D. New York. April 3, 1882.)

REMOVAL OF CAUSE—AMENDING COMPLAINT.

Where, before the removal of a cause, the state court has restricted plaintiff to his cause of action for breach of contract, on which an attachment has been granted, and he has elected to consent to such order, and it is still in force when the case is removed to the federal court, a motion by plaintiff in the circuit court for leave to amend his complaint may be denied, no change in the relative position or rights of the parties having been made.

Motion to Serve Amended Complaint.

Mullin & Griffin, for plaintiff.

Edward C. James, for defendant.

WALLACE, J. Before this action was removed into this court the state court had granted an order restricting the plaintiff from averring in his complaint any cause of action against the defendant other than for alleged breach of contract set forth in the affidavit upon which the defendant's property was attached and its appearance thereby compelled. Although the main point considered by the state court upon the motion which resulted in such order was the right of the plaintiff to incorporate into his complaint a cause of action and prayer for equitable relief, the order made was both broad and explicit in its terms, and confined the plaintiff to the cause of action set forth in the affidavit for the attachment. The plaintiff elected to consent to that order as a condition of retaining his attachment, which would otherwise have been vacated. Whether the state court would have thus adjudged if the plaintiff had complained upon a cause of action at law only, it is not for this court to determine. It suffices that the order, as made, was in force when the action was removed to this court. Undoubtedly, this court has power to modify that order, but it would be unseemly, when nothing has occurred since the removal to change the rights or position of the parties, to disregard the adjudication of the state court made upon hearing and deliberation and consented to by the plaintiff.

Although the plaintiff is entitled, by the Code of Procedure of the state, to amend, as of course, within the time limited by the Code after the defendant has answered, that right was waived, in so far as the exercise of it would involve any departure from the terms of the order, by the election signified upon the hearing which resulted in the order.

The motion for leave to serve the amended complaint is denied.

v.19,no.11—51

SIMPKINS v. LAKE SHORE & M. S. RY.¹*(Circuit Court, E. D. New York. December 28, 1883.)*

REMOVED CAUSE—JURISDICTION OF STATE COURT—DETERMINATION OF CONTROLLING JURISDICTIONAL ISSUE NOT PROPERLY HAD ON MOTION FOR SECURITY FOR COSTS.

An action having been begun in a state court, under a state statute giving that court jurisdiction of such actions when brought against a foreign corporation, provided the plaintiff be a resident of the state, the answer averred, as an objection to the jurisdiction, that the plaintiff was not a resident of the state. The defendant having removed the action to this court, moved for security for costs on affidavits tending to show such non-residence of the plaintiff, which were met by counter affidavits. *Held*, that the issue thus presented was one of the issues of the cause presented by the pleadings and was controlling; for if the action would fail in the state court on account of the plaintiff's non-residence, it would fail in this court; and that the determination of a jurisdictional fact, which might involve a dismissal of the action, could not properly be sought by a motion on affidavits, but should be left to abide the trial of the issue presented by the answer.

Motion to Compel Security for Costs.

C. Ferguson, Jr., for plaintiff.

Burrill, Zabriskie & Burrill, for defendant.

BENEDICT, J. This case comes before the court upon a motion on the part of the defendant to compel security for costs, upon the ground that the plaintiff is a non-resident. The action was commenced in the supreme court of the state. The complaint filed in the state court averred that the defendant is a foreign corporation. By a statute of the state, the supreme court of the state has jurisdiction of actions like the present when brought against foreign corporations, provided the plaintiff be a resident of the state, not otherwise. The answer filed in the state court averred, by way of objection to the jurisdiction, that the plaintiff was not a resident of the state of New York, but of England. Thereafter, the defendant removed the case to this court, and now moves for security for costs upon affidavits tending to show the plaintiff to be a non-resident of the state. Counter-affidavits are read in support of the plaintiff's averment that he is a resident. The issue thus raised is the same raised by the defendant's answer. It is one of the issues of the cause presented by the pleadings while the cause was in the state court. This issue tendered by the defendant's answer is, moreover, controlling; for if the defendant be a non-resident, as the answer asserts, the action would have failed in the state court for want of jurisdiction, and must therefore fail here, notwithstanding the plaintiff, if a non-resident, may also be an alien, and the action, for that reason, one which this court is competent to entertain. For it is the cause instituted in the state court which is to be determined by this court, and the plaintiff's residence, if fatal to the action in case it had remained in the state court, must

¹ Reported by R. D. & Wyllys Benedict, of the New York bar.

be fatal here. The defendant, therefore, by the present motion, seeks the determination of a jurisdictional fact, which determination, if in accordance with the defendant's contention, would involve a dismissal of the action. Such a determination cannot, in my opinion, be properly sought in this manner by a motion upon affidavits, but should be left to abide the result of the trial of the issue presented by the answer.

Motion denied.

MOORE and others v. NORTH RIVER CONSTRUCTION Co. and others.

(Circuit Court, N. D. New York. April 3, 1884.)

JURISDICTION OF FEDERAL COURTS—SEPARATE CONTROVERSY.

Where citizens of New York, who are creditors of a New Jersey corporation, bring suit in the nature of a creditor's bill to reach real estate which they allege was fraudulently and unlawfully conveyed to a New York corporation, no relief being demanded against the New Jersey company, *held*, that there was no separate controversy between citizens of different states such as to give jurisdiction to the United States courts.

On Motion to Remand.

Edward W. Paige and Alonzo P. Strong, for plaintiffs.

P. B. McLennan, Otto T. Bannard, and Albert B. Boardman, for defendants.

COXE, J. The plaintiffs are citizens of New York. The defendant, the North River Construction Company, is a New Jersey corporation. The other two defendants are New York corporations. The plaintiffs are creditors of the construction company. There being no pleading before the court but the complaint, it must be the sole guide in determining the character of the action. The relief demanded is that certain real estate alleged to have been paid for by the construction company, when insolvent, and conveyed direct to the railway company in fraud of the plaintiffs' rights, be sold to satisfy their claims. Also that an injunction issue restraining the defendants from disposing of or encumbering the land. No judgment is asked against the construction company.

Because the plaintiffs are not judgment creditors, it is argued that there is a controversy between them and the construction company, and that this court therefore has jurisdiction. In one sense, undoubtedly, this is true, but is it such a controversy as is contemplated by the statute? Is it, to use the language of the chief justice in *Hyde v. Ruble*, 104 U. S. 409, "a separate and distinct cause of action?" Does the complaint state two causes of action or one? No separate judgment could be entered against the construction company. Should the trial court find on the main issue that there were no purchases of land as alleged, the complaint would be dismissed as

to all of the defendants without reference to what the proof might be upon the question of indebtedness. Test it in another way. Suppose on the trial the plaintiffs prove that they are creditors of the construction company and there stop. Would there be a judgment against that company for the amount so proved or a general decree in favor of all the defendants? It is thought that under the allegations of this complaint the latter would be the inevitable result. In *Barney v. Latham*, 103 U. S. 205, on the contrary, there were two entirely distinct controversies in each of which judgment could be entered. In the case at bar the perplexities which surround the question of jurisdiction are enhanced by reason of the anomalous character of the action, but it may be said with certainty that the goal which the plaintiffs seek is the land in the possession of the West Shore company. In order to reach it they must establish a number of facts, regarding which undoubtedly a controversy may arise between them and the construction company. For instance: they must prove that the company was insolvent, that its money paid for the land, that the transfer was collusively made, that they are creditors, etc. The construction company is interested in disproving each of these propositions: but are they not, if denied, issues to be tried rather than separate and distinct causes of action? I am constrained to hold that the motion should prevail on the ground that the action, if it can be maintained at all, must proceed upon the theory that there is no separate and distinct controversy which can be fully determined between the plaintiffs and the construction company, within the meaning of the second clause of the second section of the act of 1875.

The complaint has been considered solely with reference to the question of jurisdiction. It is not intended that anything said upon this question shall be considered as an intimation that a creditor who has not established his claim by a judgment can maintain an action of this character.

The motion to remand is granted.

NASHUA & L. R. CORP. and others v. BOSTON & L. R. CORP. and others.

(Circuit Court, D. Massachusetts. March 25, 1884.)

1. CONSOLIDATED RAILROADS—STATUS IN DIFFERENT STATES.

Two corporations, chartered under the laws of different states and afterwards consolidated under the laws of both, are separate in so far that each state is left the control over the charter it grants, and identical in so far that the corporations may represent each other in suits by or against either of them.

2. SAME—EQUITY—POOLING AGENT.

The pooling agent, under a contract between railroad companies, is a trustee, and as such is accountable in a court of equity for his acts.

3. SAME—PARTIES TO SUITS.

The plaintiff is entitled to join as defendants with the corporation all persons into whose hands they can trace the funds of the joint management.

5. SAME—CONTRACT—ESTOPPEL.

A pooling contract being once executed, one corporation is estopped from denying the validity of its own act in making it, in defense of an action for its infraction brought by the other. Still less can the agents of the parties set up such a defense.

In Equity.

F. A. Brooks, for plaintiffs.

S. A. B. Abbott, for defendants.

NELSON, J. The bill sets forth, in substance, that for the term of 20 years from and after October 1, 1858, the Nashua & Lowell Railroad and the Boston & Lowell Railroad were operated jointly under a pooling contract, by the terms of which both roads were to be placed under the control and management of a joint agent to be appointed by the directors of the two corporations, and the joint earnings and expenses were to be shared in the proportion of 31 per cent. of the whole to the plaintiff and 69 per cent. to the defendant corporation, the division to be made on the first days of April and October in each year; that the defendant Hosford was appointed and acted as the joint agent under the contract from April, 1875, until the expiration of the contract; that the defendant Bartlett, who was also the treasurer of the defendant corporation, was appointed and acted as cashier of the joint funds; that Hosford, while agent, had, in violation of the contract and without authority, paid over to the defendant corporation from the joint earnings large sums of money, amounting, as alleged, to \$208,086, being 31 per cent. of the interest, reckoned at 7 per cent. a year, from 1872 to 1878, on the entire outlay of the defendant corporation in the erection of new passenger stations in Boston and Winchester, in building the Mystic River Railroad, and in purchasing certain shares of the Salem & Lowell and Lowell & Lawrence Railroads, (after deducting dividends on the shares,) the whole of which expenditure was, by the terms of the contract, to be borne solely by the defendant corporation; that Bartlett, at the termination of the contract in 1878, had in his possession as cashier the sum of \$60,000 of the joint funds, 31 per cent. of which belonged under the contract to the plaintiff; and that, acting under the direction of the defendant corporation, he had refused to pay the plaintiff its share thereof, but had either retained such share in his own hands, or had paid it over to the defendant corporation. The prayer of the bill was for an account.

The Boston & Lowell Railroad Corporation and Bartlett have demurred to the bill, assigning various grounds of demurrer.

By the familiar rules governing courts of equity the plaintiff is clearly entitled to equitable relief upon the case stated in the bill. The joint earnings of the roads constituted a trust fund in the hands of the joint agent, to be held by him as a trustee for the benefit of the

two corporations, and to be applied by him in the manner specified in the contract. A failure on his part to perform this duty rendered him liable to account to the party aggrieved. If, through the mistaken or wrongful act of the agent, the Boston & Lowell road has received a larger share of the net earnings than belonged to it under the contract, the plaintiff is at liberty to follow the fund into the hands of the defendant corporation and compel its restitution. If, as the defendants argue, the pooling contract was not within the corporate powers of the parties to it, that can afford no defense to the Boston & Lowell road, when called upon to restore to the plaintiff the sums received in excess of its due share. As the contract has been fully executed, and the defendant road has availed itself of all the benefits to be derived from it, that corporation is now estopped to deny its validity. Still less can the agents of the parties set up a defense of this character which is not open to their principals.

Bartlett is properly joined as a defendant. The plaintiff is entitled to join as defendants with the defendant corporation all persons into whose hands it can trace any part of the funds of the joint management.

It has already been decided in this case that the plaintiff, as a corporation chartered by the laws of New Hampshire, can maintain this suit in this court against the defendants, who are citizens of Massachusetts, although the plaintiff is a part of a joint or consolidated corporation under the laws of New Hampshire and Massachusetts. 8 FED. REP. 458. Corporations thus created are separate for the purposes of jurisdiction, and to enable each state to exercise control over the charters which it grants and over the acts of the corporation within its own limits. But the corporations are so far identical that they represent each other in suits by or against either of them, and the judgments or decrees will bind the whole corporation. *Horne v. Boston & M. R. R.* 18 FED. REP. 50. The Massachusetts corporation is therefore not a necessary party to this bill.

The bill waives an answer under oath. By waiving the oath no discovery is sought, and it is not necessary to interrogate the defendants specially and particularly upon the statements of the bill. Equity rules 40, 41.

The bill prays that the defendant corporation may answer by its president, J. G. Abbott. This must be regarded as mere surplusage, and not as ground of demurrer. The plaintiff is entitled to the answer of the corporation, but has no right to require that it shall answer by its president.

Demurrers overruled.

UNITED STATES v. STOWE and others.

*(District Court, D. Minnesota. February 23, 1884.)***1. DOUBLE COMPENSATION—PROHIBITION APPLICABLE ONLY TO OFFICIAL SERVICES.**

Officers and agents of the government are not forbidden to receive extra compensation for services rendered entirely apart from their official functions, but only for services required of them within the scope of their employment.

2. PAYMENT OF FREIGHT—AGENT ENTITLED TO REIMBURSEMENT.

The statutes do not forbid the payment of freight by an Indian agent when supplies are demanded at once by a sudden emergency, and an agent paying such charges is entitled to reimbursement.

Action upon the bond of Lewis Stowe, late Indian agent at the White Earth Reservation. Defendant Stowe, as such agent, and under the direction of the commissioner of Indian affairs, hired Warren, the official interpreter at the agency, to render certain services as a day laborer in the government warehouse, and as a clerk in the agent's office. For such services he paid Warren \$336. This item was disallowed by the accounting officers of the government in the settlement of Stowe's account, under sections 1764, 1765, 2074, 2076, Rev. St. For the transportation, in 1876 and 1877, of certain government property from St. Paul to Detroit, Minnesota, for the use of the agency, defendant Stowe paid to the Lake Superior & Mississippi Railroad Company \$210.67, and to the Northern Pacific Railroad Company \$52.55, which expenditures were disallowed by the accounting officers of the government, under paragraph 2, § 1, c. 133, (18 St. at Large, 452,) also section 1, Supp. Rev. St. 171, (Richardson's.) For the deficiency caused by these disallowances this action is brought.

C. A. Congdon, Asst. U. S. Atty., for plaintiff.

Gordon E. Cole, for defendants.

NELSON, J. Stowe, the agent, was authorized by the commissioner of Indian affairs to have the services performed for which he paid Warren, the interpreter. The law required the agent to execute this order. Rev. St. § 2058, p. 362. Warren was not forbidden to receive compensation for doing the work. Sections 1764 and 1765, Rev. St., do not apply to this case, for the employment was not in the line of his official duty as interpreter, and had no connection with it. It is only when extra and additional duties are imposed upon an officer as a part of his duty, and he is bound to obey or perform them, that such officer is not entitled to and cannot receive extra pay, unless it is fixed by law, and "the appropriation therefor explicitly states that it is for such additional pay," etc.

2. In my opinion section 1, par. 2, Supp. Rev. St. p. 171, and section 5, act of 1864, granting land to the Lake Superior & Mississippi Railroad Company, and section 11, charter Northern Pacific Railroad Company, do not forbid the payment of freight by the defendant; and

it was admitted in the argument that a sudden and unforeseen emergency had arisen, requiring prompt action in the interest of humanity. If so, an equitable credit, at least to the extent of the claim made by the defendant, should be allowed, under the act of March 31, 1797. See *U. S. v. Lowe*, 1 Dill. 585.

Judgment is ordered for defendants.

A provision in an act of congress, prohibiting persons holding office under the United States from receiving compensation for discharging the duties of any other office, does not apply to services entirely unconnected with their official position. *U. S. v. Brindle*, 4 Sup. Ct. Rep. 180.—[Ed.]

ROSE v. STEPHENS & CONDIT TRANSP. CO.

(Circuit Court, S. D. New York. April 8, 1882.)

NEW TRIAL—DAMAGES—PERSONAL INJURY—NEWLY-DISCOVERED EVIDENCE.

In an action to recover damages for a personal injury a motion by defendant for a new trial because of newly-discovered evidence as to the extent of plaintiff's injuries will not be granted where it does not appear that defendant, before the trial, made any investigation as to the character of the injuries received.

Motion for New Trial.

Chauncey Shaffer, for plaintiff.

Thomas E. Stillman, for defendants.

WALLACE, J. The motion for a new trial upon the ground of newly-discovered evidence should not be granted, because the defendant has failed to show that by the exercise of reasonable diligence the evidence newly discovered could not have been obtained and used upon the trial. The evidence relates to the extent of the injuries received by the plaintiff through the negligence of the defendant. The plaintiff alleged in his complaint that he had sustained severe injuries, and claimed \$5,000 damages. It does not appear that prior to the trial the defendant made any investigation to ascertain the character or extent of these injuries. Its officers seem to have contented themselves, in their preparation for a defense of the action, with accepting the plaintiff's case as it might appear upon the trial, so far as this issue is concerned. If it had been shown, upon this motion, that an effort had been unsuccessfully made upon their part, by inquiry of such persons as would be likely to have knowledge of the facts, to ascertain the character of the plaintiff's injuries, a very different case would be presented, and one which might appeal with some force to the favorable consideration of the court. To grant the motion upon such a case as is made would encourage supineness on the part of defendants. The precedent would encourage defendants

to ignore proper preparation upon one material issue, in order to obtain the chances of a second trial in case of failure upon the other issues.

The motion is denied.

*In re Account of ALLEN, Chief Supervisor of Elections, etc.*¹

(District Court, E. D. New York. November 12, 1883.)

ACCOUNTS OF SUPERVISOR OF ELECTIONS—ACT OF FEBRUARY 22, 1875, (18 ST. AT LARGE, 333,)—U. S. REV. ST. § 2031—CERTIFICATE OF JUDGE UNDER § 846.

The effect of Rev. St. § 2031, is not such as to bring the accounts of a chief supervisor of elections within the scope of the act of February 22, 1875, (18 St. at Large, 333,) providing for the passing of accounts of clerks, marshals, district attorneys, and United States commissioners in open court.

Account of Supervisor of Elections.

Frank W. Angel, Asst. U. S. Atty., for the United States.

John J. Allen, for himself.

BENEDICT, J. The account of John J. Allen, the chief supervisor of elections in this district, was presented to the district judge of the district, and was certified by him pursuant to section 2031 of the Revised Statutes in the manner heretofore adopted with reference to other similar accounts. The same account is now submitted to the district court by the district attorney, for the purpose of having the account passed on in open court, in the manner provided for the accounts of clerks, marshals, district attorneys, and United States commissioners by the act of February 22, 1875, § 1, (18 St. at Large, 333.) This action on the part of the district attorney has raised, among others, the question whether the effect of section 2031 is to bring the accounts of a chief supervisor of election within the scope of the subsequent act of February 22, 1875, which act is, by its terms, limited to the accounts of clerks, marshals, district attorneys, and United States commissioners. Upon this question my opinion is that no such effect can be given to section 2031, and that the act of February 22, 1875, has no application to the accounts of a chief supervisor of election. For this reason, therefore, if there were no other, the court is constrained to decline to enter upon the inquiry tendered by the district attorney in reference to this account, without passing upon the validity of a statute like this of February 22, 1875, which seeks to authorize proving of an account "in open court" before a circuit or a district court, and at the same time provides for the revision of the action of the court by the accounting officers of the treasury. See *U. S. v. Ferreira*, 13 How. 40; *U. S. v. Todd*, Id. note, p. 52; *Ex parte Gans*, 17 FED. REP. 471.

¹ Reported by R. D. & Wylls Benedict, of the New York bar.

A further suggestion having been made that the judge's certificate attached to this account is not a certificate such as contemplated by section 846, I take this occasion to say that the certificate is in the form adopted many years ago, and, so far as I am aware, it has always, up to this time, been deemed a sufficient compliance with the provisions of section 846. In my opinion, no other or different certificate can be required of the judge in respect to this account.

The account is therefore directed to be returned to the district attorney, to be dealt with by him as he may be advised.

HENDRYX and others v. FITZPATRICK.

(Circuit Court, D. Massachusetts. April 2, 1884.)

CONTEMPT—POWER OF COURT TO REVOKE ITS ORDERS.

An order committing a defendant for contempt, in refusing to pay a sum of money, is civil, and not criminal, in its nature, and the court which committed him is at liberty to release him again in case he shows himself unable to comply with the requirements of the court

In the Matter of Contempt of Court.

T. W. Porter and J. McC. Perkins, for complainants.

A. H. Briggs, for defendant.

Before LOWELL and NELSON, JJ.

LOWELL, J. In this case the defendant was enjoined from infringing a patent, *pendente lite*, because, though the court had serious doubts of its validity, the defendant had himself sold the patent to the plaintiffs for a considerable sum of money, and it was thought no more than justice that he should refrain from violating his own implied warranty until the final hearing. Afterwards proceedings for contempt for a violation of the injunction were prosecuted by the plaintiffs, and after evidence taken and a hearing, the defendant was ordered to pay the fees of the master by a certain day, the costs of the proceedings, and certain profits assessed by the master, by certain other days, and in default of payment to be committed. These last two sums, when paid in, were to be paid out to the plaintiffs. The defendant failed to make the last two payments, and was committed to prison. After he had been in confinement for about two weeks the district judge, with my approval, though I was unable to sit in the case, permitted the defendant to go before the master and prove, if he could, in proceedings like those under the poor-debtor law of Massachusetts, that he had no property which he could apply to the payment of his debts. The plaintiffs were duly notified of the hearing before the master and did not attend, and the master admitted the defendant to take the poor-debtor's oath; and thereupon the court discharged him upon his own recognizance.

The plaintiffs now move that the defendant may be recommitted under the original order. They argue that every order since made in the cause is *ultra vires* and void, because the first order was a final decree in a criminal case, and could not be varied after the term; and because the defendant could only be discharged from arrest by the pardon of the president. It would be a sufficient answer to this argument, that, if the order was a criminal one, having the consequences contended for, the fine should have been made payable to the United States, and the plaintiffs would have no concern with it; but we will explain why all the orders are, in our opinion, proper. The original order was an interlocutory civil order, for the benefit of the plaintiffs; and the commitment was for failure to pay the money, not for the original contempt. While, therefore, the imprisonment may not have been strictly and technically within our poor-debtor law, (Rev. St. § 991,) which, however, we think it was, yet it should, at all events, be governed by similar rules. It was made in this way, because the master found that the contempt was not willful, and I thought that no punishment was necessary. The process of contempt has two distinct functions,—one, criminal, to punish disobedience, the other, civil and remedial, to enforce a decree of the court and indemnify private persons. In patent causes it has been usual to combine the two, and to order punishment if it is thought proper; or indemnity to the plaintiff, if that is all that justice requires; or both. *Re Mullee*, 7 Blatchf. 23; *Doubleday v. Sherman*, 8 Blatchf. 45; *Schillinger v. Gunther*, 14 Blatchf. 152; *Phillips v. Detroit*, 3 Ban. & A. 150; *Dunks v. Gray*, 3 FED. REP. 862; *Searls v. Worden*, 13 FED. REP. 716; *Matthews v. Spangenberg*, 15 FED. REP. 813.

We are aware that it was at one time the opinion of Judge BLATCHFORD that a sum of money ordered to be paid to a plaintiff, in a cause of this kind, was a criminal fine, which could only be remitted by a pardon; but we are of opinion that such a fine for the benefit of a private person cannot be remitted by the president, and is a debt of a civil nature; and that Judge BLATCHFORD has so treated it in the latest case which has come before him. His first opinion is stated in *Mullee's Case*, 7 Blatchf. 23, and *Fischer v. Hayes*, 6 FED. REP. 63; but when the latter case came before the supreme court, they expressed a significant doubt whether the order to pay money for the use of the plaintiff was not an interlocutory decree in a civil cause, (*Hayes v. Fischer*, 102 U. S. 121;) and when the case came back, Judge BLATCHFORD admitted the defendant to bail, (*Fischer v. Hayes*, 7 FED. REP. 96,) which he could not have done if the judgment were criminal in its nature. The doubt of the supreme court might well have been even more strongly expressed. An order upon a defaulting trustee, assignee in bankruptcy, or other person subject to account, to pay money into court, is civil, and may be waived by the party adversely interested, and is a debt to which a bankrupt law, discharging the debt, and an insolvent law, discharging the person, are applicable.

See *Baker's Case*, 2 Strange, 1152; *Ex parte Parker*, 3 Ves. 554; and the decisions hereinafter cited.

In *McWilliams' Case*, 1 Schoales & L. 169, a defendant in contempt for not paying a legacy into the court of chancery in obedience to its order was attached while attending the commissioner to be examined as a bankrupt. His arrest was lawful, if the contempt was a criminal offense. That very learned chancery lawyer, Lord REDSDALE, said that it was merely a mode of enforcing a debt; that if it were not so he had no right to make the original order; that the substance and not the form of the proceeding must govern, and its substance was not criminal. The petitioner was discharged. The same point was decided in the same way in *Ex parte Jeyes*, 3 Dea. & Ch. 764; and *Ex parte Bury*, 3 Mont. D. & D. 309.

The remark of the lord chancellor in *McWilliams' Case*, that he had no right to make an order of this sort for the benefit of a private person, excepting as a civil remedy, is highly pertinent to this case.

Where a person had been committed to prison for nine months for contempt in not paying money into a county court, sitting in bankruptcy, JAMES, L. J., said: "The order, on the face of it, is wrong, for it is an absolute order of commitment for contempt of court for non-payment of money. This is a penal sentence. The court of chancery never made an order in this form." And again: "The order of commitment was such as had never been made in the court of chancery, and was justly characterized by the chief judge as novel and surprising." *Ex parte Hooson*, L. R. 8 Ch. 231. This distinction is preserved in our Revised Statutes. The courts have power to punish for contempt, (section 725;) but all forms and modes of proceeding which are usual in equity may be followed in cases in equity. Section 913. By virtue of section 725 the district court may punish contempts. Like power is given the district judge when sitting in chambers in bankruptcy, by section 4973; and the cognate but distinct power of enforcing his decrees "by process of contempt, and other 'remedial' process," is recognized by section 4975. See *In re Chiles*, 22 Wall. 157. Some of the older cases hold that in contempt in civil cases at common law, the proceedings, after the order of attachment, should be on the crown side of the court; that is, in the name of the sovereign. *The King v. Sheriff of Middlesex*, 3 Term R. 133; *Same v. Same*, 7 Term R. 439; *Folger v. Hoogland*, 5 Johns. 235. This is still the better practice, or, at least, a good practice, if punishment is asked for. *Cartwright's Case*, 114 Mass. 230; *Durant v. Sup'rs*, 1 Woolw. 377; *U. S. ex rel. v. A., T. & S. F. Ry. Co.* 16 FED. REP. 853. If this was ever the rule of chancery, it has long since ceased to be so, when the sole purpose of the attachment is to enforce a decree or order, such, for instance, as to sign an answer, to make a conveyance, to pay money, etc. All such orders may be waived or condoned by the private person interested in them, and are civil and remedial. *Ex parte Hooson*, *supra*; *Ex parte Eicke*, 1 Glyn.

& J. 261; *Wall v. Atkinson*, 2 Rose, 196; *Wyllie v. Green*, 1 De Gex & J. 410; *Buffum's Case*, 13 N. H. 14; *People v. Craft*, 7 Paige, 325; *Jackson v. Billings*, 1 Caines, 252; *Anon.* 2 P. Wms. 481; *Const v. Ebers*, 1 Mad. 530; *Smith v. Blofield*, 2 Ves. & B. 100; *Brown v. Andrews*, 1 Barb. 227; *Ex parte Muirhead*, 2 Ch. Div. 22; *Lees v. Newton*, L. R. 1 C. P. 658; *Re Rawlins*, 12 Law T. (N. S.) 57.

In patent cases it has been usual to embrace in one proceeding the public and the private remedy—to punish the defendant if found worthy of punishment, and, at the same time, or as an alternative, to assess damages and costs for the benefit of the plaintiff, as is seen by the cases cited in the beginning of this opinion. A course analogous to this has been said, *obiter*, to be proper, by MILLER, J., in *Re Chiles*, 22 Wall. 157, 168. "The exercise of this power has a twofold aspect, namely,—*First*, the proper punishment of the guilty party for his disrespect of the court and its order; and, the *second*, to compel his performance of some act or duty required of him by the court which he refuses to perform," citing *Stimpson v. Putnam*, 41 Vt. 238, where a defendant was, at the same time, fined \$50 for the benefit of the state, and \$1,170 and interest and costs for that of the party injured by breach of an injunction. The chancellor in that case said: "This proceeding for contempt is instituted not only to punish the guilty party, but also, and perhaps chiefly, to cause restitution to the party injured." Such, we repeat, has been the practice in patent causes. It is used in other cases, as in the familiar one of a witness neglecting to answer a summons, who may be fined for his disobedience, and also be required to testify.

If the proceedings should be criminal in form it would make no difference. A criminal sentence, for the benefit of a private person, is to be treated as civil to all intents and purposes. It is beyond the king's pardon, and within the equitable jurisdiction of the court at all times. 4 Bl. Comm. 285. At this place the author, speaking of disobedience to any rule or order of court, of the sort we are considering, says:

"Indeed, the attachment for most part of this species of contempts, and especially for non-payment of costs and non-performance of awards, is to be looked upon rather as a civil execution for the benefit of the injured party, though carried on in the shape of a criminal process for a contempt of the authority of the court. And therefore it hath been held that such contempts, and the process thereon, being properly the civil remedy of an individual for a private injury, are not released or affected by the general act of pardon."

Where a defendant had been convicted of an offense against the laws prohibiting lotteries, and had been sentenced to a term of imprisonment, which had expired, and to pay costs for the use of the prosecutor, and had not paid them, he was discharged from custody under the lord's act, which was an early insolvent law, like our poor-debtor laws, so far as the discharge of the person is concerned. *Rex*

v. *Stokes*, Cowp. 136. ASTON, J., after saying that an attachment is an execution for a civil debt, and that the public offense had been purged by the imprisonment, added: "This stage of the cause, therefore, is merely of a civil nature, and a matter solely between party and party, unconnected with the offense itself;" that it comes within the insolvent debtor's act: "If not, the consequence must be imprisonment for life; for a general pardon would not extend to him;" that is, would not release him from costs due a private person, or from imprisonment on account of them, "as was agreed in *Rex v. Stokes*, 23 Geo. II." So, where a penalty was inflicted by a criminal proceeding, but for the benefit of a private person, and an attachment was issued for want of a sufficient distress, BULLER, J., said that the proceeding was like a civil action, and that *Ex parte Whitchurch*, 1 Atk. 54, where attachment for not performing an award was held to be criminal, was no longer law. It was held, therefore, that the defendant could not be attached on Sunday. *The King v. Myers*, 1 Term. R. 265. We do not mean to be understood that the court has a general discretion to annul orders passed for the benefit of a party to the suit; but that where inability is shown to comply with the order,—as, for instance, insanity, if the decree requires an act to be done, or poverty, if the decree is for the payment of money,—it is according to the course of the court, and of all courts, to discharge the imprisonment, of which the end is proved to be unattainable. See, besides the cases already cited, *Wall v. Court of Wardens*, 1 Bay, 434; *Re Sweatman*, 1 Cow. 144; *Kane v. Haywood*, 66 N. C. 1; *Galland v. Galland*, 44 Cal. 478; *Pinckard v. Pinckard*, 23 Ga. 286.

Where an attorney of any court fails to pay over money to his client, the court may, after due proceedings, commit him for a contempt. This was formerly considered to be criminal, and is fully explained in 2 Hawk. P. C. 218 *et seq.* But it has long since been settled that it is of a civil character. *Ex parte Culliford*, 8 Barn. & C. 220; *Rex v. Edwards*, 9 Barn. & C. 652. The lord chief justice in the latter case said that it had "always" been held that attachments for non-payment of money were in the nature of civil process.

In *Reg. v. Thornton*, 4 Exch. 820, and *The Queen v. Hills*, 2 El. & Bl. 175, costs in a criminal case were in question, and the defendant was discharged—in one, because the prosecutor had proved for the amount in bankruptcy, and thus waived the attachment, and in the other, because the defendant had been discharged as an insolvent. In the former of these cases, it was said by PASHLEY, *arguendo*, that the courts had exercised the power to discharge a defendant in such a case, on account of poverty, as early as 29 Edw. I.

It was admitted, in argument, in the case before us, that the court would not have been justified in imposing a pecuniary fine upon the defendant if he had proved his poverty before the order was made, but that afterwards it was too late. We are of opinion that no such

distinction can be maintained, but that the defendant should be released from imprisonment in such a case, though his evidence is produced while the order is in process of enforcement against him.

Petition denied.

See *In re Cary*, 10 FED. REP. 622, and note, 629.—[ED.]

SEARLS v. MERRIAM and another.

(Circuit Court, S. D. New York. January 30, 1882.)

PATENTS FOR INVENTIONS—PATENT NO. 221,482—INVENTION.

Patent No. 221,482, granted to Anson Searls, as assignee of John M. Underwood, the inventor, November 11, 1879, for an improvement in whip-sockets, is void for want of invention.

In Equity.

J. P. Fitch, for plaintiff.

N. Davenport, for defendants.

BLATCHFORD, J. This suit is brought on letters patent No. 221,482, granted to the plaintiff, as assignee of John M. Underwood, the inventor, November 11, 1879, for an "improvement in whip-sockets." The whip-socket is formed of a hollow cylinder, the upper open end of which is provided with a flexible elastic ring of India rubber or analogous material, for the purpose of holding the whip-stock upright by the pressure between it and the interior of the ring. The ring fits in a recess or annular groove in the upper open end of the socket, so as to be retained therein by its own elastic expansive force. The inner edge of the ring is corrugated, or provided with projections formed on and extending from the inner edge of the body of the ring, inwards towards its center. These projections are entirely separated from each other, with spaces between them, so that they will not be pressed into contact with one another, by the insertion of the butt of the whip-stock in the socket. The extreme inner faces of the projections form a circle and support the stock by pressing against it, while they yield to permit it to be pushed in or drawn out, and the ring, though disturbed in place by those movements, will readjust itself in the recess when the stock is removed, because it is held therein by its elastic force alone. The patent has two claims:

"(1) The combination with a whip-socket having an annular recess in it, of a flexible elastic ring, which may be held in such recess by its own elastic force, and which is provided on its inner edge with non-contiguous projections, separated so that they cannot be pressed into contact with one another by the insertion of the whip-stock into the ring. (2) The ring composed of a body with such projections."

The specification sets forth that "a simple rubber ring, without projections, had been used, held in an annular recess in the mouth of the socket, the interior of the ring being made small enough to grasp the whip-stock, and such a ring has been held in place in the recess in the socket by its own expansive force;" also, that radial slits have been cut in the inner edge of the ring without removing any of the rubber. The point of the new arrangement is stated to be, that "the separated projections, while they are rigid enough to hold the whip upright and prevent it from wobbling, will yet so easily give way to the pressure of the stock as to allow the stock to be readily inserted and removed."

It is obvious that a plain ring, or a ring with radial slits, has the same action in combination with an annular recess, in which it is held by its elastic force alone, so far as regards its readjustment in the recess when disturbed, that a ring with inward non-contiguous projections has. The co-action between the recess and the part of the ring in it, when the part of the ring out of it and next the stock is disturbed, is the same in all three cases. Therefore, if the ring with inward non-contiguous projections existed before, even though without the annular recess, there was no patentable invention in using such ring with the old annular recess with which the plain ring had been used.

The date of the Underwood invention was May, 1878. The rubber disk, defendants' Exhibit C, with non-contiguous projections, existed in 1873. The number of projections and the number and size of the openings between the projections depended then, and depends now, on the thickness of the rubber. That fact was then known. It was also then known that the capacity of the rubber to exert the expansive force necessary to maintain its place in the annular recess depended on its substance and thickness. In view of the use in an annular recess of a plain ring of sufficient substance and thickness to maintain its place in the annular recess, the fact that defendants' Exhibit C was not used in an annular recess, but was clamped between the end of the socket and a cap, is not sufficient to make it a patentable invention to use in an annular recess a rubber thicker than defendants' Exhibit C, with the same character of non-contiguous projections. The action of the inner part of the ring against the stock, so far as the non-contiguous projections are concerned, is the same whether the outer part of the ring is held in an annular recess, or is clamped between the end of the socket and a cap. It is quite apparent, as is stated by the expert for the plaintiff, that the number, or size, or shape of the openings between the projections does not constitute a substantial difference, so long as they are of sufficient size and of a proper shape to permit the stock to pass through the ring without forcing the edges of the projections in contact with each other, and the smaller portions of the projections are extended towards the center. These conditions are found in defendants' Exhibit C.

When the idea is once suggested, as in that exhibit, to have openings of that character, it is but ordinary knowledge to vary their number and size according to the thickness of the material.

Neither claim of the patent can be sustained, and the bill is dismissed, with costs.

PENTLARGE v. PENTLARGE.¹

(Circuit Court, E. D. New York. January 22, 1884.)

INTERFERING PATENTS—ACTION UNDER REV. ST. § 4918—PLEA IN BAR.

In an action under Rev. St. § 4918, where the plaintiff seeks to have the defendant's patent declared void on the ground that it is for the same invention, and subsequent to the plaintiff's patent, a plea in bar by the defendant, which admits the priority of the plaintiff's patent for the same invention, but sets out a fact which would render the plaintiff's patent void for want of novelty, must be overruled, because the fact is immaterial in this proceeding.

In Equity.

Preston Stevenson, for plaintiff.

Brodhead, King & Voorhees, for defendants.

BENEDICT, J. This case has, for the convenience of counsel, been presented in several aspects. To an amended bill the defendants have filed a demurrer. The questions raised by this demurrer are the same as those heretofore raised and determined upon a demurrer to the original bill in this cause. The action, so far as it rests upon facts supposed to make out a case of duress, is not strengthened by anything contained in the amended bill, nevertheless the amended bill can stand for the same reason that the original bill was allowed to stand. The demurrer to the amended bill is therefore overruled.

Next may be considered the question raised by a motion on the part of the plaintiff to strike from the files a plea interposed by the defendants; or, otherwise, that the plea stand as an answer. By this motion the question has been raised whether the fact stated in the plea must not be brought before the court by answer, and not plea. This action is a proceeding taken by virtue of Rev. St. § 4918, where provision is made for a suit in equity whenever there are interfering patents. The bill, after setting forth a certain patent issued to the plaintiff, as the first inventor of the invention therein described, charges that the defendants have a patent issued subsequent to the plaintiff's patent, and for same invention, which patent the plaintiff prays may be declared void, pursuant to the provisions of section 4918. To this bill the defendants have interposed a plea in bar of the action, in which plea they say that the invention described in the plaintiff's patent was described in an English patent issued in 1855

¹Reported by R. D. & Wyllys Benedict, of the New York bar.

to William Rowland Taylor, and printed and published, and filed in the United States patent-office prior to the time of the plaintiff's alleged invention, by reason whereof plaintiff's patent is void, and does not entitle him to maintain any action based thereon. And the question arises whether the subject-matter of this plea can be brought before the court by plea. If a decision of this question of practice were necessary on this occasion, it might be difficult to assign any substantial reason why, if the facts stated in the plea respecting the English patent be fatal to the plaintiff's right of action, such facts may not be presented by plea, provided the defendant elect, as this defendant has done, to present them in that way, and not by answer. But a decision of that question is not called for here, inasmuch as the argument of the plea, which was had without prejudice to the question raised by the motion, has satisfied me that the plea must be overruled upon the ground that the fact pleaded, if true, is immaterial in an action like the present.

The proceeding is statutory, instituted by virtue of section 4918. Such a proceeding, as I conceive, has for its sole object a determination of the question of interference and of priority of invention. It is, by the terms of the statute, limited to cases of interfering patents, and it is only in case interfering patents are found to have been issued that the court is empowered to "adjudge and declare either of the patents void." The implication is that when the patents are found to interfere, the result of the proceeding shall be a decree making void the patent issued to the later inventor. But if the defendant in such an action may attack the plaintiff's invention upon any ground which the statute permits to be set up by answer in an action for infringement, it would often result that the proceeding would fail to secure an adjudication of the question of interference, and so the proceeding be rendered futile for the purpose which the statute intended should be accomplished. Such would be the result in this case. By this plea the defendant admits the averment of the bill that the plaintiff's patent is for the same invention as that described in the defendant's patent, and also that the plaintiff was the first inventor. Upon these facts, according to the statute, the plaintiff should have a decree declaring the defendant's patent void, and yet if the plea be allowed the plaintiff will obtain no adjudication upon this question, while the defendant will obtain a decree declaring the plaintiff's patent void and leaving his own to stand; and this, too, when the fact stated in his plea, if true, taken in connection with the facts stated in the bill, which are admitted, show the defendant's patent to be also void. The defendant, then, by his plea and his admission, taken together, shows his own patent void, and, upon that showing, claims a decree declaring the plaintiff's patent void and leaving his own unaffected. Such a result cannot, as it seems to me, be permitted. According to my understanding of the statute, the proceeding permitted thereby is to be confined to a

determination of the questions of interference and priority, and, if I am right in this, the issue tendered by the plea is immaterial. This conclusion has not been reached without giving careful consideration to the opinion expressed by TREAT, J., in *Foster v. Lindsay*, 3 Dill. 126, where the opposite conclusion was arrived at. With all my respect for the opinion of that distinguished judge, I am unable to agree with him.

An order will accordingly be entered overruling the plea.

GLOBE NAIL CO. v. UNITED STATES HORSE NAIL CO. (Two Cases.)

(Circuit Court, D. Massachusetts. March 20, 1884.)

1. PATENT—HORSE-SHOE NAIL—INFRINGEMENT.

Patent No. 92,355 for a horse-shoe nail made by cold-rolling the shank of a headed blank cut from a hot-rolled ribbed bar, *held* to be infringed by the manufacture of a nail produced in the same manner, except that the head is cold-rolled, and a small portion of the shank next to the head not rolled at all.

2. SAME—METHOD NOT SHOWN IN PREVIOUS PATENT.

The nail secured by letters No. 92,355 differs in hardness in its different parts; and the validity of the patent is not affected by the description in a previous patent of a method of manufacturing nails of uniform hardness throughout.

3. SAME—REISSUED PATENT No. 5,207.

Reissued patent No. 5,207 *held* to be substantially identical with the original, No. 78,644, and therefore valid.

4. SAME—INFRINGEMENT—HORSE-SHOE NAILS.

The process described by reissue No. 5,207, of beveling the points of horse-shoe nails by spreading the metal laterally and then shaving off the superfluous projections, *held* to be infringed by a method purporting to force the metal upwards instead of sidewise.

In Equity.

Chauncey Smith and George L. Roberts, for complainant

Browne, Holmes & Browne, for defendant.

Before LOWELL and NELSON, JJ.

NELSON, J. The first of these suits is for the infringement of patent No. 92,355, granted to Arlon M. Polsey, July 6, 1869, for an improved manufacture of nails. According to the description given in the specification, the invention consists in a horse-shoe nail, the head of which is in that condition of softness which is produced by hot-rolling the metal, and the shank or body of which is hardened by rolling, when cold, with a constantly increasing pressure from head to point. A blank is first cut from a hot-rolled ribbed bar, the projection and form of the rib being that of the finished head of the nail. The blank, when cold, is submitted to a rolling process, which begins at or near the base of the head, and continues with a gradually increasing compression to the point. By this operation the rigidity of the body of the nail is left nearly uniform throughout its whole

length, since its cross-section diminishes in area from head to point in about the same ratio as the metal becomes harder under the increasing pressure. A nail is thus formed with the head sufficiently soft to yield under the hammer and imbed in the groove of the horse-shoe, with the shank near the head hard enough to keep from bending, but not so hard as to prevent it from conforming readily to the nail hole, and with the point end so rigid as to retain its form and direction in driving. The single claim of the patent is this:

"A nail made by punching or cutting from hot-rolled ribbed bars of metal a headed blank, substantially as described, and by elongating, hardening, and compressing the shanks of such blanks by cold-rolling from the head to the point, thereby giving to all parts of the nail so produced the peculiar qualities specified."

The nail manufactured by the defendant is made in the same manner, and is in all respects the same as the Polsey nail, except that in the case of the former the head is cold-rolled with diminishing hardness from the top to the base, and the cold-rolling of the body commences a short distance below the base of the head, thus leaving a small part of the shank next the head, described as about one-tenth of the length of the blank, unrolled. The position of the defendant is that these alterations in structure take its nail out of the claim of the patent. But we are unable to give to them this effect. The leaving unrolled a small portion of the shank next the head, where in the patent the metal is left comparatively soft, so as to easily conform to the irregularities of the nail-hole, is manifestly only a trivial and unsubstantial variation from the Polsey nail. The same may be said of the added hardening of the head. An attempt is made to show that by making the shank soft near the head the nail will drive and fit the nail-hole more readily, and that hardening the upper part of the head renders it better capable of resisting the wear of the pavement, and thus a more serviceable nail is produced. We think the evidence fails to prove this. But, if true, the new elements must be regarded as additions to the Polsey nail, and not as rendering the nail a substantially different article. A nail so constructed still possesses all the essential qualities of the Polsey nail. It is a nail made by cutting a headed blank from a hot-rolled ribbed bar, and then elongating, hardening, and compressing the shank by cold-rolling, substantially from head to point, which is the invention described in the specification and claim of the patent.

The defendant further insists that the Polsey method is shown in the Whipple patents, No. 41,881 and No. 41,955, both anterior to the Polsey patent. The former is for a blank for horse-shoe nails, with the head of the form of the frustra of two pyramids having a common base, and the shank tapering therefrom to the point, the blank to be afterwards drawn out and flattened into a nail by a suitable machine or by hand. The latter is for a machine to produce such blanks by swaging, and to flatten and finish them into nails by rolling. We

have examined these patents with care, but find nothing in them resembling the Polsey invention. Whether the operations described for forming the blanks and nails are performed when the metal is hot or cold is not stated. But in either case the nail is left with an equal hardness throughout the head and shank, and thus differs wholly from the Polsey invention.

In the second case the plaintiff sues for the infringement of reissue patent No. 5,207 dated December 31, 1872, and granted to the plaintiff, as assignee of S. E. Chase, for an improvement in finishing nails. The original of this patent was No. 78,644, dated June 6, 1868. The invention is described in substantially the same terms in the specifications of the original and the reissue. It relates to a method of finishing horse-shoe nails, and giving them the desirable curvature throughout the body and a beveled and pointed form at the end by means of mechanism. The method described consists of two successive operations. In the first the nail, when nearly finished, is submitted to the action of a die, which, by compression, gives to it the proper curvature flatwise and forms a bevel at the point, the superfluous metal being spread out by the pressure on each side and beyond the point end. In the second the nail is again subjected to the action of a die which forces it through an orifice in a bed, the die and orifice having corresponding outlines and the requisite dimensions and contour. The die and orifice together operate as shears to shear off and remove the superfluous metal spread out on the sides and point in the first operation, and to cut and trim the nail at its point to the exact form of the finished nail. In the first operation the nail receives its longitudinal curvature and its bevel at the point and is finished flatwise; and in the second the point is formed and the nail straightened and finished sidewise.

The original patent contained a single claim, as follows:

"I claim in finishing nails the process of curving their bodies and beveling their points, and afterwards forcing them through an open die to shear off superfluous metal, substantially as and for the purpose specified."

The reissue contains two claims, the second of which is thus stated:

"(2) The process of curving the bodies of nails and beveling their points by spreading the metal laterally, and afterwards forcing them through an open die to shear off superfluous metal, substantially as and for the purpose specified."

We are unable to perceive any essential difference between the two claims. It is true the second claim of the reissue contains the expression, "by spreading the metal laterally," which is not found in terms in the original claim. But the original claim, construed in the light of the description of the invention given in the specification, clearly implies that the lateral spreading of the metal in the die is the necessary result of the compression given in the first operation of the finishing. The two claims are therefore, in substance, the same, and the reissue is not invalid, at least in its second claim, as being a

departure from the original, within the rule established by the recent decisions of the supreme court.

The defendant does not claim that its manufacture differs from the Chase method, except in the following particulars: The beveling die and the groove in the roll are so constructed that the bevel is stamped or impressed in the metal; and the metal displaced by the operation, instead of being spread laterally, is forced partly upwards on each side and partly forward of the point. The superfluous metal is afterwards sheared off as in the Chase method. The nail is also formed without longitudinal curvature. We doubt if, in practice, the defendant has succeeded in effecting either of these variations. The samples of its finished nails in the case show a decided curvature lengthwise, and in many of the exhibits of its nails which have passed through the beveling operation only, inspection plainly indicates a lateral spreading of the metal about the point. It is also obvious that it is mechanically impossible to impress the nail with the beveling die without at the same time spreading the metal under and on each side of it, to a greater or less extent, laterally. It is likewise true that the beveling, no less than the curving, operation of the Chase method is included in and secured by the patent. We are of opinion that the defendant's method of beveling the point is a substantial equivalent of the same operation in the Chase method. Exactly the same result is produced in both cases. The defendant's nail, when finished, cannot be distinguished in any of its features from the Chase nail. The slight difference in the process is immaterial. The two are in substance identical.

Other defenses are that the Chase invention was anticipated in the Gooding patent, No. 5,489, dated March 28, 1848, and in the Polsey patent, No. 62,682, dated March 5, 1867. These inventions were among the first rude attempts in the art of producing horse-shoe nails by machinery. The evidence shows that they were never of any real utility, and were never put to any practical use in making nails. In the specifications of the Chase patent the inventor refers to the Polsey patent, No. 62,682, and carefully distinguishes his invention from its scope. It is sufficient to remark that we find nothing in either of these patents which describes the simple and effective processes of the Chase invention.

The entry in each case will be decree for the complainant.

DAVIS v. SMITH.

(Circuit Court, D. Massachusetts. March 18, 1884.)

PATENTS FOR INVENTIONS—EXPIRATION OF PATENT—DEMURRER.

Demurrer to bill for profits and damages, filed against an infringer one day before the patent expired, sustained, and bill dismissed, with costs; following *Root v. Ry. Co.* 105 U. S. 189, and *Burdell v. Comstock*, 15 FED. REP. 395.

Demurrer to Bill.

Coburn & Thacher, for complainant.

Geo. L. Roberts & Bros., for defendant.

LOWELL, J. This bill, for profits and damages against an infringer of the plaintiff's patent, was filed one day before the patent expired. The defendant demurs for want of equity; and his demurrer must be sustained. No equitable discovery or relief is sought by the bill beyond or different from that which is usual in ordinary patent causes. The plaintiff could not expect the court to grant a restraining order, which must expire before it could, by reasonable diligence, be served, nor was one prayed for. An injunction was impossible for want of time to notify the defendant. The case, therefore, comes within *Root v. Ry. Co.* 105 U. S. 189; *Burdell v. Comstock*, 15 FED. REP. 395; *Betts v. Gallais*, L. R. 10 Eq. 392.

Demurrer sustained. Bill dismissed, with costs.

MATTHEWS v. SPANGENBERG and another.

(Circuit Court, S. D. New York. April 25, 1882.)

1. PATENTS FOR INVENTIONS—EVIDENCE—MOTION TO SUPPRESS.

Where evidence has been taken and filed out of time, but no motion to suppress has been filed, it may be considered.

2. SAME—REISSUE No. 9,028—CLAIMS 5 AND 7 VOID.

Claims 5 and 7 of reissued letters patent No. 9,028, granted January 6, 1880, to John Matthews, for soda-water apparatus, are anticipated by letters patent No. 44,645, granted to A. J. Morse, October 11, 1864, for a syrup fountain.

3. SAME—CLAIMS 4, 6, 8, AND 9 VALID—INFRINGEMENT—DISCLAIMER.

As the parts of the thing patented in the fourth, sixth, eighth, and ninth claims, which have been infringed, are definitely distinguishable from the parts claimed in the fifth and seventh claims, and the latter claims were made by mistake, without any willful default, or intent to defraud or mislead the public, and complainant has not been unreasonably negligent in not entering a disclaimer as to such parts, he may, on entering a disclaimer, maintain a suit for infringement, but without costs.

In Equity.

Arthur v. Briesen, for plaintiff.

Philip Hathaway, for defendants.

WHEELER, J. This suit is brought upon reissued letters patent No. 9,028, dated January 6, 1880, granted to the orator upon the surrender of original letters patent No. 50,255, dated October 3, 1865, for soda-water apparatus. The defense relied upon is that the defendants purchased the apparatus used by them of William Gee, who afterwards settled with the orator; that the patent is void for want of novelty; and that they do not infringe. The original patent is not in evidence.

Some of the defendants' evidence was taken and filed out of time. No motion to suppress it has been filed. The orator objects to its consideration; and the defendants ask that it be considered, or the time extended to cover its taking. As no motion to suppress has been filed, it is allowed to stand and is considered. *Wooster v. Clark*, 9 FED. REP. 854, is relied upon by the orator on this point, but in that case there was a motion to suppress.

The case does not show that the defendants purchased their apparatus of Gee before he settled with the orator, and therefore entirely fails to show that he settled with the orator for the sales to the defendants. They stand by themselves, independently of Gee. *Steam Stone-cutter Co. v. Windsor Manuf'g Co.* 17 Blatchf. C. C. 24. That defense fails for want of proof.

The patent has nine claims. The second and third are not in controversy. Upon all the evidence, it is found that the first claim is not infringed; that the fifth and seventh are anticipated by letters patent No. 44,645, dated October 11, 1864, granted to A. J. Morse, for a syrup fountain; and that the fourth, sixth, eighth, and ninth are not anticipated and have been infringed by the defendants.

The parts of the thing patented in the fourth, sixth, eighth, and ninth claims are definitely distinguishable from the parts claimed in the fifth and seventh claims; and the orator appears to have made the latter claims by mistake, supposing himself to be the original and first inventor of the parts claimed in them, without any willful default, or intent to defraud or mislead the public, and not to have unreasonably neglected to enter a disclaimer of those parts, thus far. Therefore he is entitled to maintain this suit, but without costs, on entering the proper disclaimer. Rev. St. § 4922; *Burdett v. Estey*, 15 Blatchf. C. C. 349.

On filing a certified copy from the patent-office of the record of a disclaimer by the orator of what is claimed in the fifth and seventh claims, let a decree be entered that the fourth, sixth, eighth, and ninth claims of the patent are valid, that the defendants have infringed, and for an injunction and an account, without costs.

SMITH v. STANDARD LAUNDRY MACHINERY Co. and others.

(Circuit Court, S. D. New York. February 22, 1882.)

PATENT—INFRINGEMENT—BREACH OF CONTRACT OF LICENSE—JURISDICTION OF CIRCUIT COURT.

Where the owner of a patent grants an exclusive license to a corporation to make and sell the article patented during the term of the patent, requiring sales to be returned monthly and license fees to be paid monthly, and retains the right to terminate by written notice the license, on failure to make returns and payments for three consecutive months, after due service of notice of the termination of the license for failure to make returns, an action for infringement, in which the corporation sets up in its answer that the license was not lawfully terminated, and that it had not sold any of the patented articles, and was not making and selling them, involves a question of infringement, and is cognizable in a federal court, although the parties are citizens of the same state. *Wilson v. Sanford*, 10 How. 99, and *Hartell v. Tilghman*, 99 U. S. 547, distinguished.

In Equity.

H. G. Atwater, for plaintiff.

J. Palmer, for defendants.

WHEELER, J. There are two of these cases, brought upon numerous patents described in the respective bills of complaint, and they have been heard together upon the bills, answers, replications, and plaintiff's proofs. The plaintiff, by written agreement, dated July 1, 1874, granted an exclusive license to the Standard Laundry Machinery Company, alone and singly, to manufacture and sell laundry machinery embodying the improvements patented, to the end of the terms of the patents, the company to make return to the plaintiff of all sales made during each month, on the first of the following month, and to pay, as a license fee, on or before the tenth of the following month, a sum equal to 8 per cent. of the gross sales of power machinery, and 4 per cent. of the gross sales of hand machinery, so sold. There was a clause in the agreement providing that the plaintiff might terminate the license by serving a written notice upon the company, on failure to make the returns and payments for three consecutive months. May 13, 1879, the plaintiff served notice of termination of the license. The defendants continued to use the patented inventions, and the plaintiff brought these suits for infringements after the notice. The parties are citizens of the same state, so that this court has no jurisdiction except under the patent laws. The defendants insist that those laws give no jurisdiction to decide upon the construction or continuance of the agreement for a license, and that the question of infringement depends wholly upon the agreement, and rest the case here wholly upon this question of jurisdiction. The contract of license itself provides a mode for its own termination; and the plaintiff's case shows that it was terminated in that mode. The defendants do not rest their cases upon the question whether the contract was terminated or not, but, while they insist

that it was not lawfully terminated, answer "that they have not sold any machines embodying the invention for which the complainant has obtained letters patent, as alleged in the complaint, and that defendants are not now manufacturing and selling the said machines." This raises a question of infringement, arising solely under the patent laws of the United States, of which the United States courts alone have jurisdiction, without reference to citizenship. The decision of the question of the termination of the license might obviate this question of infringement, and it might not; or, rather, it might furnish a mode of determining whether there was any infringement, and it might leave that question to be determined otherwise. If the license was not ended, the acts charged, if done, would not constitute an infringement; if ended, the question would remain whether the acts were done. The question of infringement would always be in the case until decision. This is different from *Wilson v. Sandford*, 10 How. 99, and *Hartell v. Tilghman*, 99 U. S. 547, relied upon by defendants. In each of those cases, as treated by the court, there was but one question made between the parties to be decided at all, and that was a question of contract. Neither of those cases seems to control this, and this does seem to involve a controversy of which this court has jurisdiction.

Let there be a decree for an injunction and an account, according to the prayer of the bill, with costs.

SMITH v. STANDARD LAUNDRY MACHINERY Co.

(Circuit Court, S. D. New York. January 1, 1883.)

PATENTS FOR INVENTIONS—INFRINGEMENT BY CORPORATION—PERSONAL LIABILITY OF PRESIDENT WHO SWEARS TO ANSWER—WANT OF SERVICE.

Where, in an action against a corporation for the infringement of a patent, the president, who is named as one of the defendants, but not personally served, owns all the stock, and swears to and signs the answer, a general appearance being entered in the suit for the defendants without naming them, he is personally liable.

On Exceptions to the Master's Report. The facts appear in the opinion.

H. G. Atwater, for complainant.

Justus Palmer, for defendant.

WHEELER, J. This cause has now been heard upon the exceptions to the master's report. These exceptions relate principally to the liability of the defendant Lewis at all personally. The grounds of the exception to his liability at all are that he was not so made a party individually that any decree for relief could be made against him, and that the allegations of the bill were not sufficient to be the found-

dation for charging him personally. The bill was brought upon several patents. In the statements of parties the defendants are described as the "Standard Laundry Machinery Company," a corporation; William G. Lewis, president of said company; and Channing W. Littlefield, secretary of said company. A subpoena was prayed, directed to the Standard Laundry Machinery Company, William G. Lewis, and Channing W. Littlefield, defendants. A subpoena was so issued, but was not served upon Lewis. A solicitor of the court appeared for the defendants without naming them. An answer was filed, stated to be the answer of the defendants, without naming them, and was signed by the solicitor as solicitor and counsel for the defendants, without naming them. The answer was sworn to by Lewis as one of the defendants, the affidavit at the foot stated that he was one of the defendants, and he signed it by his individual name.

The appearance of the solicitor for the defendants would of itself alone be an appearance only for defendants who had in some manner been served with process. They only were at the time, in fact, defendants. On that appearance the bill could not have been taken *pro confesso* as against Lewis. The subpoena, if it had been served, however, would only have required him to appear and answer the bill. An answer to a bill is made in person. When Lewis answered this bill he became personally, by his own act, a party to the cause made by the bill. He then became a defendant in court. The appearance for the defendants stood as an appearance for him as one of them, and he was before the court as a party. The bill, after stating the patents, and the exclusive rights of the oratrix to the inventions therein described, alleged that the defendant the Standard Laundry Machinery Company had and the defendants William G. Lewis and Channing W. Littlefield, as the agents and officers of said company, had, with full knowledge of the rights of the oratrix, made and vended machines embodying the invention.

One interrogatory, which Lewis, by note at the foot of the bill, was required to answer, asked how many machines embodying the invention had been sold by the defendants or any of them, and the prayer was that the defendants might answer the premises and be decreed to account for and pay over all profits, and damages in addition. That Lewis was an officer or agent of a corporation would give him no right to infringe the oratrix's patents, or to withhold the fruits of infringement from her, and the statement of that relation in connection with the charge of infringement would not, in legal effect, qualify the charge. Under that allegation, and an interrogatory pointing to him as a defendant charged by it, and required to answer in respect to the charge, and a prayer for relief on account of it, he was not only bound to answer as a party, but as a party from whom relief was sought by decree against him personally. His own testimony before the master shows that he owned the whole capital stock of the defendant corporation; and the report of the master shows

that he has used the corporation solely for himself, for the purpose of appearing to be an officer of it, and that its property has been, in fact, his.

The correctness of this finding has been questioned; but as there was testimony tending to establish it, and as it was involved with the question of the liability of the respective defendants in the accounting sent to the master, and he does not appear to have acted in any manner improperly or unfairly, his finding cannot, with propriety, be disturbed here. *Bridges v. Sheldon*, 18 Blatchf. C. C. 295, 507; S. C. 7 FED. REP. 34. On this finding, Lewis, if an officer or agent, was such for himself, and all he received in such pretended capacity he received for himself. An infringer is liable to account for the profits of the infringement to the owner of the patent, because they are the avails of the property of the owner in the hands of the infringer, which he has no right to detain from the owner. Lewis, and he alone, has these profits, which are avails of the property of the oratrix in his hands, and which he has no right to detain from her. The pretext of doing business in the name of the corporation is too flimsy to shield him from accounting for them. During a part of the time for which the account has been taken he did this business in the name of an individual, for the reason that the corporation had been enjoined. This was equally unavailing to protect him from liability.

Exceptions overruled.

COLGATE v. WESTERN UNION TEL. CO.

(Circuit Court, S. D. New York. April 4, 1884.)

APPLICATION FOR A REHEARING—LACHES OF APPLICANT.

An application for a rehearing, based on alleged newly-discovered evidence, must be denied when it appears that the existence of such evidence was known to the applicant or his counsel at the time of the former trial, and that the evidence was not then produced.

Motion for Rehearing.

Betts, Atterbury & Betts, for complainant; *Wm. D. Shipman and Frederick H. Betts*, of counsel.

Porter, Lourey, Soren & Stone, for defendant; *Geo. Gifford and Wm. C. Witter*, of counsel.

WALLACE, J. This is an application by the defendant for a rehearing in a cause heard in November, 1878, and in which an interlocutory decree was entered in December, 1878, adjudging the validity of the complainant's letters patent, and the infringement thereof by the defendant, and that complainant recover the profits of the defendant derived by such infringement. In January, 1879, the complain-

ant applied for a final injunction against the defendant to enjoin the infringement, which was granted as to any further use of the invention, but as to certain uses to which it had already been applied the question of issuing a perpetual injunction was postponed, to await an accounting and application for a final decree. Thereafter the parties entered into negotiations which resulted in defendant's taking a license of complainant and paying \$100,000 for a release. The application is made on the ground of newly-discovered evidence, which shows the withdrawal of an application for a patent. At the hearing of the cause the defense of abandonment of the invention was relied on by the defendant, and was considered in the opinion delivered by the court, and overruled in part upon the view that the application for a patent had never been withdrawn by the inventor.

Upon the hearing it was stated by counsel for the complainant that a letter had shortly before been found by him, in looking over the files of the patent-office, written by the inventor, formally withdrawing the application, and this fact was fully brought to the attention of the defendant's counsel. Whether it was assumed by defendant's counsel that the fact was not of sufficient importance to be incorporated into the proofs, or whether they supposed it would be treated by the court as a conceded fact, is not material, in view of the decision and opinion of the court rendered within a few days after the hearing, by which it was plainly indicated that the fact was a material one, and was not in the proofs. If under these circumstances an application had been promptly made for leave to reopen the proofs, and for a rehearing, it would have been incumbent upon the defendant to satisfy the court that the evidence could not have been obtained by the exercise of reasonable diligence, and introduced before the hearing. *Baker v. Whiting*, 1 Story, 218; *Jenkins v. Eldridge*, 3 Story, 299. It is not necessary to search for authorities outside the decisions of this court maintaining the rule that a rehearing will be denied if the non-production of the evidence is attributable to the laches of the party or his counsel. *Ruggles v. Eddy*, 11 Blatchf. 524, 529; *India-rubber Co. v. Phelps*, 8 Blatchf. 85; *Hitchcock v. Tremaine*, 9 Blatchf. 550; *Page v. Holmes Burglar Alarm Co.* 18 Blatchf. 118; S. C. 2 Fed. Rep. 330. But, after the expiration of over three years since the discovery of the evidence, whatever might have been the result of an application if it had then been made, it would have appealed much more forcibly to the judicial discretion than can be expected now, after more than three years have elapsed, after a further hearing has been had, and a perpetual injunction ordered against the defendant, and after the defendant has recognized the complainant's rights by compromising for past use, and taking a license for the future use of the invention, and for a considerable period has been enjoying the use of the invention under the license.

The law of laches, as applied to motions for new trials or rehearings, is founded on a salutary policy. It is for the interest of the

public, as well as of litigants, that there should be an end of litigation, and that efforts to reopen controversies by unsuccessful parties, after they have had a full opportunity to be heard, and a careful hearing and consideration, should be discouraged.

A rehearing is denied.

WESTCOTT and others v. RUDE and others.

(Circuit Court, D. Indiana. April 1, 1884.)

1. PATENTS FOR INVENTIONS—ACCOUNTING BEFORE MASTER—EVIDENCE.

In an account before a master, evidence of payments for past infringement, for the purpose of ascertaining the amount which should be paid by the defendant, is incompetent. To admit it is contrary to the maxim, *Inter alios acta*, etc.

2. SAME—SALE OF LICENSES—MEASURE OF DAMAGES.

When the sale of licenses by the patentee has been sufficient to establish a price for such licenses, that price should be the measure of his damages against an infringer; but a royalty or license fee, to be binding on a stranger to the licenses which established it, must be uniform.

3. SAME—SINGLE LICENSE—MARKET PRICE.

Proof of a single license is not sufficient to establish a market price.

4. SAME—SEVERAL CLAIMS—ROYALTY.

In respect to two or more claims in a patent, each of value and distinct from the other, one cannot equal both or all in value, any more than; in mathematics, a part can equal the whole. A licensee may, if he choose, bind himself to pay the same price, whether he use the entire invention or a part only; but at the same time he acquires the right to use all, and so his agreement may not be unreasonable; but if, as against an infringer, such a license can have any force, reasonably, it must be in the way only of establishing a royalty for the entire invention.

Exceptions to Master's Report.

H. C. Fox and Wood & Boyd, for complainants.

Stem & Peck, for defendants.

WOODS, J. The exceptions filed are numerous, but, passing by others, the court will consider only those which bring into question the measure of the damages assessed. Upon this point the master says: "Plaintiffs waive all claims for profits, and rely upon the proofs produced as establishing a fixed license or royalty as the measure of damages;" and, after giving an abstract of the testimony of the four witnesses who were examined on the subject, the report proceeds to say:

"It is very difficult to determine from this evidence whether it makes proof of such an established royalty or license fee as furnishes a criterion upon which to estimate complainant's damages. The owner of a patent is granted a monopoly. He may choose to reserve the right to use his invention exclusively to himself, and to make and sell machines, keeping all other manufacturers out of competition. He may enjoin infringers. He has the right to fix a reasonable license fee or royalty to be paid by manufacturers who use his invention in making machines. And if fixed and reasonable, and paid

by those who use the invention, such fee or royalty is a criterion upon which a computation or assessment of damages may be based. It is proved that the Wayne Agricultural Company paid the royalty of \$1 for one-horse machines, and \$2 for two-horse machines, for four years; a sum which, in the absence of evidence to the contrary, may be regarded as reasonable. Mast & Co. paid between \$2,000 and \$3,000 in cash, and conceded privileges, which Westcott estimates to have been worth as much more, for infringement. It is true, Westcott threatened suit, and, when money is paid under threat of suit merely as the price of peace, it furnishes no evidence of the amount or value of the real claim in dispute, but the settlement made shows that Westcott was paid something substantial for the infringement, and that the fear of litigation was a small element of the settlement itself. Westcott says that he arrived at the amount by his estimate of the number of the machines made by Mast & Co., and other considerations, which are explained in Mast's deposition. Mast says no estimate was made of the number of machines. Westcott says he gave licenses, like the one attached to his deposition, to Mast & Co. and to English & Over. Mast was examined, but not interrogated on that point. Mr. English, the active man in the firm of English & Over, says he does not recollect whether they took a license or not.

"It is with considerable reluctance that I have come to the conclusion that the evidence furnishes proof of a license fee, which may be taken as a basis for damages. The defendants have undoubtedly infringed complainants' invention; and the machines made by them, which are mentioned in the evidence, were all made after this suit was brought. As to the point made, that the evidence does not show how many of the machines made by defendants infringed one and how many infringed both claims of plaintiff, the master is of the opinion that the terms of the license were the same in either case, and the same fee was charged whether one or more claims were infringed. I therefore report and find that the defendants have made and sold 800 infringing one-horse machines, and that plaintiff's damages on that account are \$800, and that defendants have made and sold 800 infringing two-horse machines, and that plaintiff's damages on that account are \$1,600, making \$2,400, his damages in full."

The clause in the license referred to by the master is of the following tenor:

"*Third.* The party of the second part agrees to pay two dollars as a license fee upon every two-horse drill or seeder, and the sum of one dollar on every one-horse drill or seeder, manufactured by said party of the second part, containing any of the patented improvements; provided, that if the said fee be paid upon the days provided herein for semi-annual returns, or within ten days thereafter, a discount of fifty per cent. shall be made from said fee for prompt payment."

There is probably no reason to question the general principles enunciated by the master in respect to the rights of patentees in their inventions; but the court does not concur, in all respects, with the master's application of them in this case, nor with the conclusion reached. Some of the facts found are not, in the judgment of the court, supported by the evidence. Some items of evidence were considered by the master, which, in the opinion of the court, were not admissible, and which, therefore, should have been allowed no weight whatever.

In respect to the royalty paid by the Wayne Agricultural Company, Westcott, the only witness to the point, testified this:

"The licensees to whom these licenses were given paid the fees as stipulated. The Wayne Agricultural Company paid for four years, since which time they have paid nothing, their excuse being that they claimed to have bought an interest in the patent. We sued them in this court, and the court decided that they had no title to the patent, and then they agreed to arbitrate with us and the suit was dismissed."

This evidence does not show the payment of fees as stated by the master. It is left uncertain whether or not the fees paid "for four years" were at the rate of one and two dollars for a machine, or 50 per cent. of those sums. The fair inference, perhaps, is that the Wayne Agricultural Company did for four years manufacture drills under the license, though it is not entirely clear that the license was not issued after or near the close of that period, so as to make the transaction in reality a settlement for infringements. This is certainly so in respect to the other parties named, who, if they received licenses at all, which is doubtful, received them as evidence of settlements, and these settlements, it is shown, were made either under express threats, or the fear, of suits for infringement. If for a time the Wayne Agricultural Company made the drills under a license, the manufacture was afterwards continued under a different claim of right, and when that claim had been overruled by the court, instead of settling for the infringement on the terms of the license, the company obtained an arbitration, the result of which has not been shown.

The first inquiry is, whether or not the proof in respect to payments for infringements was admissible, and ought to have been considered by the master at all. I know of no case in which it has been decided that such evidence is competent, and, upon principle, am not able to see how it can be; on the contrary, it seems to me clear that it ought not to be received. Proof of license fees, charged and paid before use for the right to use an invention, is admissible upon the same theory that proof of sales in open market of any marketable commodity is competent; because it shows, or tends to show, a market price. But settlements for past use of an invention cannot be brought within the rule, because inconsistent with the principle on which the rule rests. The infringer, or one who is accused of infringement, is, from the necessity of the situation, under compulsion to make compensation as demanded, or to take the risk of a suit; and how much his action, in a particular case of settlement, may have been influenced by this or other special considerations, it is impossible for the master or the court to determine, and therefore the inquiry should not be entered upon. The only way to escape the inquiry is to exclude the evidence. To admit it is contrary to the maxim, *Inter alios acta*, etc. It involves an attempt to resolve one doubt or difficulty by another. *Litem lite solvit*. There are doubtless reported cases in which it appears that such evidence was received and considered, but generally this has been done without objection, and uniformly (so far as I know) without a judicial declaration

or decision that it was proper. In the opinion of the supreme court in *Packet Co v. Sickles*, 19 Wall. 611, the rule is reaffirmed as laid down in *Seymour v McCormick*, 16 How. 480, "that in suits at law for infringement of patents, when the sale of licenses by the patentee had been sufficient to establish a price for such licenses, that price should be taken as the measure of his damages against the infringer." "The rule thus declared," it is added, "has remained the established criterion of damages in cases to which it was applicable ever since;" and further on in the opinion it is said, and it affords a clear interpretation of the rule in respect to the point now mooted: "In such a case nothing is more reasonable than that the price fixed by the patentee for the use of his invention, in his dealings with others, and submitted to by them before using it, should govern." This, it is true, is the rule at law, but the complainants, waiving their right in equity to claim an account of profits, have invoked the same rule here, and must abide by it as it is. See, also, *Black v. Munson*, 14 Blatchf. 268; *Greenleaf v. Yale Lock Manufg Co.* 17 Blatchf. 253; 3 Suth. Dam. 601-607; 1 Greenl. Ev. § 174; Whart. Ev. 1199; Abb. Tr. Ev. 188, 189; *Mattheus v. Spangenberg*, 14 FED. REP. 350. It follows that the proof of damages made in this case, excepting that in reference to the license granted to the Wayne Agricultural Company, must be rejected, and should have been disregarded by the master; and, this being done, does there remain evidence sufficient to support the master's conclusion? It seems probable that the master himself would have thought not; since, as it was, he came to that conclusion "with considerable reluctance."

The rule, as already stated, requires "a sale of licenses" "sufficient to establish a price for such licenses." "A royalty, in order to be binding on a stranger to the licenses which established it, must be a uniform royalty." Walk. Pat. 390. These and the like expressions and definitions found in the cases and text-books, imply that proof of a single license is not sufficient; and if under some circumstances such proof might be deemed adequate, that in this instance is not of such clear and unequivocal character as to give it such weight. *Proctor v. Brill*, 4 FED. REP. 415; *Judson v. Bradford*, 3 Ban. & A. 539; *Black v. Munson*, 2 Ban. & A. 623. It is true, in a sense, doubtless, that the owner of an invention has a right to fix his price upon it; but to constitute evidence against an infringer he must have done it "in his dealings with others," and not merely in a form of license which he was willing to grant. It is, as it appears to me, entirely inadmissible, at law or in equity, that a patentee may, by inserting in his licenses a stipulation for a certain royalty, with a proviso that half that sum shall be received in full, in case of prompt payment, acquire a right to demand the entire sum of an infringer. If he can arbitrarily make such a discrimination, he may as well make the ratio three to one, or in any other proportion. The question is, what is a reasonable royalty? The laws of the land fix the rates of interest for

v.19,no.11—53

the forbearance of money, and if it be possible to make a discrimination against infringers of patents over prompt-paying licensees greater than lawful interest, (except as may be done by the courts under the statutory provision for treble damages,) it must be done, as it seems to me, upon some competent evidence, other than an arbitrary clause in a license or licenses, however many of them may have been issued.

The same may be said in reference to the clause in the license which requires that the specified royalty shall be paid for every drill "containing any of the patented improvements." This, as it seems to me, affords no proof, certainly not conclusive proof, against an infringer that he should pay the entire royalty named in the license for infringing only one of two or more claims of a patent, unless the one infringed be shown to be the only claim which has or had any value, or unless the different claims be substantially the same.

In respect to two or more claims in a patent, each of value and distinct from the other, one cannot equal both or all in value any more than in mathematics a part can equal the whole. The licensee may, if he choose, bind himself to pay the same price, whether he use the entire invention or a part only; but at the same time he acquires the right to use all, and so his agreement may not be unreasonable; but if, as against an infringer, such a license can have any force, reasonably, it must be in the way only of establishing a royalty for the entire invention. This view is in accordance with authority.

In *Birdsall v. Coolidge*, 93 U. S. 64, it appears that the alleged infringement was of one only of three claims in the letters patent, and the court says: "Still it is obvious that there cannot be any one rule of damages prescribed which will apply in all cases, even when it is conceded that the finding must be limited to actual damages. * * * Where the patented improvement has been used only to a limited extent and for a short time, * * * the jury should find less than the amount of the license fee." See, also, *Proctor v. Brill*, *supra*; *Wooster v. Simonson*, 16 FED. REP. 680; *Ruggles v. Eddy*, 2 Ban. & A. 627.

Without further evidence, the plaintiff is entitled to nominal damages only; but, that there may not be a failure of justice, the case is remanded to the master, with direction to admit further evidence by each party, if offered, and to report the same and his conclusions.

FIELD v. IRELAND and others.

(Circuit Court, N. D. New York. April 5, 1884.)

PATENT—INFRINGEMENT—GLOVE-FASTENERS.

The case of *Field v. Comeau*, 17 O. G. 568, followed; holding that the complainant's patent for a glove-fastener, consisting of an automatic wire spring, is not infringed by a device consisting of stiff arms pivoted at one end.

In Equity.

Eugene N. Elliot, for complainant.

James M. Dudley, for defendants.

COXE, J. The complainant has a patent for an improvement in glove-fastenings. The claim is in the following words: "The combination, substantially as described, of a spring, A, with the split portion, B, of a glove, for the purpose specified." In *Field v. Comeau*, 17 O. G. 568, Judge WHEELER restricted this claim to the particular style of spring described in the specification and drawings. That decision is controlling. No broader construction can now be given to the patent. The question of infringement, therefore, alone remains to be considered.

The complainant's spring is made of a single piece of wire and is automatic and continuous in its operation. When the spring is in repose the arms are together and overlap. When drawn apart they will immediately fly back if released. The defendants' device, on the contrary, is composed of two stiff arms pivoted at one end. A spring is riveted to one arm which connects, at its free end, with a link fastened to the end of the other. When the arms are open, and by pressure upon them the link is brought above the pivot, the spring acts, and the arms come together. At right angles the arms remain open and the spring does not begin to operate in closing them until they have been brought to an angle of about 45 degrees. The points of difference between the two devices are many and radical. But the reasoning of the *Comeau Case* seems conclusive upon this question also. The spring which was there held not to infringe is almost the exact counterpart of the defendants' spring. They differ only in minute and unimportant particulars. The one operates on a cam, the other on a link; with this exception they are alike. In speaking of the defendants' spring in that case the learned judge uses language which would be equally applicable here. He says:

"The form of the defendants' spring is different from the orator's, its mode of operation is different, and the result of its operation is somewhat different. It cannot be said to be the same as the orator's, or to be substantially like the orator's. Each got the idea of closing the wrists of gloves by means of springs from others. The orator carries out the idea in his mode, and the defendants in theirs, and, as neither has control of anything but the particular mode, neither can justly say that the other uses his mode."

The two cases cannot be successfully distinguished.

There should be a decree for the defendants, with costs.

THE WORTHINGTON AND DAVIS.

(District Court, E. D. Michigan. April 30, 1883.)

1. COLLISION—RUNNING INTO VESSEL AT ANCHOR—PRESUMPTION OF FAULT.

The presumption of fault arising from running into a vessel at anchor may be rebutted by showing that the moving vessel exercised all reasonable care upon her part, and that the collision was an inevitable accident; or by showing that the fault is with the anchored vessel in failing to use proper precautions.

2. SAME—ANCHORAGE IN ST. CLAIR RIVER—DUTY OF VESSEL.

Anchorage in St. Clair river is not necessarily improper because the channel is comparatively narrow, and vessels are frequently passing and repassing, if room be left for vessels and tows to pass in safety. A vessel so anchored, however, is bound to keep a watch, and not to allow her sails to obstruct or obscure the view of her anchor light.

3. SAME—INSCRUTABLE FAULT—LIBEL DISMISSED.

In cases of inscrutable fault the libel should be dismissed.

In Admiralty.

This was a libel for a collision between the schooner Gladstone and the schooner Davis, in tow of the propeller Worthington, which occurred on the night of July 26, 1881, on the St. Clair river, near Herson's island. The Gladstone was bound on a voyage from Detroit to the port of Golden Valley, Ontario. She left Detroit in the afternoon, under sail, reached the St. Clair river, and sailed up to a point a little above the place of collision. The wind, which had been light from the west or north-west during the afternoon and evening, about 9 o'clock failed altogether. The schooner, being unable to proceed further, came to anchor in the channel of the St. Clair river, somewhat upon the Canadian side. After coming to anchor, her riding lights were taken in, and a bright anchor light placed in her port fore-rigging, about 20 feet from the deck. For all that appears, this light was burning brightly up to the time of the collision. A lookout was also stationed upon the deck to watch approaching vessels. The night was clear, and lights could easily be seen at the usual distance. Some time after 10 o'clock the schooner Davis, which was the last of three vessels in tow of the propeller Worthington, bound down the river, came into collision with the Gladstone, breaking her jib-boom, bowsprit, and cat-head, and damaging her port bow.

Moore & Canfield, for libelant.

H. D. Goulder, for claimant.

Brown, J. It is charged in the libel that the propeller was in fault in running too close to the Gladstone, and that the schooner Davis was in fault in not keeping a sharp lookout, and in not porting her wheel sufficiently to keep in the wake of the propeller, and thus avoid coming in contact with the Gladstone. Separate answers were filed on the part of the propeller and the Davis, the same counsel representing both vessels. Upon the hearing, however, there was no evidence showing the Davis to be in fault, as she appeared to have done the best she could in following the Worthington. The case against

her was practically abandoned. The answer on the part of the propeller avers that the wind was blowing a stiff breeze from the westward; that the Gladstone had her foresail and mainsail set, and was lying athwart the channel; denies that the schooner had a proper anchor watch; and avers that if she had any light it was so placed as to be obscured by the sails from the view of the vessels coming down the river. It was claimed, furthermore, that before discovering the Gladstone another propeller, the Oneida, had just passed the Worthington, and was ahead upon the same course and in the channel; and that the officers in charge of the Worthington, before discovering any light upon the Gladstone, saw the Oneida suddenly sheer to the westward, whereupon the Worthington put her wheel hard a-port, and changed her course as much to starboard as it safely could be; and that it was only when they had approached within about 200 or 300 feet that her officers and crew for the first time saw the light of the Gladstone. It was also averred that when the Worthington ported she gave the proper signal to the tow, and that the first vessel passed clear, the second within a few feet of the Gladstone's jib-boom, and the third vessel, the Davis, struck and did some injury to the Gladstone.

There can be no doubt of the proposition that, as the collision occurred with an anchored vessel, the burden of proof is upon the Worthington to show herself guiltless of fault. She may do this by showing that she exercised all reasonable care upon her part, and that the collision was the result of an inevitable accident, or, as is done in this case, by showing that the fault is with the schooner in herself failing to observe the proper precautions. The first fault charged against the Gladstone is that she was lying in an improper, unusual, and unsafe place. In this connection I can do little more than repeat what was said by Judge LONGYEAR in the case of *The Masters and Raynor*, 1 Brown, Adm. 342, that anchorage in the St. Clair river is not necessarily improper because the channel is comparatively narrow, and vessels are frequently passing and repassing, if room be left for vessels and tows to pass in safety. It always has been the custom for sailing vessels, navigating the Detroit and St. Clair rivers, to come to anchor in the channel, and I am not disposed to say such custom is unreasonable, though collisions are not infrequently occasioned thereby; and in the increasing magnitude of commerce we may be ultimately compelled to adopt a different rule; but I think it much more prudent for vessels to anchor as near the shore as the water will permit. Sometimes, however,—and that is claimed in this case,—the wind falls so suddenly that the vessel has no option but to drop her anchor where the wind leaves her. It would seem, however, that even in such a case something might be done, with the aid of the current and her rudders, to get the vessel closer into shore; but as there was undoubtedly sufficient room left for tows to pass the Gladstone upon the American side, I am not disposed to criticise her anchorage at this spot.

But, whether anchoring there from necessity or choice, I have no doubt that she is bound to exercise a greater degree of care and diligence in respect to her light and her anchor watch than would be requisite in case she were anchored out of the usual path of vessels. I am not disposed to say that she was in fault for having her sails up, if she had otherwise complied with the statute in having a light which could be readily seen by vessels coming up and down the river. The labor of getting a vessel under way would undoubtedly be much lessened by having her sails already hoisted, in case a favorable wind should spring up, and if the light be properly displayed I do not see that the liability to collision would be thereby enhanced. This was the opinion of Judge WILKINS in the case of *The Planet*, 1 Brown, Adm. 124. In this case I cannot see that the furling of the sails would have assisted the schooner any in enabling her to give way to the descending tow.

The difficulty in the case turns upon the question whether the Gladstone displayed a proper anchor light to approaching vessels. There seems to be no question that she did display a bright light about 20 feet from her deck, and it appears to have been set in her port fore-rigging, but it certainly did not comply with rule 10, Rev. St. § 4233, which requires that all vessels, when at anchor in roadsteads or fair-ways, shall exhibit, where it can best be seen, a white light, so constructed as to show a clear, uniform, and unbroken light, visible all around the horizon. Now, this light, while complying with the law in other respects, clearly was not visible to a person approaching from the starboard side of the vessel back of the foremast, and in that respect there can be no question that the schooner was in fault, and the only remaining inquiry is whether such fault contributed to this collision. Upon the part of the schooner it is averred that the wind was north-west, and that she was heading a little toward the Canada shore, and hence that her light could be clearly visible to all vessels coming down the stream. Upon the other hand there is a large amount of testimony tending to show that there was a brisk wind from the south-west, and that the vessel was lying with her head canting towards the American shore, in a position which *might* at least have obscured her light to a propeller coming down the stream. This testimony is corroborated by that of the witness Kirby, who swears that the injury was done by the wrenching of her jib-boom and her bowsprit from starboard to port. If her hull was struck at all it would appear to have been a mere glancing blow, and that the principal injury was done by the jib-boom catching the mast of the *Davis* and breaking it off. This, with the wrenching of the bowsprit, inflicted the only serious damage to the schooner. It seems, too, that the *Oneida*, which preceded the *Worthington* down the river a very short distance, did not observe her light until she was very near to her, and that her attention was first called to her, not by seeing the light directly, but by seeing the loom of the light upon her sails. The men upon the *Worthington* also swore that they did not see her light, and ported only be-

cause the Oneida ported, and that the light was first revealed when they had approached very near to the schooner. Had the Worthington seen this light at a greater distance, it would undoubtedly have been her duty to port sooner; but if we are to believe the testimony of her officers and crew, and those of her tow, the Gladstone's light must have been concealed either by the Oneida (in which case the accident as to the propeller would have been inevitable) or by the sails of the Gladstone. In my opinion the propeller has rebutted the presumption of fault which attached to her colliding with a vessel at anchor, and put it upon the Gladstone, although the case is an exceedingly close one.

If the case be not one of fault on the part of the Gladstone, it is, to my mind at least, a case of inscrutable fault, and the question remains to be considered what is the measure of liability in respect to collisions of this character. Cases of inscrutable fault are those wherein the court can see that a fault has been committed, but is unable, from the conflict of testimony, or otherwise, to locate it. Since the introduction of colored lights and fog signals these cases are of rare occurrence, and the measure of liability is still an unsettled question. At common law the plaintiff is bound to make out his case by a preponderance of testimony, and if the question of fault is left in doubt the defendant is entitled to a verdict, and the loss rests where it falls. This is also the rule in the English admiralty and vice-admiralty courts. *The Catherine of Dover*, 2 Hagg. 154; *The Maid of Auckland*, 6 Notes Cas. 240; *The Rockaway*, 2 Stew. Vice Adm. 129; *The City of London*, Swab. 800, 302. The laws of Oleron, of Wisbuy, and the Marine Ordinance of Louis XVI., made no distinction between cases of mutual fault, inscrutable fault, and inevitable accident, but divided the damages in every case where the collision was not the fault of one party only. This rule was probably adopted on account of the difficulty of determining to which vessel the fault was imputable. It has received the sanction of Emerigon, Valin, Pothier, Grotius, and most, if not all, of the continental authors upon the subject. It has been incorporated into the French Commercial Code, but in the German Code no allusion whatever is made to this class of cases. The question has never been definitely settled by the supreme court of the United States, although in the opinion of Mr. Justice SWAYNE, in the case of *The Grace Girdler*, 7 Wall. 196, there is a dictum to the effect that "where there is a reasonable doubt as to which party is to blame, the loss must be sustained by the party on whom it has fallen;" citing *The Catherine of Dover*, 2 Hagg. 154. The point does not seem to have been argued by counsel, and the case was disposed of as one of inevitable accident. The district courts are about equally divided in opinion. *The Scioto*, Davies, 359; *The John Henry*, 3 Ware, 264; *The David Dows*, 16 FED. REP. 154. *Contra*, *The Kallisto*, 2 Hughes, 128; *The Breeze*, 6 Ben. 14; *The Summit*, 2 Curt. 150; *The Cherokee*, 15 FED. REP.

119; *The Amanda Powell*, 14 FED. REP. 486. Although I know of one reported case in which the rule was actually applied, (*Lucas v. The Thomas Swan*, Newb. 158,) it has apparently met with the approval of Mr. Justice STORY in his work upon Bailments, (sections 608, 609,) Chancellor KENT, (3 Kent, Comm. 231,) Judge CONKLING, (1 Conk. Adm. 378,) and most of the American elementary writers, though none of them pronounce a decided opinion of their own. Fland. Mar. Law. §§ 357, 358; Bouv. Law Dict. tit. "Collision." The question received, however, its most elaborate discussion by Judge HALL, of the Northern district of New York, in the case of *The Comet*, 9 Blatchf. 323 and the continental rule was adopted without hesitation.

These authorities are undoubtedly entitled to great respect, but it will be observed that in most of them there is no discussion of the question as an original proposition, and the rule is apparently adopted in deference to the continental doctrine. Conceding that the maritime law of continental Europe favors a division of damages, does it necessarily follow that the law as administered in this country should be the same? I think not. While the maritime Codes of the different countries have undoubtedly many features in common, there are probably no two exactly alike. A reference to the provisions upon the subject of collision will show that the German law differs in many particulars, notably in regard to the division of damages, from the French, and that again from the Dutch and Russian. Indeed, the ancient Codes and writers, cited by the learned judge in the case of *The Comet*, declared that in cases of inevitable accident the damages shall be divided; yet nothing is better settled in the maritime law of England and America, than that in such case the loss shall rest where it falls. Uniformity, at least, does not require us to adopt the rule of division in cases of inscrutable fault. In short, the maritime law is not international, except in a limited sense. It inevitably takes on a local coloring conformable to the habits and traditions of the different countries in which it is administered.

There are certain fundamental principles of justice adopted by the English and American courts which have become maxims of jurisprudence, and are equally binding in cases of common law, equity, and admiralty jurisdiction. Among these is that which prohibits a person being deprived of his liberty or property without being proved guilty of some fault or dereliction. Under the terms "due process of law" or "law of the land" provisions of similar import are inserted in all our constitutions. "By the law of the land," said Mr. Webster, in the *Dartmouth College Case*, 4 Wheat. 518, "is most clearly intended the general law which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property, and immunities under the protection of general rules which govern society." Every person is presumed innocent, even of fault, and is entitled to rest

upon that presumption until shown to be guilty; and the whole object of our judicial machinery is to determine by competent proofs who has committed a crime, perpetrated a wrong, or broken a contract. If charged with a crime, the accused must be proven guilty beyond a reasonable doubt. If damages are sought, the plaintiff, the *actor*, must always make out his case by at least a preponderance of evidence. If the evidence is clearly balanced, it is the duty of the court to dismiss the proceedings. I know of no reason why this same rule should not obtain in collision cases. The difficulty of proof is usually not greater; the injustice of a false step is no less. Indeed, they are peculiarly cases wherein fault should be established and located, since the loss, in a large majority of cases, falls upon persons guiltless of all personal blame. So strongly has this consideration appealed to the good sense of the mercantile world, that, by the laws of most civilized countries, the liability of an innocent owner is limited to the value of his interest in the offending ship and her freight. The doctrine of division in cases of mutual fault, though an infringement upon the common law, is not an exception, and hardly a qualification, of the rule requiring the libellant to establish his case. It is only a simplification of the doctrine of contributory negligence,—a measure of damages rather than a method of proof, and the only practicable mode of doing justice in cases of mutual fault. For these reasons my own opinion is decidedly in favor of the English rule adopted by Mr. Justice SWAYNE in *The Grace Girdler*.

The libel will be dismissed, but, as the case is one of very grave doubt, no costs will be awarded to either party.

THE SOUTHFIELD.¹

(*District Court, E. D. New York. January 29, 1884.*)

DAMAGE TO CANAL-BOAT BY SUCTION AND SURGE CAUSED BY PASSING FERRY-BOAT—EVIDENCE.

In an action against the ferry-boat S., to recover damages for injuries caused by the suction and surge produced by the passing ferry-boat to a canal-boat moored in a proper place at a bulk-head at Staten island, *held*, that, upon the evidence, the injuries were caused by the ferry-boat's passing at an unnecessary rate of speed, and that the ferry-boat was liable for the damage sustained.

In Admiralty.

E. G. Davis, for libellant.

Macfarland, Reynolds & Lowrey, for claimants.

BENEDICT, J. This action is brought by the owners of the canal-boat Annie C. Haeger, to recover for injuries caused to that boat by

¹Reported by R. D. & Wyllys Benedict, of the New York bar.

the suction and surge made by the ferry-boat Southfield, in passing the canal-boat on the morning of the eighth of May, 1882. The canal-boat was moored at the bulk-head, between Stapleton and the Wrecker's pier, on Staten island, and was there discharging a cargo of malt. She lay with her bow to the northward, with her stern some 25 feet from the line of the north side of the Wrecker's pier, and was made fast to the bulk-head by a four-inch bow-line, a four-inch stern-line, and a three-inch breast-line, all sound and strong. The Southfield was engaged in making regular trips upon the Staten island ferry, and on the trip in question went, according to the answer, from New York direct to Clifton, but according to her proof, from New York to Tompkinsville and then to Clifton, without stopping at Stapleton. As she passed the place where the libellant's boat was moored she created a suction and surge of the water which broke the stern-line and the breast-line of the canal-boat, carried the boat herself out some 25 feet from the bulk-head, and then cast her back with such violence as to throw down persons upon her deck, and do considerable injury to the boat. The place where the canal-boat was moored is a place in common use for discharging of boats, where boats like the libellant's can lie without injury, provided the ferry-boats use moderate speed when passing at low tide. Upon the evidence it is impossible to attribute the injury of the canal-boat to any neglect on her part, either in selecting an improper place to discharge or in omitting reasonable caution in respect to her mooring. It is also beyond dispute that the immediate cause of the injury was the suction and surge created by the Southfield as she passed down to Clifton on the 6 o'clock morning trip from New York, the tide being then low. The inquiry, therefore, is whether this suction and surge is attributable to any neglect of duty on the part of the Southfield. The law applicable in cases of this description is not in doubt. It is thus stated in the case of *The Morrisania*, 13 Blatchf. 512:

"The undoubted right of the steam-boat to the navigation of the river is subject to the restriction that it must be exercised in a reasonable and careful manner, and do no injury to others that care and prudence may avoid."

By the law, it was the duty of the Southfield, in passing the libellant's boat, to avoid endangering that boat by her suction, provided that could be done by the exercise of reasonable care in respect to speed. The ferry-boat had the right to pass from Tompkinsville to Clifton at low as well as at high water, and she had the right to select such a course, and to move with such speed, between these points, as would enable her to make the landing at Clifton in safety. But in view of the situation of the canal-boat, she owed a duty to the libellant to pass the canal-boat at as low a rate of speed as was consistent with her safe navigation to the Clifton landing. This obligation is acknowledged in the answer, when it is averred that the ferry-boat passed without causing or creating any unnecessary or unusual disturbance in, or suction of, the water about the said bulk-head, and

employing only such speed as was actually necessary to enable her to make her said docks in safety. The answer also indicates, with sufficient accuracy, what speed was actually necessary to the safe navigation of the ferry-boat at this time and place, for it avers that the engine of the ferry-boat was slowed abreast of the Stapleton pier, and with the aid of wind and tide the ferry-boat floated past under moderate steerage way and careful handling.

The decision of the case turns, then, upon a question of fact, namely, whether the ferry-boat passed the libellant's boat as described in the answer, or at unnecessary speed, as charged in the libel. Upon this question the weight of the evidence is with the libellant. The libellant, who was on the deck of his boat, and watching the ferry-boat, testifies that the ferry-boat did not check her speed until after she passed the Wrecker's pier. He also testifies that his attention was called to the ferry-boat by his deck-hand. That he said to the deck-hand, "Is she going to check down?" and the deck-hand replied, "I guess not, by the looks." This conversation had at the time, with the ferry-boat in view and under attention, strongly confirms the master's statement that the ferry-boat did not check her speed until after she had passed his boat.

In opposition to this statement of the libellant, the claimants produce the testimony of the pilot and wheelsman of the ferry-boat. The testimony of the pilot, which, it will be observed, is not strictly in accordance with the statement of the answer, is this: "When we left Quarantine dock we hooked the boat up, and when I got within 200 feet of the Club House dock, I shut her off with one bell, and from there to Clifton I ran shut off." Elsewhere he says that he rang the one bell because he could not manage the boat at full speed. But he makes no claim to have navigated the ferry-boat with any reference to the effect of her navigation upon the boats lying at the bulkhead, nor did he know of the damage done until his return from New York on the next trip, and his testimony, taken together, is calculated to raise a doubt as to his having any distinct recollection of the place where he slowed his boat on this particular trip. Certainly, it is not sufficient to outweigh the testimony of the libellant, whose attention was called to the speed of the ferry-boat by the danger of his boat, and whose statement is confirmed by the conversation had at the time. No support to the pilot's testimony is derived from the testimony of the wheelsman, who manifestly has little, if any, recollection respecting this particular trip. Moreover, the libellant's testimony in regard to the speed of the ferry-boat is in harmony with the result, while that of the ferry-boat pilot is not. That the passing of the ferry-boat was followed by an unusual suction is proved, and not denied. It is also shown by the movements of the canal-boat. This unusual suction is accounted for by unnecessary speed on the part of the ferry-boat, and the evidence discloses nothing else to which it can be attributed. Probability seems, also, on the side of the libellant's state-

ment that the ferry-boat passed him without checking. The ferry-boat omitted the Stapleton landing, and this indicates that the boat was short of time, as, according to the superintendent, she some times was on the morning trip from New York. Being short of time, it is by no means improbable that she ran longer than usual before checking her speed. My conclusion, therefore, is that the damage sued for was caused by a neglect of duty on the part of the ferry-boat in this, that she passed the libelant's boat at an unnecessary rate of speed.

A decree must be entered in favor of the libelant, with an order of reference to ascertain the amount.

THE CHAS. E. SOPER.¹

THE OSSEO.¹

(District Court, F. D. New York. November 16, 1883.)

1. COLLISION—STEAM-BOAT AND TUG—CROSSING COURSES—FAULT IN NOT HOLDING COURSE—FAULTY LOOKOUT.

A collision occurred between the tug S. and the steam-boat O., in the East river, in the day-time, in clear weather, under the following circumstances: The tide was flood. The O. had left Fulton market pier, where she had lain head down the river, and rounded out, bound up the river. The S. was coming down near midstream. Abreast, or nearly so, and between the S. and the New York shore, was a tug towing a schooner on a hawser down stream. Ahead of the S., coming up, was a tug with two barges along-side, and between this tow and the New York shore was another tug and schooner. The S. could not pass to port of the barges, owing to the closing up of the other vessels, and starboarded, and had just cleared the barges when she struck the O. on the port side. *Held*, that the S. was not in fault for sheering across the bows of the barges, nor for not stopping and backing when she found she could not pass the barges to port; nor was the collision caused by the S. being within 20 yards of the vessels going down, in violation of a state statute; that the omission of the S. to answer the O.'s whistle caused no change in the movements of either, and in no way conduced to the collision; that after the S. starboarded to pass the barges, the S. and the O. were on courses crossing, and the O. was in fault for straightening up the river and not holding her course, and for not seeing the S. as soon as she might have done; that the S. was also in fault for not keeping a good lookout, and seeing the O. before the S. sheered, it being highly probable that if the O. had been then seen the S. would have sheered more sharply, and removed from the O. the temptation to cross the S.'s bows. Both vessels being responsible for the collision, the damages must be apportioned.

2. SAME—CLAIM FOR SALVAGE BY VESSEL IN FAULT.

A claim for salvage, made by the S. for towing the O. to a place of safety, after she was disabled by the collision, was rejected because the collision that made the service necessary was in part caused by the fault of the S. herself.

In Admiralty.

Scudder & Carter, for the Osseo.

Edwin G. Davis, for the Soper.

¹Reported by R. D. & Wyllys Benedict, of the New York bar.

BENEDICT, J. These are cross actions arising out of a collision between the tug Charles E. Soper and the steam-boat Osseo, that occurred nearly under the Brooklyn bridge, in the East river, on the twenty-ninth day of May, 1882. The tide was flood. The Osseo had left her berth at the Fulton market pier, where she had lain head down the river, and was bound on her regular trip up the river. It was day-time, and the weather was clear. As the Osseo rounded out from her berth, the tug Soper was coming down the river, near the middle of the stream. Abreast, or nearly abreast, of the Soper, and between her and the New York shore, was a tug towing a three-masted schooner on a hawser, and also bound down the river. Ahead of the Soper, and coming up the river, was a tug with two lumber-barges along-side, and between this tug and the New York shore was another tug with a schooner in tow. As the Soper approached the lumber-barges, her intention was to pass to port of that tow, but this was rendered impossible by the closing up of the other vessels, whereupon she hove her wheel a-starboard and passed outside of the lumber-barges. When she had just cleared them she came in collision with the Osseo, striking her heavily in the port paddle-box. At the time of the blow the Soper was backing her engine and the Osseo was moving rapidly ahead. The libel of the Osseo charges that the collision was occasioned by the fault of the Soper, in that she did not keep out of the way of the Osseo, and in that she had no lookout, and did not see the Osseo in time to avoid her, and did not answer her whistle. The theory of the Osseo, put forth in her libel, is that she was about abreast of the lumber-barges and going in the same direction as they were, but faster, when the Soper changed her course to cross the bows of the lumber-barges, and, although the Osseo blew one whistle and ported, the Soper, without answering the whistle, kept on and ran into the Osseo. The answer of the Soper states that, as the Soper crossed the bows of the lumber-boats, the Osseo swung round the stern of the schooner that was towing up the river, and, when pointed to the starboard quarter of the starboard lumber-boat, attempted to cross the bows of the Soper on that course by putting on full speed, although she had half the river clear upon the Brooklyn side, and there was nothing to prevent her avoiding the Soper by stopping, or by going further towards the Brooklyn shore, instead of attempting to pass close to the lumber-boats, as she did.

Upon the argument it was earnestly contended in behalf of the Osseo that the Soper was in fault for sheering across the bows of the lumber-boats when she did. No such fault is charged in her libel, nor was the sheer a fault. That course was forced upon the Soper by the other vessels close to her, and was a proper course to pursue under the circumstances. It was also contended that the Soper was in fault for not stopping and backing when she found that she could not pass the lumber-boats to port. This fault is not charged in the libel, nor proved by the evidence. It was also contended that the

Soper was running in violation of the state law, because she was less than 20 yards from the tug and three-masted schooner towing down. The libel charges no such fault; nor was the collision caused by the Soper being within 20 yards of the vessels going in the same direction.

In regard to the faults that are charged in the libel it is my opinion that the omission of the Soper to answer the whistle of the Osseo caused no change in the movements of either boat, and in no way conduced to the collision. It is also my opinion that the Soper cannot be held in fault for not avoiding the Osseo. There was no danger of collision between the Soper and Osseo before the Soper sheered to cross the bows of the lumber-boats. The clear weight of evidence contradicts the statement of the Osseo's libel, that, when the Soper sheered, the Osseo was heading up the river abreast of the lumber barges, and shows that at that time the Osseo was astern of the lumber boats, heading towards Brooklyn. After the Soper altered her course, the Osseo straightened up in the river, and attempted to cross ahead of the Soper. If it be true that when the Soper altered her course she assumed the obligation to avoid the Osseo, because the vessels were then on courses crossing, and she had the Osseo on her starboard hand, by the same rule the Osseo became charged with the obligation to hold her course. This she did not do. On the contrary, she straightened up the river, and, as the libel admits, came parallel with the lumber barges. This fault of the Osseo plainly conduced to the collision, and is sufficient to render her responsible for the accident that ensued.

But the Soper is also in fault for not keeping a good lookout, as charged in the libel. The testimony shows that the Osseo was not seen by the Soper until after the Soper sheered and her bows had crossed the bows of the lumber-boats. There was nothing to prevent the Soper from seeing the Osseo; and before making the change of course that she did, it was her duty to observe the position of all vessels near her. And it is highly probable that if the Osseo had been seen by the Soper when the necessity for the sheer arose, the Soper would have been sheered more sharply than she was, and thereby all temptation to attempt to cross her bows removed from the Osseo. For this fault the Soper must be held to be also responsible for the accident that ensued. A similar fault is proved against the Osseo, for she did not see the Soper as soon as she might have done. Had the position of the Soper, when she altered her course, been observed by the Osseo, it is probable that the navigation of the Osseo would have been different from what it was. My conclusion, therefore, is that both vessels are responsible for the collision in question, and that the damages resulting must be apportioned between them.

In addition to the claim of damages made by the Soper, her cross-libel contains a claim for salvage services in towing the the Osseo to a place of safety after she was disabled by the collision in question,

and also a claim for compensation for towing the Osseo for several days after the collision, under a contract made in respect thereto. No objection is made to the joinder of these demands in an action like this, and they will therefore be disposed of on their merits. The claim for salvage must be rejected because the collision that made the service necessary was in part caused by the fault of the Soper herself.

*As to the demand for towage services subsequently performed under a contract there is really no dispute between the parties. This demand is therefore allowed. If there be any controversy as to its amount, a reference may be had.

THE E. LUCKENBACK.*

District Court, E. D. New York. January 19, 1884.)

STENOGRAPHER'S FEES ON TRIAL—WHEN TAXED.

A direction made in open court that the testimony given in court be taken down by a stenographer is sufficient to entitle the stenographer's fees to be taxed by the successful party.

Appeal from Taxation of Costs.

Goodrich, Deady & Platt, for the motion.

Butler, Stillman & Hubbard, opposed.

BENEDICT, J. The judge's notes of the trial of this cause contain the memorandum, "stenographer takes notes." This memorandum indicates a direction given at the time that the testimony given in court be taken down by a stenographer. A direction to that effect made in open court is sufficient. It was unnecessary to enter a formal order. The sum paid stenographer was therefore for services rendered in pursuance of a direction of the court, and, like the expenses of printing, (*Dennis v. Eddy*, 12 Blatchf. 195,) is taxable by the successful party.

*Reported by R. D. & Wyllys Benedict, of the New York bar.

WHITE v. TWO HUNDRED AND NINETY-TWO THOUSAND THREE HUNDRED DOLLARS, Proceeds of the Steam-Boats Americus, etc.¹

(District Court, E. D. New York. December 28, 1883.)

1. SHIP'S HUSBAND—LIEN—PROCEEDS OF SALE OF VESSEL.

There is no lien on moneys, the proceeds of the sale of steam-boats, in favor of one who acted in the capacity of ship's husband, for sums paid by him in satisfaction of demands claimed to be at the time subsisting maritime liens on the vessels, such proceeds not being in his hands.

2. SAME—EXCEPTION TO LIBEL.

Exception to a libel claiming such a lien on proceeds of certain vessels was sustained and the libel dismissed.

In Admiralty.

D. & T. McMahon, for libelant.

Blair, Snow & Rūdd, (*R. D. Benedict*, of counsel,) for respondent.

BENEDICT, J. This case comes before the court upon exception to the libel, upon the ground, among others, that the libel fails to state facts, showing the libelant, *R. Cornell White*, to have a lien upon the moneys proceeded against. These moneys, as the libel shows, are the proceeds of certain steam-boats, of which vessels the libelant was ship's husband. The claim sought to be enforced against these moneys consists of various sums paid from time to time by the libelant, while acting in the capacity of ship's husband, in satisfaction of certain demands, which were at the time, as the libelant claims, subsisting maritime liens upon the respective vessels. Upon this statement the libelant had no lien upon the vessels, and has none upon the proceeds, not being in his hands. The authorities are clear to the effect that a ship's husband has no lien upon the ship for sums paid by him in satisfaction of the ship's bills. *The Larch*, 2 Curt. C. C. 427; *The Sarah J. Weed*, 2 Low. 556; *The J. C. Williams*, 15 FED. REP. 558. These cases are decisive of the present case. If authority were wanting, my opinion would still be adverse to the libelant. The libelant cannot maintain this action if he could not maintain an action against the vessels themselves, and there are, in my opinion, strong considerations which should forbid a ship's husband to acquire, as against his principals, a lien upon their vessel for payments which he is employed to make for them, and which he makes for a compensation paid him.

This exception to the libel is therefore well taken, and the libel must be dismissed, with costs.

¹ Reported by *R. D. & Wylls Benedict*, of the New York bar.

MOSHER v. St. Louis, I. M. & S. Ry. Co.¹*(Circuit Court, E. D. Missouri. March 24, 1884.)***REMOVAL OF CASES FROM STATE COURTS TO THE CIRCUIT COURT OF THE UNITED STATES.**

Either party may remove into a circuit court of the United States any case where the controversy is between citizens of different states.

Motion to remand a case removed to this court from the circuit court of Jefferson county, Missouri, at the instance of the defendant who is a resident of Missouri.

William M. Eccles and E. P. Johnson, for plaintiff.

Bennett Pike, for defendant.

TREAT, J. The court is referred to sections of the Revised Statutes which embraced all statutes prior to December 1, 1873. Since then the act of March 3, 1875, has enlarged the jurisdiction of the federal courts, whereby either party may remove into a circuit court of the United States any case where the controversy is between citizens of different states.

The motion to remand is overruled.

ALBRIGHT and others v. OYSTER and others.¹*(Circuit Court, E. D. Missouri. January 21, 1884.)***EQUITY—RESULTING TRUSTS—PARTIES.**

A., B., C., and D. had an interest in certain lands. D. died, and E. qualified as his executrix, and in that capacity agreed with A., B., and C. that the land should be divided, and C.'s share conveyed to X. in trust for C.'s children. The division was made, and C.'s share was conveyed to X. under an oral agreement that he would hold it in trust for said children; but the deed was absolute on its face, and recited a consideration, though none was paid by X. X. afterwards, without consideration, made an absolute conveyance of said property to A. A. then brought suit in ejectment against C., who held possession of said property for his children, and recovered judgment. In a suit brought by C. and several of his children, in equity, to have said judgment at law restrained, and for other relief, *held*:

- (1) That said conveyance to X., under said oral agreement, had caused a resulting trust to arise in favor of C.'s children, and that X. held subject thereto.
- (2) That A. received the legal title to said property from X., subject to said trust.
- (3) That E., as executrix of D., and B. were both proper parties.

In Equity. Demurrers and plea to the bill, and exceptions to answer.

¹ Reported by Benj. F. Rex, Esq., of the St. Louis bar.

The facts stated in the bill are, in substance, as follows:

Abraham Oyster died in 1882, testate and seized of certain lands situated in Missouri. He left four children, Margaret, George, David K., and Simon Oyster. Simon died, however, before his father's property was distributed. He left a will, of which he appointed his wife, Margaretta, executrix. After his death his wife, as his executrix, agreed with the three surviving children of Abraham Oyster to make a different division of Abraham Oyster's lands from the one provided for in his will. It was agreed between them that said lands should be sold by D. K. Oyster, who was his father's administrator, at public sale, and that certain specified tracts, and such other tracts as it seemed advisable to keep, should be bid in by the parties to the agreement, and that the lands so bid in should be appraised and divided between them without any payment of the amounts bid. The plan was carried out, and the lands in controversy fell to D. K. Oyster, but, pursuant to said agreement, were conveyed by him, as his father's administrator, to Simon K. Oyster, by a deed, absolute on its face, and which recited a consideration. No consideration was paid by said Simon K., however, and the conveyance was made under an oral agreement on his part to hold the property in trust for D. K. Oyster's children. Simon K. subsequently became very sick, and, while he was expecting to die, George Oyster persuaded him that it might create trouble if he died with said trust estate in his possession, and that he had better deed the land to him. And Simon K. accordingly executed a deed, reciting a consideration, and absolute on its face, conveying said lands to George Oyster. No consideration was in fact paid. Ever since the property in question was bought in and conveyed to Simon K. Oyster in the manner described, David K. has held possession of it for his children, who are minors. After getting the legal title into his hands, George Oyster brought suit in ejectment against David K. to get possession of said property, with intent to defraud said children out of it, and asked, also, for rents and profits. David K., having no legal defense, entered into a stipulation with George to let judgment go in consideration of an agreement on George's part that no execution should issue until May, 1884, in order that complainants might have time to file their bill here, and judgment went accordingly.

The prayer is that George Oyster be restrained from issuing an execution on the judgment in the ejectment suit, and from commencing or prosecuting any other proceeding at law against the complainants for recovering possession of said lands; for a decree to convey to Mollie N. Albright, William E. Oyster, and Iola E. Oyster, (children of David K. Oyster,) all the right, title, and interest in said lands which said George Oyster acquired from Simon K. Oyster, and for a discovery.

Margaretta Oyster, executrix of Simon, and Margaret Oyster, who are joined as parties defendant, demurred to the bill on the ground that it does not show that they have any interest, or claim any interest, in the lands mentioned in the bill, or have ever denied complainants' right to the relief demanded, and also because the bill does not state any case entitling complainants to any discovery or relief against her.

Simon K. Oyster filed a plea raising the question of whether or not the Missouri statute of frauds should be held to operate to prevent the granting of the relief asked in the bill. The section relied on is that "all declarations or creations of trust or confidence, of any lands,

tenements, or hereditaments, shall be manifested and proved by some writing signed by the party who is or shall be by law enabled to declare such trusts, or by his last will in writing, or else they shall be void." That section is followed by another, however, (section 2512, Rev. St.,) providing that "resulting trusts shall be of like force as the same would have been if the act had not been made."

George Oyster filed an answer in which he set up the statute of frauds, and alleged, among other things, that David K. Oyster, as administrator of his father, was indebted, upon the basis of the contract upon which the division of Abraham's real estate was made, in the sum of \$4,975 to him, and in the sum of \$5,230 to Margaretta Oyster, at the time he made the deed to Simon K. Oyster, and still remains indebted to them for said sums, with interest, although payment had been frequently requested; and that the sureties on the bond given by David K., as administrator, as well as David K. himself, are insolvent, so that the only resource left his said creditors to get payment of what remains unpaid of the legacies is the lands in dispute, or the lien thereon for the unpaid purchase money.

The complainants excepted both to that part of the answer setting up the statute of frauds and the parts setting up the indebtedness of David K., as administrator, and his insolvency and the insolvency of his sureties.

George H. Shields and James Carr, for complainants.

Dryden & Dryden, for defendants.

TREAT, J. The demurrers to the bill are overruled. The demurrants are *proper*, and in certain aspects of the case may be *necessary* parties. Under the theory of the bill there was ample consideration for the conveyance to Simon K. Oyster, in trust, moving from David for his children. The averments are to the effect that the consideration named in the deed to Simon K. was merely for the purpose of equalizing the distribution of the estate, as had been agreed upon. If those averments are true, then Simon K. took the title clothed with the trust for David's children. It is admitted that George occupies no better position than Simon K., his grantor. Therefore the exceptions to the plea are sustained; also, for the same reasons, the first exception to the answer, to-wit, so much as sets up the statute of frauds. The other exception to the answer is overruled, for, if defendant's theory be correct, the matters involved in the second exception may become material.

CONTROL OF COURTS OF EQUITY OVER JUDGMENTS AT LAW—GENERAL PRINCIPLES. The leading American case on this subject is *Marine Ins. Co. of Alexandria v. Hodgson*,¹ in which the opinion of the court was delivered by Chief Justice MARSHALL. The statement made by him in that case, of the rules governing the action of courts of equity where relief is asked against judgments at law, is as follows: "Without attempting to draw any precise

¹ 7 Cranch, 382.

line to which courts of equity will advance, and which they cannot pass, in restraining parties from availing themselves of judgments obtained at law, it may safely be said that any fact which clearly proves it to be against conscience to execute a judgment, and of which the injured party could not have availed himself in a court of law, or of which he might have availed himself at law but was prevented by fraud or accident, unmixed with any fault or negligence in himself or his agents, will justify an application to a court of chancery. On the other hand, it may, with equal safety, be laid down as a general rule that a defense cannot be set up in equity which has been fully and fairly tried at law, although it may be the opinion of that court that the defense ought to have been sustained at law."

In addition to the grounds for relief referred to by Chief Justice MARSHALL mistake and surprise may be mentioned.

DEFENSES AVAILABLE AT LAW. "Where," as Chancellor KENT said in deciding the case of *Simpson v. Hart*,¹ "courts of law and equity have concurrent jurisdiction over a question, and it receives a decision at law, equity can no more re-examine it than the court of law in a similar case could re-examine a decree of a court of equity." When a defense is once fairly passed upon, the decision is final, no matter how inequitable it may appear.² And where a defense sought to be set up in equity, as a ground for relief against a judgment at law, might have been set up at law, but was not because of a lack of diligence on the complainant's part, equity will not interfere. The rule is inflexible.³ So, even where a judgment has been obtained by fraud, accident, or mistake, if there is any adequate remedy at law, as by motion for a new trial, or appeal, equity requires the injured party to avail himself of that remedy, and if he fails to do so without good excuse, will grant no relief.⁴ The fact that a defense is equitable is no excuse for not setting it up at law, if available at law under the Code practice.⁵ Ignorance of a defense constitutes no ground for the interference of equity if there was negligence in remaining ignorant. Defendants are bound to use diligence in preparing themselves for trial. If they do not, they are left to bear the consequences.⁶ Thus, if a defendant cannot appear and make his defense in person, it is his duty to employ an

¹ 1 Johns. Ch. 97.

² *Bateman v. Willoe*, 1 Sch. & Lef. (Eng.) 204; *Emerson v. Udall*, 13 Vt. 477; *Agard v. Valencia*, 39 Cal. 292; *Duncan v. Lyons*, 3 Johns. Ch. 356; *Ry. Co. v. Neal*, 1 Wood, 353; *Hendrickson v. Hinckly*, 58 U. S. 443; *Truly v. Wanzer*, 46 U. S. 141; *Foster v. State Bank*, 17 Ala. 672; *Brush v. McCanby*, 7 Gill, 189; *Snyder v. Vannoy*, 1 Or. 344; *Yancey v. Downer*, 5 Litt. 8; *Sumner v. Whitley*, 1 Mo. 708; *Matson v. Field*, 10 Mo. 100; *Ritter v. Democratic Press Co.* 63 Mo. 458.

³ *Foster v. Wood*, 6 Johns. Ch. 86; *Emerson v. Udall*, 13 Vt. 477; *Smith v. McIver*, 22 U. S. 532; *Lester v. Hoskins*, 28 Ark. 63; *Higgins v. Bullock*, 73 Ill. 205; *Smith v. Powell*, 50 Ill. 21; *Richmond Enquirer Co. v. Robinson*, 24 Grat. 548; *Kelly v. Hurt*, 74 Mo. 561; *Katz v. Moore*, 13 Md. 568; *Collier v. Easton*, 2 Mo. 146; *Jackson v. Patrick*, 10 S. C. 207; *Slack v. Wood*, 9 Grat. 40; *Marsh's Adm'r v. Bast*, 41 Mo. 493; *Prewitt v. Perry*, 6 Tex. 260; *Lyday v. Double*, 13 Md. 566; *Selbina Hotel Ass'n v. Parker*, 58 Mo. 327; *Ewing v. Nickle*, 45 Md. 413; *Gaines v. Kennedy*, 53 Miss. 103; *Johnson v. Lyon*, 14 Iowa,

431; *Mills v. Van Voorhis*, 10 Abb. Pr. 10; *Coffee v. Ball*, 49 Tex. 16; *Andrews v. Fenter*, 1 Ark. 186; *Cummins v. Bentley*, 5 Ark. 9; *Bellany v. Woodson*, 4 Ga. 175; *Robuck v. Harkins*, 38 Ga. 174; *Norris v. Humie*, 2 Leigh, (Va.) 334; *Green v. Thomas*, 17 Cal. 86; *Marsh v. Edgerton*, 1 Chand. (Wis.) 198; *Tyler v. Hamersley*, 44 Conn. 419; *Phelps v. Peabody*, 7 Cal. 50.

⁴ *Huston v. Ditto*, 20 Md. 305; *Bellows v. Stone*, 14 N. H. 203; *Reed's Adm'r v. Hansard*, 37 Mo. 199; *Nat. Bank v. Burnet Manufg. Co.* 33 N. J. 486; *City of Muscatine v. M. & M. Ry. Co.* 1 Dill. 536; *Mudson v. Kline*, 9 Grat. 379; *Walker v. Robbins*, 55 U. S. 584.

⁵ *Kelly v. Hurt*, 74 Mo. 561; *Winfield v. Bacon*, 24 Barb. 154; *Savage v. Allen*, 54 N. Y. 458.

⁶ *Skinner v. Deming*, 2 Ind. 553; *McCown v. Macklin's Ex'r*, 7 Bush, 308; *Brown v. Swann*, 35 U. S. 497; *Thompson v. Berry*, 3 Johns. Ch. 395; *Tutt v. Ferguson*, 13 Kan. 45; *McCollum v. Prewitt*, 37 Ala.: 573; *Garrett v. Lynch's Adm'r*, 45 Ala. 204; *Marine Ins. Co. v. Hodgson*, 11 U. S. 333.

agent or attorney to act for him if the defense is of such a nature that it can be made in his absence. If it cannot, he should apply for a continuance. Where he fails to do either, and judgment goes against him by default, equity will not enjoin its execution.¹ The negligence of attorneys is considered the negligence of their clients, and equity will not interfere on behalf of a complainant whose attorney has negligently failed to make a defense to a suit at law and permitted judgment to go by default,² or has neglected to assign error on appeal,³ or fraudulently caused his client to lose the benefit of an appeal,⁴ even where the attorney is insolvent. But where the defendant has both a legal defense and an equitable defense, not available at law, a failure to use diligence in making his legal defense will not, it seems, prevent a court of equity from granting an injunction upon proof of the equitable defense, in case a judgment is rendered against him.⁵

DEFENSES NOT AVAILABLE AT LAW—NEWLY-DISCOVERED EVIDENCE. Equity will always restrain the execution of a judgment where it would be contrary to equity and good conscience to allow it to be executed, and where the facts which render it thus inequitable were either not available at law,⁶ or were not discovered by the complainant, notwithstanding due diligence, until it was too late to set them up there.⁷ In *Wynne v. Newman's Adm'r*, 75 Va. 816, BURKE, J., says that the circumstances under which equity will grant a new trial because of newly-discovered evidence "may be summed up thus: (1) The evidence must have been discovered since the trial. (2) It must be evidence that could not have been discovered before the trial by the plaintiff or defendant, as the case may be, by the exercise of reasonable diligence. (3) It must be material in its object, and such as ought, on another trial, to produce an opposite result on the merits. (4) It must not be merely cumulative, corroborative, or collateral." The general rule governing this whole subject is that whenever a complainant can show a good defense which he has failed, without fault or negligence, to avail himself of at law, he may be relieved in chancery.⁸

WHERE THERE HAS BEEN NO SERVICE OF PROCESS, OR A DEFECTIVE SERVICE. Where an unjust judgment is obtained against a defendant over whom the court rendering the judgment has no jurisdiction,⁹ or who has never been served with process, or received notice of the institution or pendency of the suit against him,¹⁰ the execution will be enjoined, unless relief

¹ *Duncan v. Gibson*, 45 Mo. 352; *George v. Tutt*, 36 Mo. 141; *Powell v. Cyfers*, 1 Heisk. 526; *McCullum v. Prewett*, 37 Ala. 573; *Crim v. Handley*, 94 U. S. 652.

² *Rogers v. Parker*, 1 Hughes, 148; *Kern v. Strausberger*, 7 Ill. 413; *Bowman v. Field*, 9 Mo. App. 576; *Winn v. Wilson*, 1 Henp. 698; *Crim v. Handley*, 94 U. S. 652.

³ *Miller v. Bernecker*, 46 Mo. 194; *Dinet v. Eigenmann*, 96 Ill. 39.

⁴ *Dobbs v. St. Jo. F. & M. Ins. Co.* 72 Mo. 189.

⁵ *Cornelius v. Thomas*, 1 Tenn. Ch. 283; *Winchester v. Gleaves*, 3 Hay. 213.

⁶ *Clute v. Potter*, 37 Barb. 199; *Marine Ins. Co. v. Hodgson*, 7 Cranch, 333; *Foster v. Wood*, 6 Johns. Ch. 86; *Gaines v. Hale*, 26 Ark. 168; *Key v. Knott*, 9 Gill & J. 342; *Pollock v. Gilbert*, 16 Ga. 398; *Vather v. Zane*, 6 Grt. 246; *Rogers v. Cress*, 3 Pin. (Wis.) 36; *Dunham v. Downer*, 81 Vt. 249; *Weaver v. Poyer*, 79

Ill. 417; *Bank v. Ruse*, 27 Ga. 391; *Odell v. Reed*, 54 Ga. 142.

⁷ *Iglehart v. Lee*, 4 Md. Ch. 514; *Footte v. Silsby*, 1 Blatchf. 545; *Taylor v. Sutton*, 15 Ga. 103; *Pearce v. Chastain*, 3 Ga. 226; *Mills v. Van Voorhis*, 10 Abb. Pr. 10; *Millick v. First Nat. Bank*, 52 Iowa, 94.

⁸ *Sanders v. Jennings*, 2 J. I. Marsh. 513; *Barr v. Deniston*, 19 N. H. 170; *Watson v. Palmer*, 5 Ark. 501; *Bank v. Reese*, 27 Ga. 391; *Humphreys v. Leggett*, 50 U. S. 297; *Leggett v. Humphreys*, 62 U. S. 66; *Burem v. Foster*, 6 Heisk. 333; *Rice v. Bank*, 7 Hum. 39; *Clifton v. Livor*, 24 Ga. 91.

⁹ *Grass v. Hess*, 37 Ind. 193.

¹⁰ *Martin v. Parsons*, 49 Cal. 94; *Weaver v. Poyer*, 79 Ill. 417; *Wilday v. McConnel*, 63 Ill. 278; *Southern Exp. Co. v. Craft*, 43 Miss. 508; *Brooks v. Harrison*, 2 Ala. 209; *Dunklin v. Wilson*, 64 Ala. 162; *Crafts v. Dexter*, 8 Ala. 767.

can be obtained at law.¹ But no relief will be granted where the complainant has been properly served with process, and has failed to make a defense because he thought the suit was against another person.²

WHERE AN ATTEMPT IS MADE TO LEVY ON PROPERTY NOT BELONGING TO THE DEFENDANT. Equity will not permit a judgment to be executed by levying on property not belonging to the party against whom it was rendered;³ and where a person is in quiet possession of real estate as owner, it will restrain others by injunction from dispossessing him by process growing out of litigation to which he was not a party.⁴

FRAUD, ACCIDENT, SURPRISE, AND MISTAKE. Equity will never permit an unjust judgment, obtained, without negligence on the defendant's part, by surprise, fraud, accident, or mistake, to be executed where there is no legal remedy.⁵ Thus, where the plaintiff caused a false return to be made by the person deputed to serve the summons on the defendant, when he knew there had been no service, and recovered judgment by default, the judgment was annulled. So, relief was granted where the plaintiff had induced the defendants to withdraw an equitable plea they had filed in the case, by a promise that if such plea were withdrawn he would do the equity set up in the plea, and would enter into writing to that effect, but had failed to comply with his promise and taken judgment.⁶ So, where a judgment is taken by default in violation of an agreement of compromise by which a defense is prevented, its execution will be restrained.⁷ So, where the defendant is induced by false representations of the plaintiff⁸ or his attorney⁹ to believe that no further proceedings will be taken, and makes no defense, a judgment by default will not be permitted to be executed. So, where the defendant allows judgment to go against him in consideration of an agreement on the plaintiff's part that no money need be paid on it except upon the happening of a certain event, the plaintiff will not be permitted to exact payment in violation of the agreement.¹⁰ So, where defendant's counsel is shown to have acted for both parties, and advised the defendant to confess judgment.¹¹ So, where a sheriff, whom the complainant had agreed to save harmless, fraudulently, in collusion with the plaintiff, allowed judgment to go against him when he had a good defense.¹² But he who comes into equity must do equity. If a party asks for relief against a judgment for more than is due, he must offer to pay what he admits is due.¹³

In *Cannon v. Reynolds*,¹⁴ where a mistake was made in the defendant's favor in the statement of the account sued on, and the defendant, knowing of the mistake, allowed judgment to go by default, the judgment was set aside.

In another case, in which an appeal had been dismissed, because of a clerical mistake in making out the appeal bond, the judgment was enjoined.

In the case of *Bell v. Cunningham*¹⁵ the defendants were non-resident foreigners. Their counsel went to trial upon the declaration as it stood, which was not supportable. New counts were filed by leave of court, which cov-

¹ *Nat. Bank v. Burnet Manufg Co.* 3 N. J. 486.

² *Higgins v. Bullock*, 73 Ill. 206.

³ *Givens v. Tidmore*, 8 Ala. 745.

⁴ *Goodnough v. Sheppard*, 28 Ill. 81; *Stewart v. Pace*, 30 Ark. 594.

⁵ *Carrington v. Holabird*, 17 Conn. 530; *Wingate v. Haywood*, 40 N. H. 437; *Currer v. Esty*, 110 Mass. 556; *Norris v. Hume*, 2 Leigh, (Va.) 334; *Brooks v. Harrison*, 2 Ala. 209; *Rogers v. Cross*, 3 Pin. (Wis.) 36; *Burem v. Foster*, 6 Heisk. 333.

⁶ *Markham v. Angier*, 57 Ga. 42.

⁷ *Nealls' Adm'r v. Dicks*, 72 Ind. 374;

Bridgeport Sav. Bank v. Eldredge, 28 Conn. 556; *Rogers v. Gwinn*, 21 Iowa, 58; *Hibbard v. Eastman*, 47 N. H. 507; *Kent v. Richards*, 3 Md. Ch. 392.

⁸ *Dobson v. Pearce*, 12 N. Y. 156; *Williams v. Fowler*, 2 J. J. Marsh. 405.

⁹ *Pearce v. Olney*, 20 Conn. 544; *Holland v. Trotter*, 22 Grat. 136.

¹⁰ *Moore v. Barclay*, 16 Ala. 153.

¹¹ *Molyneux v. Huey*, 81 N. C. 107.

¹² *Iglehart v. Lee*, 4 Md. Ch. 514.

¹³ *Campbell v. Morrison*, 7 Paige, 157.

¹⁴ 5 El. & Bl. 300.

¹⁵ 1 Sumn. 89.

ered a claim not before embraced in the declaration. The defendants had no notice of the change and no means of instructing their counsel on any point of defense. The trial immediately proceeded, and a verdict obtained which would not have been recovered if the defendants had had notice of the claim. Judge STORY delivered the opinion of the court, and held that an injunction should be granted *pro tanto* to the judgment, on the ground of surprise.

EQUITABLE REMEDIES—NEW TRIALS. In relieving against an unjust judgment recovered in a court of law, equity does not act upon the court of law, but upon the party who has recovered the judgment,—sometimes by simply enjoining him from attempting to collect it; sometimes by forcing him to agree to a new trial. The new trial should never be granted in terms.¹ In deciding the case of *C. & F. Ry. Co. v. Titus*, Chancellor RUNYON laid down the law as follows: "Originally chancery compelled new trials at law by perpetually enjoining the plaintiff in the judgment from enforcing it, unless he would consent to a new trial; the injunction being the means by which the plaintiff was constrained to do justice, and the practice of thus compelling new trials at law still exists. This court can, in any given case, itself give effect to the testimony, with respect to which a new trial may be ordered, and determine what difference it ought to have made in the result of the trial at law, if it had been introduced there. In such cases there will, in effect, be a new trial in this court, instead of at law. It is quite within the power of this court to order an issue at law where the facts are contradictory."²

St. Louis.

B. F. REX.

¹ Story, Eq. Jur. § 1571 et seq.; Yancey v. Downer, 5 Litt. 8; Bush v. Craig, 4 Bibb, 168; Floyd v. Jayne, 6 Johns. Ch. 479; Wynne v. Newman's Adm'r, 75 Va. 811. Contra, McConnell's Ex'r, 63 Ill. 280; Nealis' Adm'r v. Dicks, 72 Ind. 374; Col-

lier v. Easton, 2 Mo. 146; Molyneux v. Huey, 81 N. C. 106; Carrington v. Holabird, 19 Conn. 84.

² Key v. Knot, 9 Gill & J. 342; Foote v. Silsby, 1 Blatchf. 545; Turney's Ex'r v. Young, 2 Tenn. 266.

NICHOLS v. JONES and another.¹

(*Circuit Court, N. D. Alabama.* February, 1884.)

1. EQUITY JURISDICTION.

Where the case shows that a multiplicity of suits at law will be necessary for the complainant to obtain at law an adequate remedy, a bill in equity will be maintained.

2. INJUNCTION.

Injunctions are granted to prevent trespasses as well as to stay waste where the mischief would be irreparable and to prevent a multiplicity of suits.

In Equity. On motion for injunction.

The complainant's bill shows that on the seventh of May, 1873, Henry Clews being the owner and in possession of certain mineral lands in Calhoun county, in this state, sold and conveyed for value the same to John M. Guiteau, who afterwards, on the sixth of June, 1876, sold and conveyed to John P. McEwan, and that the latter, with

¹ Reported by Joseph P. Hornor, Esq., of the New Orleans bar.

his wife, on the sixth of March, 1880, by proper deed, sold and conveyed the same to complainant, and that all of the said conveyances were properly acknowledged and recorded in the county of Calhoun prior to the year 1880, except the one last mentioned. Further, that the defendants claim title to the same premises by virtue of an attachment suit instituted in the circuit court of Calhoun county early in the year 1880, by defendant Jones against said Henry Clews, a citizen of New York, in which suit said lands were attached, a judgment recovered, and the lands sold by the sheriff of Calhoun county under execution to said Jones on May 31, 1880. Further, that at a former term of this court complainant had instituted a suit for the possession of said lands against one Ashley, a tenant of defendant Jones in possession of the same, and recovered a judgment, which was executed by the marshal, who, under a writ of *habere facias possessionem*, placed complainant in possession, and that complainant took possession and held the same by his agent and tenant, and that thereafter the defendant, with fraud and illegal influence over the said tenant, dispossessed complainant, possessed himself, and has ever since detained and now holds the same. Further, that complainant has instituted an action for damages against said Jones in the circuit court of Calhoun county, because of his said trespass, which action is now pending. The bill also alleges that the lands are valuable only as mineral lands; that defendants are mining and removing ore, and thereby inflicting irreparable damage; that defendant Jones is insolvent, and defendant Morgan has little, if any, means; and that only by a multiplicity of suits at law can complainant, if at all, protect his rights.

The defendants, by answer not sworn to, deny that complainant is owner of the lands described, and allege fraud and collusion in the conveyances from Clews to complainant's grantor, and the fraud and collusion of complainant and Ashley in obtaining the judgment in this court for possession, which judgment has been set aside and defendants admitted as parties, and that the suit is still pending; and they deny all fraud and illegal influence in obtaining possession from complainant's tenant as set forth in the bill; and all other matters charged in the bill are admitted, the defendants particularly claiming *bona fide* title under the attachment proceedings set forth in bill and answer.

An admission is now filed in the record that when the bill in this case was filed an action of ejectment by the complainant against the defendants for the land in controversy was pending in this court; that on November 5, 1883, the complainant dismissed his said action of ejectment, and that there is now no action of ejectment pending by the complainant for the land in controversy. An inspection of the record shows that the said action of ejectment was dismissed under an order of court rendered at last term compelling the complainant to elect between his action of ejectment and this equity action. At this time a motion, after due notice, is made for an injunction to restrain,

pendente lite, the defendants from wasting the lands in controversy by removing the mineral deposits therefrom. The defendants admitting the facts of removal of minerals, resist the motion on the two grounds—of want of equity in the bill, and of diligence on the part of complainant.

D. P. Lewis, for complainant.

Ward & Cabanis and *J. D. Brandon*, for defendants.

PARDEE, J. It seems clear that if complainant has brought his case within our equity jurisdiction a proper and meritorious case for an injunction is shown. The admitted damages committed and being committed by defendants are irreparable, restitution being impossible, and the money value not being ascertainable, and the defendants are insolvent, or next door to insolvency. The defendants first urge that as no suit in ejectment is pending, and no specific fraud alleged in the bill, the action is one of ejectment in the form of a bill in chancery. Were this all of the case there would be nothing further to do than to refuse the motion and, *sua sponte*, direct the bill to be dismissed. *Lewis v. Cocks*, 23 Wall. 469. But the complainant shows one suit for damages now pending, the recovery of one judgment in ejectment, and possession obtained thereunder, which was lost by the fraud and illegal influences of the defendants, and the case shows that a multiplicity of suits at law will be necessary for the complainant to obtain at law an adequate remedy. Equity will entertain bill to prevent a multiplicity of suits. *Garrison v. Ins. Co.* 19 How. 312; Story, Eq. Jur. § 928. Injunctions are granted to prevent trespasses as well as to stay waste, where the mischief would be irreparable and to prevent a multiplicity of suits. *Livingston v. Livingston*, 6 Johns. Ch. 497; Story, Eq. Jur. §§ 928, 929. That the defendants deny complainant's title, and that no suit at law is pending to settle the question of title, is a very serious objection to the granting of the injunction asked; but it seems the effect of this is avoided from the following facts apparent on the record: (1) The defendants do not deny nor assert title under oath. *Griffin v. Bank*, 17 Ala. 258; *Rainey v. Rainey*, 35 Ala. 282. (2) The title claimed by defendant as defeating complainant's, appears to be one obtained by attachment against a bankrupt, issued long after the bankruptcy and seizing property sold by the bankrupt months before the bankruptcy, making a very doubtful pretense of title, nearly a sham on its face. Rev. St. §§ 5119, 5120; *Bank v. Buckner*, 20 How. 108. (3) The defendants compelled the complainant to elect between his bill in equity and his suit in ejectment, and now object to the state of litigation as forced by themselves.

In the case of *West Point Iron Co. v. Reymert* it was held that mines, quarries, and timber are protected by injunction, upon the ground that injuries to and depredations upon them, are, or may cause, irreparable damage, and with a view to prevent a multiplicity of suits; nor is it necessary that the plaintiff's right should be first established

in an action at law. 45 N. Y. (6 Hand.) 703. And in that case the court further said:

"It was a proper case for relief by injunction if the plaintiff's right to the mine was established, and it was not necessary that the right should be first established in an action at law. The injury complained of was not a mere fugitive and temporary trespass, for which adequate compensation could be obtained in an action at law, but was an injury to the *corpus* of the estate." Page 705.

See, also, *Thomas v. Oakley*, 18 Ves. 184; Story, Eq. Jur. 929; and see *McLaughlin v. Kelly*, 22 Cal. 211.

The want of diligence urged against the complainant is that, as the defendants filed their answer September 14, 1883, the complainant should have had his case ready for hearing at the October term following. The complainant had until the October rules to demur, or reply, and then he was entitled to three months to take testimony before he could be charged with want of diligence. Besides the October term seems to have been used up in determining whether complainant should elect between his action at law and his bill in equity, and from affidavit on file, it seems the chancery docket was not called from press of other business.

On the whole case, I do not see, in view of the insolvency of the defendants, rendering a multiplicity of suits necessary for the complainant to protect himself at law, and that the injuries complained of are to the body of the estate, and considering that this court has forbidden the complainant to prosecute his suit at law and his bill in equity at the same time, how, in equity, an injunction preserving the rights of the parties, pending the suit, can be refused.

The rights of the defendants will be saved by complainant's giving bond in the sum of \$1,000.

NEWMAN, Receiver, v. MOODY.¹

(*Circuit Court, N. D. Alabama.* February, 1884.)

1. DEMURRER.

A demurrer filed without leave, and after answer and submission, comes too late; by answering, defendant waived all objections to the form and manner of proceeding.

2. REHEARING—EQUITY RULE 88.

Where no appeal lies from the decree to the supreme court it was within the discretion of the court, under equity rule No. 88, to allow a rehearing before the end of the next term, even if the decree was final.

3. RECEIVER.

Where an administrator comes into the possession of funds belonging to the estate of his decedent, and accounts therefor to the state court appointing him, long prior to notice from this court, he cannot be held to again account for or pay said money to a receiver subsequently appointed by this court.

¹Reported by Joseph P. Hornor, Esq., of the New Orleans bar.

At the October term, 1881, the following petition was filed:

"To the Hon. John Bruce, presiding in the Circuit Court of the United States for the Northern District of Alabama: In the case of W. H. Johnson and others against W. R. Alexander and others, pending in said court, your petitioner, W. P. Newman, is receiver, having been appointed as such at a former term thereof. Your said petitioner alleges that there is now in the hands of Amos L. Moody, of Franklin county, Alabama, within said Northern district, the sum of five hundred and forty-one 25-100 dollars belonging to the estate of Jacob V. Johnson, deceased. Your petitioner, therefore, prays for an order directing said Moody to appear at the next term of this court to show cause, if any he have, why a decree should not be rendered against him in favor of your petitioner for said money, and he will ever pray."

Thereupon the following order was entered:

"It is hereby ordered that notice be issued and served on Amos L. Moody, of Franklin county, Alabama, to appear at the next term of this court, and show cause, if any he have, why a decree should not be rendered against him in favor of the said W. P. Newman, receiver as aforesaid, for the sum of five hundred and forty-one 25-100 dollars, alleged to be in his hands, belonging to the estate of Jacob V. Johnson, deceased, of whose estate the said Newman is receiver,

"This October 25, 1881.

[Signed]

"JOHN BRUCE, Judge."

At the following term, in April, 1882, the defendant Moody filed the following answer:

"In answer to the citation served on him in the above-styled cause, Amos L. Moody, as administrator *de bonis non* of the estate of Jacob V. Johnson, states that the only assets that have come into his hands as administrator were 85 shares of the M. & C. R. R. stock, which was sold under the orders of the probate court of Franklin county, and from the sale thereof the sum of \$541.25 was realized. The said sale was duly confirmed, and the proceeds thereof expended and disbursed in part payment of the cost of administration, all of which will be more fully seen by Exhibit A, showing the different payments made out of said fund, and Exhibit B, the decrees of the court thereon, and which are made as part of this answer. He further states that said fund was garnished in his hands by process of garnishment served on W. D. Bowen and respondent from the circuit court at Lauderdale county in favor of *W. A. Bassinger v. Reuben Copeland, Adm'r of said estate of Jacob B. Johnson, and W. D. Bowen and respondent Amos L. Moody*, long prior to issuance and service of said citation. Now, having fully answered, respondent prays to be hence dismissed with his reasonable costs in this behalf expended.

[Signed]

"AMOS L. MOODY."

Thereupon the following was rendered:

"This cause is submitted on petition of William P. Newman, receiver, etc., for decree against Amos L. Moody, and it appearing to the satisfaction of the court that the said Moody received, on the eleventh day of June, 1880, five hundred and forty-one 25-100 dollars of moneys belonging to the estate of the said Jacob V. Johnson, deceased; and it further appearing to the satisfaction of the court that said Moody has disbursed the same without authority of law and contrary to the orders of this court: It is therefore ordered, adjudged, and decreed by the court that said Moody pay to said William P. Newman, as such receiver, the sum of six hundred and twenty dollars and seventy-four cents, that being the principal, with the interest added thereon to this date,

besides the costs of the proceedings upon this petition, for which let execution issue.

"April 14, 1882.

[Signed]

"JOHN BRUCE, Judge."

At the succeeding term of court the following was entered :

"Come the parties by their solicitors, and, upon motion and showing deemed satisfactory to the court, it is ordered that the former submission of the particular matter of the petition of Wm. P. Newman, receiver, against A. L. Moody, and the answer of said Moody to said petition, be set aside and a new submission of said matter be granted, to be heard and decided in vacation, and that the counsel be allowed thirty days in which to file briefs; also that said A. L. Moody have leave to file an amended answer, and that he be allowed fifteen days within which to file said answer."

The defendant has filed a demurrer, and an amended answer and demurrer, and the cause has been submitted to the circuit judge on the record and briefs.

L. P. Walker & Betts, for receiver.

O'Neal & O'Neal, for defendant.

PARDEE, J. The demurrer filed by defendant contains 23 counts, but practically makes but three points: (1) That the receiver had not been previously authorized nor instructed by the court to institute the suit; (2) that the proceedings were summary, and not by regular bill and subpoena; and (3) the remedy should have been by action at law.

The amended answer states the same defense as the original, but more explicitly, and, unlike the original, is properly verified. The brief filed by defendant is devoted to sustaining the points made by demurrer, of which it is sufficient to say that the demurrer was filed too late, being filed without leave, and after answer and submission. By answering, defendant waived all objections to the form and modes of proceeding.

The sole point made by counsel for the receiver is that the decree was final with the April term, 1882, and beyond the power of the court to vacate at the subsequent term. If it was a final decree and appealable the point is well taken. *Cameron v. McRoberts*, 3 Wheat. 593; *McMicken v. Perin*, 18 How. 507. "No rehearing shall be granted after the term at which the final decree of the court shall have been entered and recorded, if an appeal lies to the supreme court. But, if no appeal lies, the petition may be admitted at any time before the next term of the court, in the discretion of the court." Equity rule 88. I doubt if the decree was a final decree. It in effect only changed the custody of the fund in controversy. It was yet to be disposed of by the court, and if it had been paid over to the receiver, could, if justice required, have been turned back to the defendant. As it was not paid over, it was within the discretion of the court to re-examine the question as to whether it should be paid over. But as no appeal lay from the decree to the supreme court, under the equity rule referred to, it was within the discretion of the court to allow a rehearing

before the end of the next term, even if the decree was final. On the merits of the case equity and justice are with the defendant.

Aside from the answers and exhibits attached, there is no evidence adduced. From the answers and exhibits it appears that the defendant, as administrator *de bonis non*, with the will annexed of Jacob V. Johnson, came into possession of the sum of \$541.25, long prior to the appointment of plaintiff as receiver in the case of *W. H. Johnson v. W. R. Alexander*, by this court, and that prior to notice he (defendant) had fully disbursed the same under orders and judgments of the probate court of Franklin county, by which court he was appointed administrator, and with which court he has settled his accounts. On what equity he can be compelled to pay again has not been pointed out. The former decree was based on the ground "that said Moody has disbursed the same without authority of law, and contrary to the orders of this court." This does not appear at this time, but the contrary is fully established. Moody was not a party to the main case, and he disbursed the money under orders of the court which appointed him administrator long prior to notice from this court.

A decree will be entered at the next term, vacating the decree entered herein at the April term, 1882, and dismissing all proceedings against Amos L. Moody, with costs.

BLAIR v. ST. LOUIS, H. & K. R. Co.¹

(Circuit Court, E. D. Missouri. March 24, 1884.)

1. LIENS UPON PROPERTY IN THE HANDS OF A RECEIVER.

Where a railroad has been placed in the hands of a receiver by this court, persons claiming statutory liens may be permitted to file them here with the same force and effect as if filed respectively in the state courts.

2. SAME—STATUTORY AND EQUITABLE LIENS ON THE SAME FOOTING.

Where like demands are presented from other states in which no statutory lien therefor exists, they will be entitled to the same *status* as statutory liens.

In Equity. Order.

Butler, Stilman & Hubbard, for complainant

William P. Harrison, for defendant.

TREAT J. Inasmuch as many intervening petitions have been filed in this case, and others may be, praying for orders on the receiver to pay the sums claimed out of the net income of the defendant corporation as operated by said receiver, and also out of the funds by him raised on his certificates issued, and to be issued, under the orders of this court, as a first lien on the property of said corporation, and on the property by him acquired under the orders of this court, in

¹ Reported by Benj. F. Rex, Esq., of the St. Louis bar.

the course of his administration of his trust, and inasmuch as some of said petitions may rest on statutory liens, conditioned on the notice and proceedings required by statute,—

It is ordered that, to avoid expense and delay, all persons claiming statutory liens be permitted to file the same in this court, with the same force and effect as if filed, respectively, in the state courts.

It is further ordered that where like demands are presented from other states, in which no statutory lien therefor exists, they shall be entitled to the same *status*, so that statutory and equitable liens may rest on a like basis.

Inasmuch as this court has heretofore settled the rules of law and equity by which all intervening claims in cases like this are to be adjudged, and the United States supreme court has more definitely and fully prescribed such rules, in *Fosdick v. Schall*, 99 U. S. 235; *Barton v. Barbour*, 104 U. S. 126; *Miltenberger v. Ry.* 106 U. S. 286; S. C. 1 Sup. Ct. Rep. 140; *Union Trust Co. v. Souther*, 107 U. S. 591; S. C. 2 Sup. Ct. Rep. 295; *Union Trust Co. v. Walker*, 107 U. S. 596; S. C. 2 Sup. Ct. Rep. 299.

It is ordered that all intervening claims filed, or that may hereafter be filed, in this case, be referred to the special master herein, for his report thereon, his reports to state distinctly whether the respective demands are such as should be paid by the receiver under the rulings of the United States supreme court, or are merely claims at large against the defendant corporation, devoid of a lien, statutory or equitable, prior in right to the lien of the mortgage sued on.

It is further ordered that when an intervening claim, so far as the facts on which it rests, fully appears from the books of the defendant to be correct, the master may proceed to pass thereon without further evidence, unless, in his opinion, further evidence is needed, or some person in interest appears to contest the same.

It is further ordered that the master give due notice to the respective claimants or their attorneys, also to the trustee and receiver or their attorneys, when and where he will proceed to consider and pass upon their demands.

The right of exception to proceedings before the master and to his reports is reserved. The receiver should, in all of these demands, have notice of the time and place of hearing the same before the master and in court; also the solicitor of the complainant, with leave to be heard in person or by attorney.

To avoid delay and expenses the receiver and complainant should have an attorney to attend to this business who is an officer of this court, and ready to conduct the business promptly and efficiently, and to accept service accordingly.¹

¹ The same order was made in the case of *Central Trust Co. v. Texas & St. L. Ry. Co.*

DONAHUE and others v. ROBERTS and others.*

(Circuit Court, E. D. Missouri. March 21, 1884.)

1. DEPOSITIONS—CERTIFICATE.

Where depositions are taken *de bene esse*, under section 865, Rev. St., before a notary, his certificate should state, among other things, (1) that he is not a party in interest; (2) that the depositions were reduced to writing in the deponent's presence; and (3) in what court it is to be used.

2. SAME—AMENDMENTS.

Where a notary's certificate fails to comply with the requirements of law, leave may be given to amend it.

In Equity. Motion to suppress depositions.

The grounds of the motion sufficiently appear from the opinion of the court.

Walker & Walker, for complainants.

Lucien Eaton, for defendants.

TREAT, J., (orally.) The motion to suppress will be sustained for a number of reasons: *First*, the depositions are certified as taken in the wrong court; *second*, it is not stated that the notary taking them was not a party in interest; *third*, it is not stated that they were reduced to writing in the presence of the deponent,—all of which propositions have obtained ever since 1789. The motion to suppress will be sustained. These matters being, as held by the supreme court over and over again, in derogation of the common law, the party must conform to the requirements of the statute, otherwise the depositions will not be received.

Leave is given to withdraw the depositions in order that the notary's certificate may be amended.

WARING and another v. LOUISVILLE & NASHVILLE R. Co.†

(Circuit Court, S. D. Alabama. February, 1884.)

1. CONTRACTS.

When writings which amount to a contract between the parties are not complete in themselves to show what the contract was, the court must look to the surrounding circumstances when the contract was made.

Van Epps v. Walsh, 1 Woods, 598.

The Orient, 4 Woods, 262; S. C. 16 FED. REP. 916.

2. LEASE.

The implication of law, resulting from a payment of rent under a tenancy at will, that the tenancy becomes one from year to year, is not strong enough to overcome the fact that there was a distinct understanding between the parties as to the nature of the tenancy.

*Reported by Benj. F. Rex, Esq., of the St. Louis bar.

†Reported by Joseph P. Hornor, Esq., of the New Orleans bar.

This is an action of ejectment brought by the plaintiffs, Moses Waring and Virginia E. Mitchell, against the Louisville & Nashville Railroad Company, to recover the possession of a triangular lot of ground near the foot of Theatre street, in the city of Mobile, and damages for its detention. A jury has been waived by written stipulation, and the case submitted to the court.

From the evidence adduced on the trial of the case the court finds the following as the facts:

(1) That on the thirteenth day of March, 1877, the plaintiffs, Moses Waring and Virginia E. Mitchell, under a written lease to E. D. Morgan and James A. Raynor, as trustees and receivers, etc., of the property described in the pleadings, for the period of five years, commencing on the first day of April, 1877, and ending on the first day of April, 1882, for which the lessees were to pay as rent the sum of \$400 per annum, in quarterly payments, viz., \$50 to Waring on the twenty-fifth days of July, October, January, and April of each year, and the like sum of \$50 to Mrs. Mitchell, on the same days of payment. That said lessees went into possession under said lease, and made said rent payments regularly, and continued to occupy the property under the lease until May, in the year 1880, when they assigned and transferred all their interest in the said lease and leased property to the defendant, the Louisville & Nashville Railroad Company, who thereupon entered, under the said lease, as tenants of said Waring and Mitchell, and paid the rent under said lease to said Waring and Mitchell until April 1, 1882, when said lease expired.

(2) That at the expiration of the said lease, the said Louisville & Nashville Railroad Company applied to said Waring, representing and acting for himself and Mrs. Mitchell, to have the lease renewed, but Mr. Waring declined to renew the lease or to make a new one of any sort, but at the same time told the agents of the defendants that the plaintiffs would not interfere with the defendants continuing to use the lot as it had previously done, until the plaintiffs should come to some definite conclusion as to what they would do about the lot, and the defendant continued in the possession and occupancy of the same.

(3) That negotiations were thereupon entered into between the parties, the plaintiffs desiring some qualification of the use of the premises, and also desiring to secure a side track connecting with the Mobile & Ohio Railroad, and the defendant desiring to purchase or secure a permanent lease.

(4) Pending the negotiations the following writings passed between the parties, to-wit:

"LOUISVILLE & NASHVILLE RAILROAD CO.

To Mrs. Virginia Mitchell, Dr.

1882.

MOBILE.

August 2d. For rent of ground foot of Theatre street, Mobile, for tracks entering freight-yard, as per lease.

For quarter ending July 25, 1882, - - - - \$50
(Fifty Dollars.)

Correct:

R. P. BROWN, Clerk.

Approved:

J. T. HARAHAN, Superintendent.

Audited:

D. W. C. ROWLAND, Gen. Supt.

C. QUARRIER, Comptroller

Received, Fifty 00-100 Dollars.

Date 4th August, 1882.

Witness:

W. S. ARMOUR, Cashier.

VIRGINIA E. MITCHELL,
By WM. BARNEWALL, Agent.

"LOUISVILLE & NASHVILLE RAILROAD CO.

To Mr. Waring, Dr.

1882.

MOBILE.

August 2d. For rent of ground foot of Theatre street, Mobile, for tracks entering freight-yard, as per lease, in hands of J. T. Harahan.

For quarter ending July 25, 1882, - - - - - \$50

(Fifty Dollars.)

Correct:

Approved:

R. P. BROWN, Clerk.

J. T. HARAHAH, Superintendent.

Audited:

D. W. C. ROWLAND, Gen. Supt.

C. QUARRIER, Comptroller.

Received fifty dollars, due July 1, 1882.

Date August 4, 1882. -

M. WARING.

Witness:

W. S. ARMOUR, Cashier."

The words "fifty dollars, due July 1, 1882," were inserted by plaintiff Waring when the document was presented to him by the agent of the company.

On August 4, 1882, there was no lease in the hands of J. T. Harahan, except the old lease referred to in the first finding aforesaid.

(5) That thereafter negotiations looking to a permanent arrangement were carried on between the plaintiffs and the agents of defendant, at least so far as that plaintiff Waring wrote several letters, and received from J. T. Harahan, defendant's superintendent of division, the following reply:

"*Louisville & Nashville Railroad Company, operating New Orleans, Mobile & Texas Railroad, as reorganized.*

J. T. Harahan, Supt.

OFFICE OF SUPERINTENDENT,
NEW ORLEANS, LA., Sept. 11, 1882. ,

M. Waring, Esq., Mobile, Ala.—DEAR SIR: I have been patiently waiting to hear from our folks in Louisville, but as most of them are absent in New York I cannot hear from them for a few days yet. Will let you hear about the lease soon as I can hear from them.

Yours, etc.;

J. T. HARAHAH, Supt."

And finally, prior to November 25, 1882, said Waring informed said defendant that the plaintiffs would make no arrangement for said Louisville & Nashville Railroad Company to continue to occupy the lot unless said railroad company would stop using it as a switching ground for their cars; that this the said Louisville & Nashville Railroad Company declined to agree to, and thereupon, on the twenty-fifth of November, 1882, a written notice to quit was signed by the plaintiffs and regularly served on the defendant, and on the first day of December another written paper signed by both of the plaintiffs demanding the possession of the property, which defendant never surrendered, but still holds.

(6) That the rental value of the property exceeded \$400 per year.

Peter Hamilton and Thomas A. Hamilton, for plaintiffs.

Gaylord B. Clark, for defendant.

PARTEE, J. On the trial of the case, after the plaintiffs had closed and the two writings mentioned in finding "four" were offered, counsel for defendant moved to strike out all the parol evidence adduced by plaintiffs in the case which tended to vary the written receipt and contract and the implication of law arising from the acceptance of

rent, which would exclude all of plaintiffs' evidence, save the lease and notices to quit, aforesaid, on the ground that the said writings constituted a written contract between the parties, complete in all its parts as aided by implications of law, for the lease of the property in question, and that parol evidence is incompetent to vary the terms of such contract. This motion was reserved to be passed upon with the merits. The view that I take of the case is that after the expiration of the five years' lease, under the understanding and consent of the parties, the continued holding of the defendant was as a tenant at will. Either party could have ended the tenancy without consent of the other. See Bouv. Law Dict. *verbo*, "Tenant at Will." This was undoubtedly the case down to August 4, 1882, when a quarter's rent was paid and the writings purporting to be a charge for and a receipt of rent were given. And that this was the view taken of it by the parties is shown by the negotiations that were carried on with a view to obtain a lease for a fixed term. This simplifies materially the question of the force and effect to be given to the writings of August 4, 1882.

Conceding these writings to amount to a contract between the parties, they are not complete in themselves to show what the contract was. By themselves, they do not make a lease for a quarter, nor for a year, nor for the term of the old lease. We must look to the surrounding circumstances. "Another rule of law, just as well settled, is that the obligation of a contract is what the parties intended to mean when they entered into it. What they both understood to be the contract, that is the contract; and to arrive at the understanding of the parties, the courts are authorized to look at the circumstances which surrounded them when they made it." *Van Epps v. Walsh*, 1 Woods, 598; *The Orient*, 4 Woods, 262; S. C. 16 FED. REP. 916. In this case, what were the surrounding circumstances when the writings were made? The defendant was a tenant at will of the premises in question, desirous of purchasing or obtaining a permanent lease. The plaintiffs were not willing to sell, nor lease for a fixed time, unless with stipulations as to use, and they desired concessions as to a side track to connect with the Mobile & Ohio road. There was no lease, save the old and expired one, in the hands of Harahan. And negotiations were pending between the parties for a new lease. That the plaintiffs intended to grant a lease by the writings is negatived by all the circumstances. That the defendant intended by these writings or that its agents thought it had acquired a lease for any fixed period is negatived by all the circumstances, and by the letter of Harahan, superintendent, written a month afterwards. The legitimate construction of the writings, then, is that they were receipts for rent past due under a tenancy at will. The implication of law resulting from a payment of rent under a tenancy at will, that the tenancy becomes one from year to year, (see Bouv. Law Dict. *verbo*, "Tenant at Will," and cases there cited,) is not strong enough to overcome the

fact that there was a distinct understanding between the parties as to the nature of the tenancy. Woods, Landl. & Ten. 25, 60, 61, and cases cited; and see, also, *Crommelin v. Thiess*, 81 Ala. 418. Had the defendant held over after the expiration of the five-year lease, without any agreement on the part of the plaintiffs as to the character of such holding, the defendant would have been a tenant on sufferance, the plaintiffs having a right to elect whether to resume possession or to treat the defendant as a tenant from year to year. Had the defendant held over without any agreement with the plaintiffs, and had paid, and plaintiffs had received, rent, the law would have implied a contract of lease from year to year. Had the defendant held over without any agreement with the plaintiffs, and then the writings of August 4th had been passed between the parties, I am inclined to the opinion that the law would have implied a renewal of the five-year lease; and this by fair construction of the writings themselves, otherwise unexplained.

But the case made differs from all of these hypothetical cases. By understanding of the parties the defendant held over as a tenant at will, and thereafter the minds of the contracting parties did not meet, and although rent was paid and received on the terms of the old lease, the character of defendant's holding was not changed.

MARLOR v. TEXAS & P. RY. CO.¹

(Circuit Court, S. D. New York. April 14, 1884.)

1. MORTGAGE BONDS OF RAILROAD—RIGHT OF ACTION FOR INTEREST.

It matters not whether the bonds of a railroad are secured by a mortgage making the interest a lien upon the lands of the company or upon its net earnings, or upon both, or whether there is no mortgage at all. If there is an agreement to pay interest and it is not paid, there is a breach of the bond for which the holder can maintain an action.

2. SAME—IN CASE OF SCRIP TENDERED IN LIEU OF INTEREST.

A railroad mortgage provides that in the event of a failure of net earnings sufficient to pay interest on the bonds secured by it, the company can, in its option, issue certain scrip in lieu thereof. In such a case the bondholder is not bound to accept the scrip unless the fact exists which authorizes the company to issue it, nor is the burden upon him to prove a negative. His right of action is *prima facie* perfect upon proof of non-payment of interest on the presentment of his bond at the time when and the place where the interest is made payable.

Motion to Strike out Part of Answer.

Dos Passos Bros., for complainant.

Dillon & Swayne and *W. S. Pierce, Jr.*, for defendant.

WALLACE, J. The only questions which seem to be involved in this case are (1) whether the mortgage bonds of the defendant contain a promise for the payment of interest annually on the first day of July

¹Affirmed. See 8 Sup. Ct. Rep. 311.

in each year; and (2) whether defendant has exercised its option to issue scrip for the interest, convertible into capital stock of the company, and receivable at par for the purchase of the company's land at schedule prices.

The first question is one of law, to be solved by reading the bonds and mortgage; the second is one of fact.

1. The bond, so far as is relevant to the controversy, reads as follows:

"The Texas & Pacific Railway Company hereby acknowledges itself to be indebted to ———, of ———, or assigns, in the sum of one thousand dollars, lawful money of the United States of America, which sum the said company promises to pay to the said ———, or assigns, at the office of the company in the city of New York, on the first day of January, A. D. (1915) one thousand nine hundred and fifteen, with interest thereon at the rate of seven per cent. per annum, payable annually on the first day of July in each year, as provided in the mortgage hereinafter mentioned. This bond is one of a series of bonds numbered consecutively from one to eight thousand nine hundred and eight, of the denomination of one thousand dollars each, of like tenor and date, the payment whereof is secured by a first mortgage of even date herewith, duly recorded, upon certain lands heretofore granted to the Texas & Pacific Railway Company by the state of Texas. This bond has also, as security for the interest, a mortgage lien upon the net income of the said the Texas & Pacific Railway Company, derived from operating its lines of railway east of Fort Worth, in the state of Texas, after providing for the operating expenses, the current repairs, and reconstructions, and the interest upon the first and second mortgage bonds secured upon said lines of railway, and in case such net earnings shall not in any one year be sufficient to enable the company to pay seven per cent. interest on the outstanding bonds, then scrip may, at the option of the company, be issued for the interest; such scrip to be received at par and interest, the same as money, in payment for any of the company's lands acquired as aforesaid in Texas, at the ordinary schedule price, or it may be converted into capital stock of the company when presented in amounts of \$100 or its multiple."

There seems to be nothing in the language of the mortgage to qualify the promise of the bond. It is quite immaterial whether the mortgage secures the interest of the bonds by a lien upon the lands of the company, or by a lien upon the earnings of the company, or by a lien upon both, or whether it is not secured at all by the mortgage. If there is an agreement to pay interest, and it is not paid, there is a breach of the bond for which the holder can maintain an action. Whether his interest can be collected through a foreclosure of the mortgage is a different inquiry, and not relevant now. It would have been simple enough to have made the interest payable only out of the net earnings of the company's railway by the terms of the bond, if that had been intended.

2. By the terms of the bond the defendant reserved the option, in case the net earnings of its railway were not sufficient in any year to enable it to pay the interest on its bonds, to issue scrip for the interest. The complainant avers that the defendant has neither paid the interest nor exercised the option. By its answer the de-

defendant denies that it has failed to exercise this option, and denies that the plaintiff has demanded payment of the interest. The fact, whether the net earnings of the defendant's railway are sufficient in any one year to pay the interest or not, is one peculiarly within its knowledge, and it is not incumbent upon a holder of the bond to assume the burden of proving the negative. He is not bound to accept the scrip unless the fact exists which authorizes the defendant to substitute scrip for money. His right of action is *prima facie* perfect upon proof of non-payment of the interest, on the presentment of his bond at the place where the interest is made payable. It then devolves upon the defendant to show the existence of the fact which authorizes it to tender scrip, and then the exercise of the option.

This general view of the questions at issue has been stated in order to indicate what issues are fairly presented by the pleadings, and what extraneous matter in the answer has no proper place there. The plaintiff's motion to strike out as irrelevant and redundant is granted, so far as it will eliminate from the answer any and all proceedings, resolutions, mortgages, constructions, understandings, and intentions of the defendant, which are not recited in the bonds in suit, or in the mortgage securing these bonds, because the plaintiff was not a party to them, and is not affected by them. This results in striking out nearly 40 folios of the answer,—a result which justifies this motion, although generally motions of this character are not to be encouraged. In view of the averments of the answer at folios 53 to 63, the plaintiff's motion to make another part of the answer more definite and certain is denied.

It is not intended by this decision to preclude the defendant from the benefit of anything contained in the mortgage which may be urged on the trial of the action as qualifying the promise set forth in the bonds. The bonds and mortgage are one obligation, and may be read and construed together. Neither is it intended to indicate what action on the part of the defendant is a due exercise of its option to pay interest in scrip.

HALL v. CITY OF NEW ORLEANS.¹

(Circuit Court, E. D. Louisiana. February, 1884.)

1. ACT OF LOUISIANA, NO. 73 OF 1872.

The act of the legislature of Louisiana, No. 73 of 1872, approved April 26, 1872, (Sess. Acts 1872, p. 124,) was in force until the passage of the premium bond act, March 6, 1876, (Sess. Acts 1876, p. 54.) By section 15 of the act of 1872 a sinking fund was created for certain bonds of the city of New Orleans, in which fund the bondholders interested were declared to have a vested interest. The taxes levied and collected under the act were insufficient to pay the coupons maturing while the law was in force. *Held*, that holders of coupons maturing after the repeal of the law acquired no right to the fund; holders of coupons maturing before the repeal of the law were entitled to the fund in the hands of the fiscal agent, and could have enforced collection as the taxes were collected and received by him.

2. PRESCRIPTION—PLEDGE.

As long as the debt secured remains unpaid and the pledge continues in existence, whatever be the time elapsed since maturity, the defense of prescription cannot be raised. *Forstall v. Consolidated Ass'n*, 34 La. Ann. 776. As to the coupons which fell due prior to the repeal of the act of 1872, prescription has been interrupted; those which fell due after the repeal, and more than five years prior to the institution of this suit, are prescribed.

At Law.

E. H. Farrar, for plaintiff.

Henry C. Miller and Chas. F. Buck, City Atty., for defendant.

PARDEE, J. Act No. 73, approved April 26, 1872, (Sess. Acts 1872, p. 124,) was in force until the passage of the premium bond act, March 6, 1876. Under the provisions of section 15 of the said act of 1872 a sinking fund was created for all city bonds for which no other retiring provision existed by law, in which fund the bondholders interested were declared to have a vested interest. In pursuance of this section taxes were levied in 1873 and 1874, which were collected from time to time to this day, whereby a trust fund has been in the hands of the fiscal agent of the city, particularly so, until it was distributed by order of this court in the case of *Lauer v. The City* (not reported) in the year 1883.

The taxes so levied and collected have been insufficient to pay the coupons maturing while the law was in force. As the fund was insufficient to pay coupons maturing while the law was in force, holders of the coupons maturing after the repeal of the law acquired no right to the fund, for in no sense could it be said to be a trust fund for their benefit. The case is different with regard to the holders of coupons maturing before the repeal of the law. They were entitled to the funds in the hands of the fiscal agent, and could have enforced collection as the taxes were collected and received by the agent.

In the case of *Forstall v. Consolidated Ass'n* the supreme court of Louisiana say:

"It is no objection that the object or thing pledged was not delivered to the creditor. Even in the absence of a *law contract*, it is lawful to stipulate that

¹ Reported by Joseph P. Hornor, Esq., of the New Orleans bar.

the pledge may remain in trust in the hands of a third person, even in those of the debtor, provided it be held precariously. * * * As long as the debt thus secured remains unpaid and the pledge continues in existence, whatever be the time elapsed since maturity, the defense of prescription cannot be raised." See 34 La. Ann. 776, and cases there cited.

The coupons sued on in this case are from bonds within the provisions of section 15 of the act of 1872; those which fell due prior to the repeal of the act, March 6, 1876, have been secured by the fund pledged for their benefit, and prescription has been interrupted; those which fell due after the repeal of the said act, and more than five years prior to the institution of this suit, are prescribed. Judgment will be entered accordingly.

BILLINGS, J., concurs.

COLE V. CITY OF LA GRANGE.¹

SANFORD V. SAME.¹

(Circuit Court, E. D. Missouri. March 22, 1884.)

CONSTITUTIONAL LAW—TAXATION IN AID OF PRIVATE ENTERPRISES.

State legislatures have no authority to authorize taxation in aid of private enterprises or objects, even where there is no express constitutional prohibition.

Demurrers to the Answers.

These are suits upon interest coupons cut from bonds issued as a gift from the city of La Grange, Missouri, to the La Grange Iron & Steel Company, a private corporation, under an act of the legislature of Missouri. The answers set up as defenses, (1) general denials; and (2) that the issue of the bonds was *ultra vires*, and contrary to law.

Sanders & Haynes, for plaintiffs.

David Wagner, for defendant.

TREAT, J. These cases rest on the same facts and propositions of law. The purpose is to have the judgment of the court on the special defense set up; yet the demurrer is general, and each answer contains a general denial. That technical point seems to have been overlooked; but as the parties have presented the subject on special defenses, by mutual understanding, the court announces its views with respect thereto. It is not deemed necessary to travel over the ground, theoretical and elemental, on which the many cases cited rest; for the books and adjudged cases are full of the law-learning involved.

¹Reported by Benj. F. Rex, Esq., of the St. Louis bar.

The main proposition always is as to the authority of a county or town or city to incur the obligations sued on, whether evidenced by a bond or otherwise. In these cases the suits are on coupons detached from bonds issued by the defendant, pursuant to the required vote of the citizens, as a gift to a private manufacturing corporation. There was a legislative enactment, to-wit, the charter of the defendant, which in terms permitted the issue of the bonds, the proper vote etc., having been duly had. The state constitution contains this clause:

"The general assembly shall not authorize any city, county, or town to become the stockholder in, or to loan its credit to, any company, association, or corporation, unless two-thirds of the qualified voters of such county, city, or town, at a regular or special election to be held thereon, shall assent thereto."

It is contended that as there is no specific prohibition in the constitution against the issue by a city of its bonds as a gift to a private enterprise, if a two-thirds majority of the citizens so vote, the bonds might be held valid in the hands of *bona fide* holders, and the property within the corporate limits remain subject to taxation to meet such alleged obligations. It is true the state constitution in express terms refers only to becoming a stockholder or loaning credit, and says nothing about *gifts*. Why not? Because it was considered by all familiar with the elemental principles of free governments that they were not founded and did not exist for the confiscation of private rights, or, through the exercise of the taxing power, appropriate one man's property for the private benefit of another.

The court, at the close of the argument, asked if it was contended that inasmuch as the constitution required a two-thirds vote only as to becoming a stockholder or loaning municipal credit, therefore, a city could, without vote, give away its corporate funds or revenues, or impose a tax to make good a promised gift. Inasmuch as it is beyond the legitimate sphere of municipalities to use their taxing or other functions for mere private interests; and inasmuch as it had been settled that they could, as stockholders or otherwise, aid public enterprises, there was need of restricting the latter by exacting a vote of the people, but no need of providing against the former. It is not a "*casus omissus*," nor an intentional license for indiscriminate squandering of revenues by way of donations. When the required vote is had for stock or loans it is supposed the city receives value or security therefor, and the constitution placed restrictions thereon. Is it to be asserted that because no such restrictions were placed on gifts, that, therefore, the two-thirds of the voters of a city could impose on all taxable property heavy taxes for years, to make good a mere gift to a private manufacturing corporation? The question answers itself. If such a course could be pursued for one private enterprise it could for all.

It is not necessary to review the many cases cited. A court cannot ignore that the federal and state constitutions—nay that all state constitutions—prohibit the taking of private property even for public

uses without just compensation. Is it to be argued, therefore, that private property can be taken for private uses, either with or without just compensation? The supreme court of the United States stated the elemental thought underlying American constitutional law when it declared that an attempt, through the guise of the taxing power, to take one man's property for the private benefit of another is void, an act of spoliation, and not a lawful use of legislative or municipal functions.

There have been so many well-considered cases in the United States courts and in the state courts on this subject that it would be a work of supererogation to repeat their arguments. It must suffice that the weight of authority and sound reason concur in holding bonds and coupons like those in question void *ab initio*. *Loan Ass'n v. Topeka*, 20 Wall. 665; *Com. Bank v. City of Iola*, 2 Dill. 353; *Parkersburg v. Brown*, 106 U. S. 487; S. C. 1 Sup. Ct. Rep. 442; *Allen v. Jay*, 12 (U. S.) Amer. Law Reg. 481, with notes; *State v. Curators State Univ.* 57 Mo. 178; *St. Louis Co. Ct. v. Griswold*, 58 Mo. 175; *Livingston Co. v. Darlington*, 101 U. S. 407.

In *Cooley*, Const. Lim. the subject is fully discussed, cases reviewed, and conclusions stated. Page 264 *et seq.*

Demurrers overruled.

In re LETCHWORTH and others, Bankrupts.

(District Court, N. D. New York. March, 1884.)

BANKRUPTCY—RENEWAL NOTE EXECUTED AFTER BANKRUPTCY.

Where a party previous to becoming a bankrupt was liable on a bond, by the terms of which he became a continuing guarantor of notes discounted by a certain bank for a company of which he was the president, and at the time of his bankruptcy the bank held a note so discounted, indorsed by him, the fact that a renewal note was given after the filing of his petition, will not prevent the debt from being proved as a claim against his estate.

In Bankruptcy.

Charles F. Durston, for assignee.

Theo. M. Pomeroy, for creditors.

COXE, J. At the time of the commencement of the proceedings in bankruptcy herein, William H. Seward, Jr., & Co., bankers, held the bond of the above-named bankrupt, by the terms of which he became a continuing guarantor for the payment of any notes which the said firm might discount, for a manufacturing company of which he was president. Demand and notice of non-payment were waived. When the petition was filed the manufacturing company was indebted to Seward & Co. in the sum of \$2,500, for which they held the company's note indorsed by the bankrupt. This note was renewed from

time to time, the last renewal being after the adjudication in bankruptcy. The assignee insists that for this reason the debt is not provable. It is thought, however, that under the peculiar phraseology of the bond and in view of the obligation there created, it would be unjust to treat the liability of the bankrupt as that of an indorser simply. At the time of the bankruptcy he was clearly liable on the bond in the event of the failure of the makers of the note to pay. True, his liability had not then become absolute, but the debt existed and the obligation was created before the petition was filed. Legally and equitably the estate is bound by his contract.

The report of the register is confirmed and the proof permitted to remain on file.

In re MERRELL and others, Bankrupts.

(District Court, N. D. New York. March, 1884.)

BANKRUPTCY—DEBTS CONTRACTED BY BANKRUPT AFTER PROCEEDINGS COMMENCED.

A debt contracted by a bankrupt subsequently to the commencement of proceedings against him cannot be proved in bankruptcy.

This is an appeal from a decision of the register sustaining certain proofs of debt. The petition in bankruptcy was filed November 13, 1873. On the twenty-sixth of the same month the bankrupts contracted the indebtedness in question. The adjudication was dated February 27, 1874. The proofs of debt were made February 13, 1875. The creditors contend that their proofs should stand, for the reason that the indebtedness upon which they are founded was due and payable at the time of the adjudication. The assignee insists that they should be expunged because the indebtedness was contracted subsequently to the proceedings in bankruptcy.

Charles F. Durston, for assignee.

Theodore M. Pomeroy, for creditors.

COXE, J. Section 5067 of the Revised Statutes provides: "That all debts due and payable from the bankrupt at the time of the commencement of the proceedings in bankruptcy * * * may be proved against the estate of the bankrupt." The proceedings are commenced (section 4991) when the petition is filed. These provisions were in force at the time the proofs in this matter were presented to the register. The indebtedness upon which the proofs are founded was not contracted until 13 days after the proceedings were commenced. The conclusion follows, therefore, that the proofs should not be permitted to stand. Even before the Revised Statutes, and before the substitution of the words "commencement of proceedings in bankruptcy" for the words "adjudication of bankruptcy" in section 19 of

the bankrupt law, the weight of authority favored a construction limiting the proof of debts to those existing at the time of filing the petition.

The proofs should be expunged.

THE ALINE.¹

(District Court, E. D. New York. December 31, 1883.)

1. SHIPPING — DELIVERY — PERISHABLE CARGO — DISCHARGE IN FREEZING WEATHER—"ACT OF GOD."

A steamship brought a consignment of oranges to New York, where she arrived on December 29th. The weather was so cold as to render it impossible to land oranges without freezing them, and continued below zero for several days. The oranges were landed in spite of the consignee's objection, and their value was for the most part destroyed. *Held*, that the act which destroyed the fruit was not the "act of God," but of man, in discharging the oranges at an unsuitable time.

2. SAME—EXCEPTIONS IN BILL OF LADING—VESSEL READY TO DISCHARGE.

A vessel is not "ready to discharge," within the meaning of a provision in the bill of lading that all goods are "to be taken from along-side immediately the vessel is ready to discharge," when it is impossible for her to discharge without destroying the cargo.

3. SAME—"EFFECT OF CLIMATE."

"Effect of climate," used in a bill of lading, does not apply to the effect of a temporary frost.

4. SAME—NEGLIGENCE.

Where it was proved that there was no necessity to land the oranges at that time, either because other consignees had demanded their cargo, which could not be separated from the libellant's, or because of the engagements of the vessel, it was held to be negligence on the part of the vessel to discharge at that time, and a decree was ordered in favor of the libellant.

In Admiralty.

Jas. K. Hill, Wing & Shoudy, (R. D. Benedict, of counsel,) for libellant.

McDaniel, Wheeler & Souther, for claimants.

BENEDICT, J. This action is brought to recover the value of a consignment of oranges shipped on board the steamship *Aline*, in Jamaica, to be delivered at New York. There is no substantial dispute in regard to the material facts. The oranges were shipped in good order, and arrived in New York in like order. The day on which the steamer arrived at New York, being Wednesday, December 29th, was so cold as to render it impossible to land oranges without freezing them. The weather continued cold, indeed below zero, until the following Monday. The steamer commenced to land oranges on the day of her arrival, and on that and the following Thursday and Friday landed the whole consignment. The necessary consequence was

¹ Reported by R. D. & Wylls Benedict, of the New York bar.

that the libelant's oranges were frozen, and their value for the most part destroyed. Objection was made by the libelant to the landing of the oranges because of the unsuitable weather, and he now brings this action to recover his loss.

It is conceded in behalf of the steam-ship that her defense, if she has any, rests upon the exceptions mentioned in the bill of lading. One of the exceptions relied on is that of damage caused by "act of God." But the act which destroyed this fruit was not the act of God, but of man, in discharging the oranges at an unsuitable time.

Again, it is contended in behalf of the steamer that the bill of lading makes special provision for the landing of these oranges when they were landed, because it says, "all goods to be taken from alongside immediately the vessel is ready to discharge." But this provision cannot relieve the steamer, for she was not "ready to discharge," within the meaning of this provision, when it was impossible for her to discharge without destroying the cargo. Ready to discharge means ready to make a proper discharge. And a discharge of oranges when the weather is so cold as to freeze them before they can be removed from the wharf is not a proper discharge.

Next, it is contended that the steamer is freed from liability by the provision of the bill of lading, which declares that the ship shall not be liable for any injury to the goods occasioned by " * * * effect of climate or heat of holds." But it would, as it seems to me, be straining language to consider the word "climate," used in the bill of lading, as intended to apply to a temporary frost such as existed when the steamer arrived. Moreover, in my opinion, negligence is shown, if it be proved, as I think it has been proved, that there was no necessity to land the libelant's oranges at the time when they were landed. The claimants insist that the steamer was compelled to land the oranges when she did, because she was a general ship, and other consignees of oranges had demanded the immediate landing of their fruit, from which the libelant's fruit could not be separated in the ship. If such a demand on the part of other consignees of cargo can be said to have been proved, it created no duty on the part of the carrier to discharge immediately, when such discharge would necessarily involve the destruction of cargo belonging to others. Such a demand, to be effective, must be reasonable. It was unreasonable on the part of consignees of any cargo to ask the steamer to destroy the libelant's cargo in order to make immediate delivery of theirs. Nor was there any necessity for the immediate discharge of these oranges arising out of the engagements of the steam-ship. The question whether a steamer running in a regular line, and being under obligation to sail on an advertised day, has the right to discharge inward cargo regardless of results, when the discharge becomes necessary to enable her to sail on her appointed day, does not arise here. For here it is shown that the steamer did not sail on her appointed day, but remained over a day, merely for the sake of getting in more

cargo, and it also appears that there was time before she sailed to have landed all the oranges in suitable weather and taken in all the outward cargo that she had to take. In this instance, therefore, there was no necessity to discharge the oranges when she did, to enable the steam-ship to keep her appointment. The oranges in question were shipped under two bills of lading, differing from each other in some particulars, but, in the view I have taken of the case, they are alike in legal effect, so far as regards the libellant's demand, and under any aspect in which I have been able to consider them, they do not relieve the steam-ship from responsibility to the libellant for the destruction of his fruit. There must therefore be a decree in favor of the libellant. The amount of his damages will be ascertained by a reference.

Let a decree be entered accordingly.

THE GEISER.¹

(District Court, E. D. New York. March 4, 1884.)

DAMAGE TO CARGO BY HEAT FROM STEAM-PIPES—BILL OF LADING—CONSIGNEE'S RIGHT OF ACTION—ADVANCES.

Where cabbages were stowed in the between-decks of a steam-ship, and were injured by heat from steam-pipes placed around the room where the cabbages were, for the purpose of warming the room when used, as it was intended, for steerage passengers, and it appeared that, the pipes being new and in some places obstructed, extra steam was put on in them to keep the chart-room warm, *held*, that the vessel was negligent and liable to the shipper for the damage done; that, though the shipper had expressed himself satisfied to have the cabbages stowed as they were, he could not be supposed to have assented to the pipes being unduly heated as they were; that the fact that the consignees who sued on the bill of lading had afterwards been paid their advances, did not destroy their right of action upon the contract.

In Admiralty. Action on bill of lading by consignee of cargo.

Clarence Cary, (Alex. Cameron, counsel,) for libellants.

Jas. K. Hill, Wing & Shoudy, for claimants.

BENEDIOT, J. This action is to recover for non-delivery in good order of a consignment of cabbages shipped in Copenhagen, on board the steam-ship Geiser, to be transported therein to the port of New York. The cabbages were stowed in the between-decks, and upon their arrival in New York a large portion of them were decayed, being then, according to the witnesses, about the consistency of soup. This condition of the cabbages was not owing to their condition when shipped. Then they were hard and sound. Nor was it owing to an unusually severe voyage. Quantities of cabbages in various vessels have endured a voyage of equal severity without decay or injury.

¹Reported by R. D. & Wyllys Benedict, of the New York bar.

What destroyed the cabbages in this instance was heat developed in steam-heating pipes which were placed around the room, in which the cabbages were stowed, for the purpose of warming the place when used, as it was intended to be used, for transporting steerage passengers. On this voyage these pipes were kept unduly heated, whereby the place was kept hot. I incline to the opinion that it was negligence on the part of the ship to have any steam in these pipes so long as the cabbages were stowed near there; but, however that may be, certainly it was negligence to heat the pipes as the proof shows they were heated on this occasion. The fact is that the steam-pipes of the ship, being new, were in some places obstructed, and in an effort to keep the chart-room warm by putting on extra steam, an extraordinary heat was developed in the pipes where they ran by the cabbages. And although the cabbages were nearly cooked by these pipes, and the ship filled with the odor, the presence of extraordinary heat in the pipes does not seem to have been discovered until the arrival of the vessel in New York. Ordinary diligence would have disclosed the fact that in the effort to keep the chart-room warm the pipes running by the cabbages were being unduly heated; and, under the circumstances, it was negligence to apply great heat to the cabbages, for which the ship is responsible.

There is nothing in the point that the shipper expressed himself satisfied to have the cabbages stowed as they were. He had, as I think, the right to suppose that the pipes would not be heated at all, so long as the room was used to stow cabbages. At any rate he cannot be supposed to have assented to the pipes being unduly heated as these pipes were.

The right of the libelants to maintain their action has not been successfully disputed. The contract sued on was made with them. The cabbages were consigned to them, and they had at that time an interest in them to the extent of their advances. The fact that since the contract was made they have been paid their advances does not destroy their right of action upon the contract made with them.

There must be a decree for the libelants, with an order of reference to ascertain the amount of the loss.

THE AMERICAN EAGLE.

(District Court, N. D. Illinois. March 3, 1884.)

MARITIME LIEN—ASSIGNMENT OF DEBT.

A maritime lien passes to an assignee of the debt.

In Admiralty.

W. G. Beale, for libelant.

Schuyler & Kremer, for respondent.

BLODGETT, J. This case comes before me at this time upon exceptions to the libel. The libel is filed by the assignee of the material-man who furnished the materials for repairing the tug, and who has assigned his claim to the libelant, who now seeks to enforce the lien of the material-man upon the tug. The exception to the libel is taken on the ground that the lien of the material-man does not accompany the claim into the hands of an assignee. It is conceded, for the purposes of this case, that the person who originally furnished the material had a statutory lien which he could have enforced in admiralty; but it is insisted that the transfer of the debt waived the lien, or, at least, that it does not inure to the benefit of the assignee to whom the debt is transferred. There is no doubt some seeming authority in support of the libelant's exception, but I think the more reliable and better considered cases are in favor of supporting the lien in behalf of the assignee, or giving him all the security which the original creditor had. In the case of *The Sarah J. Weed*, 2 Low. 555, this question is exhaustively discussed, and the authorities considered and analyzed by Judge LOWELL, who comes to the conclusion that all the rights of the original creditor come to the assignee; that the lien is a part of the indebtedness and goes with it into the hands of whoever the original creditor shall assign it to. After discussing the authorities, the judge says:

"The convincing reason is that given by Judge WARE in the case cited, that the debtor cannot be injured by an assignment, while the creditor will lose part of the benefit of his security if he cannot assign it."

The conclusion of this learned judge seems to me so satisfactory upon the question that I am content to accept his reasons without adding any of my own.

The exceptions to the libel are overruled, and the report of the commissioner confirmed.

BURNS v. THE SPAIN.¹

(District Court, E. D. New York. March 14, 1884.)

COLLISION IN SLIP—CANAL-BOAT AND PROPELLER—CONTRADICTORY EVIDENCE.

A canal-boat, lying in the same slip with a steam-ship, fouled the screw of the steam-ship and received injuries which caused her to sink. On the part of the canal-boat it was alleged that the accident was due to the screw being put in motion before the steam-ship was unmoored, which created a current. The steam-ship denied that the screw had been put in motion, and claimed that the canal-boat had drifted with the tide against the screw. *Held*, the testimony being contradictory, that the case did not present such a preponderance of evidence in favor of the libellant as to allow it to be held that he had proven his case, and the libel was dismissed, without costs.

In Admiralty.

J. A. Hyland, for libellant.

John Chetwood, for claimants.

BENEDICT, J. The libellant's canal-boat, lying in the same slip with the steam-ship Spain, on the morning on which the steamer sailed, in May, 1882, fouled the screw of the steamer, and there received injuries which caused her to sink. The charge of the libellant is that before the steam-ship was unmoored her screw was put in motion in the slip, without notice or warning to the boats in the slip, and thereby a current created which forced the libellant's boat upon the screw while in motion. On the part of the steam-ship, it is averred that the screw of the steam-ship was not moved prior to the accident, but that the canal-boat, through negligence, drifted by the tide upon the screw, the same not being in motion, where she was injured by coming in contact with the screw at rest, and not by a blow from the screw in motion. The testimony upon the point of the inquiry, namely, whether the screw of the steam-ship was in motion on the morning in question before the canal-boat got foul of the screw, contains contradictions that I have not been able to reconcile. I am satisfied that there is misstatement or concealment on one side or the other, but the case does not present such a preponderance of evidence in favor of the libellant's account of the accident as will permit me to hold that he has proven his case. I must therefore dismiss the libel. I give no costs.

¹ Reported by R. D. & Wyllys Benedict, of the New York bar

MACNAUGHTON v. SOUTH PAC. C. R. Co.

(Circuit Court, D. California. March 24, 1884.)

1. REMOVAL OF CAUSES FROM STATE COURT—APPLICATION MUST SPECIFY WHEN GROUND EXISTED.

In order to show jurisdiction in a federal court over a cause removed thither from a state court on the ground of the parties being residents of different states, it must appear in the application for removal that this ground subsisted at the time the suit was instituted in the state court.

2. SAME—AMENDMENT NOT A RIGHT.

The amending of an application so as to show jurisdiction is a matter within the discretion of the court, and cannot be claimed by a party litigant as a right.

3. SAME—"SESSION" EQUIVALENT TO "TERM" IN CONTEMPLATION OF ACT OF CONGRESS.

The word "session" in the present constitution of California, relative to the sittings of courts, is "term" within the contemplation of the act of congress.

Motion to Remand.

H. N. Clement, for plaintiff.

Gordon Blanding, for defendant.

SAWYER, J. This action was commenced in the Fourth district court of the state of California on August 1, 1879. Defendant demurred August 22, 1879, and the demurrer was overruled. Defendant having answered, plaintiff demurred to that part of the answer setting up new matter as a defense, October 2, 1879. The new constitution of California of 1879 having in the mean time taken effect, the case went into the superior court, as successor to the state district court, and on January 23, 1880, was assigned to department No. 7 of the superior court. On March 22, 1880, the demurrer to the answer was sustained, with leave to amend. An amended answer was filed April 1, 1880, which, under the Code of Civil Procedure, put the case at issue, and it was ready for trial. On January 21, 1884, the defendant filed a petition to remove the case to the United States circuit court, on the ground that the plaintiff is a citizen of Missouri, and the defendant a citizen of California. The petition alleges that "there is in this action a controversy between citizens of different states, to-wit, a controversy between your petitioner, the defendant herein,—which said defendant was at the time of the commencement of this action, ever since has been, and now is, a corporation duly organized and existing under and by virtue of the laws of the state of California, and which said defendant is a citizen of the said state of California,—and the plaintiff herein, who is a citizen of the state of Missouri." The proper bond was filed, and a copy of the record obtained by petitioner and filed in the circuit court, February 7, 1884, the state court having made no order and taken no action upon the petition. The plaintiff moved to remand the case to the state court, on the grounds: (1) That it is not shown by the petition that plaintiff was a citizen of Missouri at the time of the com-

commencement of this suit; (2) that it appears from the record that the application was not made "before or at the first term at which it could have been tried," or within the time required by law; (3) that defendant has not used due diligence in making application for removal. The supreme court has repeatedly held that on a removal the record must show that the citizenship of the parties of different states must exist both at the time of the commencement of the suit and at the time of the application for removal. In this case it does not appear but that both plaintiff and defendant were citizens of California when the suit was commenced. It simply shows that plaintiff was a citizen of Missouri at the time of the application for removal, which is four years and nearly ten months after the commencement of the suit. Clearly, the record does not show jurisdiction in this court, or a proper case for removal on the ground of citizenship, and the case must be remanded on that ground.

The present constitution of California, which went into effect on January 1, 1880, five months after this suit was commenced, provides that the superior court "shall be always open, (legal holidays and non-judicial days excepted);" and the Code of Civil Procedure, (section 73,) adapted to the new constitution, provides that "the superior courts shall always be open, (legal holidays and non-judicial days excepted,) and they shall hold their sessions at the county seats of the several counties, or cities and counties, respectively. They shall hold *regular sessions*, commencing on the first Mondays of January, April, July, and October, and special sessions at such other times as may be prescribed by the judge or judges thereof: provided, that in the city and county of San Francisco the presiding judge shall prescribe the times of holding such special sessions." Under these provisions of the Code and Constitution it is insisted by defendant that there are no terms of court in California, and that the provision of the act of congress of 1875, that the application for removal must be made "before or at the term at which said cause could be first tried," can have no application in said state; that a removal from any state court of California, therefore, is in time if the application be made at any time before the trial, no matter how long it may have been ready, or in a condition for trial. I am unable to take this view. Congress undoubtedly intended to require prompt action, and to provide that unless the party avails himself of the right promptly, after a reasonable opportunity to try the case has been had, his right to remove shall be cut off or waived. In this district it has always been held by the circuit court that the respective separate general sessions of the courts to be held four times in each year, provided for by the statutes, are "terms," within the reason and meaning of the act of congress. There is no magic in the word "terms," or in the words, the courts "shall always be open." Courts of chancery, and some other courts, are always open for many purposes, though not always in session; yet they have regularly defined terms. The regu-

lar sessions of the superior courts, commencing at regularly appointed periods, are substantially terms. They are terms, at least, in my judgment, within the reason and meaning of the act of congress, and this construction will be adhered to in this circuit, until overruled by the supreme court. The cause must be remanded on this ground, also. In some of the counties, by rule of court, new calendars are made up for every month, and the calendar is called anew and trials thereon begun on the first Monday in each month. It is by no means certain that the special sessions provided for in the act, and in those cases where monthly calendars are provided for by rule, such special and monthly sessions would not, also, be held to be terms, within the meaning of the act of congress. However that may be, the regular sessions must certainly be regarded as terms for the purpose of the removal of causes.

At the argument of the motion to remand, the court declared that the petition for removal was insufficient, for the reason that it did not show that plaintiff was a citizen of a state other than the state of California at the time of the commencement of the suit, whereupon the counsel for petitioner stated that this jurisdictional fact existed, and asked leave to amend the petition so as to properly state the facts. Several cases from the circuit courts were cited, wherein it was held that the circuit court had authority to allow the substitution of a new bond, to cure defects in the bond filed in the state court, and also to allow the petition to be amended so as to show the proper jurisdictional facts, where not shown by the record brought from the state court and filed in the circuit court. The filing of a new bond is merely to correct an *irregularity* in the proceedings. It is not a jurisdictional fact in this court. Generally the main object of a bond has been accomplished by the filing of the record in the circuit court before the motion to remand has been made. I have heretofore thought it proper to allow an imperfect bond to be corrected in the circuit court, or any other matter of mere irregularity, not affecting the jurisdiction of the court. But, although aware that some circuit judges have adopted a different practice, I have never in this circuit allowed a petition which did not show the jurisdictional facts to be amended in such way as to show jurisdiction.

I am not prepared to say that the court has not power to allow such an amendment to be made; but if the power be conceded, it is not a matter which the party can demand as a legal right, but only a matter for the exercise of a sound discretion by the court. It has been said by some judges that they saw no reason why an amendment, showing the jurisdictional facts, should not be allowed to the petition in the circuit court, that is not equally applicable to the case of a bill originally filed in the circuit court, which omits to properly state the jurisdictional facts depending upon citizenship or otherwise. In my judgment, there is a very important distinction, that does not appear to have attracted the attention of the courts in the cases hitherto

reported. Take the present case for example. The record in the state court shows a case over which that court has jurisdiction, and it does not show a proper case for removal, or any case of which this court has jurisdiction. The supreme court has decided that, whenever the proceedings in the state court have been perfected so as to show upon the record of that court that the petitioner is entitled to have his case removed, all jurisdiction of the state court ceases, and all subsequent proceedings in the case are illegal and void, even if it has refused to make any order for the removal; and that no order of removal is necessary. The jurisdiction of the state court is suspended, or superseded, the moment the proceedings showing a proper case for removal have been perfected. But the supreme court has also held the correlative proposition to be true, that the state court is not bound to renounce its jurisdiction, or let go its hold upon the case, until its record shows upon its face a proper case for removal, and that the jurisdiction of the United States court has attached; that the state court is authorized to proceed until its own record shows that it has lost jurisdiction, and the jurisdiction of the circuit court has attached. Now, in this case, the record of the state court shows jurisdiction in that court, and does not show jurisdiction in this court. The state court is, therefore, fully authorized to proceed to a final judgment, which will be valid. The record in this court does not show jurisdiction in this court, but if the petition be amended here, as desired, jurisdiction will be shown by the record in this court. Its jurisdiction appearing on the record, it can, also, regularly proceed to final judgment. Thus each court, proceeding on its own record, has jurisdiction, and the result may be, two final valid judgments, entirely different, or even opposite judgments, with no error in the record upon which either judgment or decree could be reversed on writ of error or appeal. That state courts may proceed when its record does not show a valid removal is evident from the fact that in a number of cases they have proceeded even after a valid removal; and their judgments in such cases have been reversed on that ground by the supreme court. In my judgment, in such cases as this the circuit court, in the exercise of a sound discretion, should not permit a case to be thus embarrassed by an amendment to the petition, so as to show a proper case for removal, and jurisdiction in the circuit court, when these conditions are not shown in the record of the state court. The law as to averments of citizenship has been laid down so often, and been so long settled, that those who fail to make the proper allegations are entitled to little indulgence on account of the oversight. Although there is no ground to suspect anything of the kind in this case, there is reason to believe that the right to remove is sometimes exercised, not for the purposes of justice, but just the opposite—to obtain delay, and to hinder and obstruct the administration of justice by the enormous expense and inconvenience of litigating five or six hundred miles, more or less, from home. In my judgment, in this

circuit, at least, a pretty strict rule should be adhered to, in requiring a clear case for removal to be made out in the first instance in the court where the suit is brought; and that the court to which a removal is made should not be lax in allowing defective records to be made good by amendment after removal. This is the principle heretofore acted upon in this court.

For the reasons indicated, leave to amend the petition so as to show jurisdiction is denied, and the cause remanded to the state court, with costs.

JUDGE and others v. ANDERSON.

(Circuit Court, D. Minnesota. April 24, 1884.)

1. PRACTICE IN CASES REMOVED FROM STATE COURTS—WHEN JURISDICTION ATTACHES.

The jurisdiction of the United States circuit court attaches in a case removable under the statute at the time when the petition and bond is filed in the state court.

2. SAME—WHEN ISSUE MAY BE JOINED.

If the cause commenced in the state court 30 days before the next session of the circuit court, and is not at issue when removed, the rule of the United States circuit court in this district gives until the fifth day of the term to make up the issue, and the case then stands for trial.

On April 9, 1884, the defendant filed a petition and bond for removal of the above-entitled cause to the circuit court of the United States for the district of Minnesota. The petition is in compliance with the statute for the removal of causes from the state to the federal court, and is accompanied by the bond required. An order was made for the removal by the state court, and on April 14th the *plaintiffs* procured and filed a transcript of the record of the cause in the clerk's office of the United States circuit court for the district of Minnesota. The term of that court as fixed by law commenced on the second Monday in December, A. D. 1883, and was still continuing when the transcript of the record was filed. The circuit court has a rule that when a cause is commenced in the state court, 30 days before the next term of the United States circuit court in the district convenes, if issue is not joined in the state court at the time of the removal, the cause shall stand for trial, and the issues shall be joined therein within five days from the first day of the said term. The defendant, by counsel, appears specially under protest, and objects to the jurisdiction of the court to proceed in the action and grant judgment for default according to the state statute, unless an answer is filed within a time to be fixed by the court.

Frackelton & Careins, for plaintiffs.

Warner & Stevens, for defendant.

NELSON, J. It has been decided by the supreme court of the United States that the jurisdiction of the United States circuit court attaches in a case removable, under the statute, at the time when the petition and bond is filed in the state court. The transfer of jurisdiction is then complete in advance of the entry of a transcript of the record in the clerk's office of the circuit court. *Duncan v. Gegan*, 101 U. S. 812; *Railroad Co. v. Koontz*, 104 U. S. 15; *Steam-ship Co. v. Tugman*, 106 U. S. 122; S. C. 1 Sup. Ct. Rep. 58; *St. Paul & C. Ry. Co. v. McLean*, 2 Sup. Ct. Rep. 499. The circuit court does not take the suit unless its jurisdiction appears of record; and if, before the statutory time when the removing party is required to enter a copy of the record and his appearance in the United States circuit court, either party procures a transcript and files it in the clerk's office, the jurisdiction then appears of record, and all proceedings necessary to prepare the cause for trial at the next session of the court can be taken by either party. The court then has jurisdiction of the cause as if it had been commenced there by original process.

In the case of *Kern v. Huidekoper*, 103 U. S. 487, the plaintiff applied for removal July 6th, and filed the transcript in the clerk's office of the United States circuit court on July 27th. The term of that court prescribed by law began on July 2d, before the petition for removal was filed in the state court. On November 14th, the July term still continuing, the circuit court made an order approving the filing of the record. The supreme court held that the filing of the record July 27th gave the circuit court the right to proceed with the cause; that is, as I understand the decision, to go on and perfect the issues, if necessary, and grant provisional remedies, but the removing party is not required to try the issues until the term next ensuing that of the state court when the cause was removed.

The rule cited by counsel does not prevent the court from entertaining motions to make up the issues when applied to by the parties. If the cause commenced in the state court 30 days before the next session of the circuit court, and is not at issue when removed, this rule gives until the fifth day of the term to make up the issues, and the cause then stands for trial. It applies to all cases removed and docketed on the first day of the term, where neither party had previously applied to the court to proceed in the case.

The defendant will file his answer within five days from this day, to-wit, April 24, 1884; and it is so ordered.

MULVILLE, Trustee, v. ADAMS and others.

*(Circuit Court, N. D. New York. March 4, 1884.)***1. FIRE INSURANCE — DESCRIPTION OF PREMISES — RESPONSIBILITY OF THE ASSURED FOR WARRANTIES AND REPRESENTATIONS.**

Where, in an application for insurance whereby the assured agrees that the application is a just, full, and true exposition of all the facts and circumstances in regard to the condition, situation, value, and risk of the property, so far as the same are known to him and are material to the risk, it is immaterial whether the statements are regarded as warranty or merely as representations of the truth of the statement, because the applicant only assumes responsibility for their truth so far as the facts are known to him and are material to his risk.

2. SAME—CONDITIONS WORKING FORFEITURE.

Conditions that work a forfeiture are not to be extended by construction. Being put into the policy for the benefit of the insurer, they will be construed most liberally for the assured.

3. SAME—MATERIALITY A QUESTION OF FACT.

The materiality of a representation is a question of fact. The test is the probable effect of the representation upon the judgment of the insurer.

In Equity.

Wm. W. Badger, for complainant.

Wetmore & Jenner, for defendants.

WALLACE, J. The complainant, as trustee for 21 insurance companies that had issued policies of fire insurance to the defendant Adams, took an assignment of a bond and mortgage executed by Adams to one Dodge, and has filed this bill to foreclose the mortgage and obtain a decree against Adams on the bond. The property of Adams insured by said policies had been burned, and suits had been brought, some by Adams and some by Dodge, against the several companies to recover the loss, when it was arranged between all the parties that Dodge should assign the bond and mortgage to the complainant, and the pending suits should be discontinued. The assignment contained the following clause:

"The said Mulville, in consideration of receiving said assignment and the discontinuance of such actions, agrees to and with the said Dodge that he will within thirty days commence a suit to foreclose the said mortgage, to which suit the said Adams shall be made a party, and a claim made against him for any deficiency, and that if any of the said policies of insurance were valid as to the interest of said Adams therein at the time of the fire, May 15, 1877, that then such of them as were then valid shall be deemed a good and sufficient defense to the extent that such policies may have been valid."

The property insured consisted of "a saw-mill building, a stone boiler-house attached thereto, and a brick chimney standing detached, all known as the Clinton Mills, together with the engines, boilers, machinery, tools, and all fixtures and appurtenances contained in the buildings." The total insurance was \$20,500, of which \$5,473.50 was upon the buildings and \$15,026.50 was upon the personal property and fixtures.

The bill alleges generally that the several insurance policies issued by the companies to Adams were invalid and void on account of misrepresentations, concealment, and breach of warranty on the part of Adams. The specific allegations are that the insurance was made and issued upon a survey and written description of the property, and that by the terms of the policies such survey and description were to be taken and deemed a part of such policy and a warranty on the part of the assured; and that by other conditions of the policies any false representations by the assured of the condition, situation, or occupancy of the property, any omission to make known every fact material to the risk, any overvaluation, or any misrepresentation whatever, either in a written application or otherwise, should render the policies void: The bill further alleges that in the said survey and description of the premises, among other things, the insured represented the premises described in said policies as being disconnected and detached from a building known and described as a lath and shingle mill; and further represented that there was no planer or planing machine on said premises, nor in the said adjoining building; that there was no woodland or woods within one quarter of a mile of said premises; and that there were no other buildings than those set forth in the application within 150 feet of the buildings insured,—all of which representations were false. The bill also alleges that the insured represented and warranted that there was no incumbrance or mortgage on the property insured, whereas there was in fact at the time of the application for insurance a mortgage thereon in favor of one Dodge. By an amendment to the bill it is alleged that by the terms of the several policies it was conditioned that if the property covered by the insurance should be sold, conveyed, or transferred, the policies should become void, and that they did become void because of a conveyance made by Adams to his son after procuring the insurance and before the fire.

The case turns upon the validity of the policies as affected by the misrepresentations and breaches thus set forth. If none of them are invalid because of these misrepresentations and breaches, they were valid at the time of the fire. The bill contains further allegations intended to show that a recovery could not have been had against the insurance companies upon the policies because of breaches of conditions which took place after the loss, such as failure of the assured to comply with the conditions respecting proofs of loss, failure to furnish certified copies of invoices of property destroyed, refusal of the assured to arbitrate, and overvaluation and false swearing in the proofs of loss. These allegations must be deemed irrelevant to the real controversy, because by the agreement under which the complainant acquired the mortgage the only question open to contestation is whether the policies were valid at the time of the fire. If they were then valid, they are a good defense to the mortgage. The language of the agreement does not permit the complainant to contest

generally the question whether the plaintiffs in the pending suits against the insurance companies were entitled to recover upon the policies.

The validity of the policies has been assailed in the arguments of counsel upon several grounds, which must be disregarded because the allegations of the bill do not present them. No overvaluation is alleged except in the proofs of loss, and no concealment, as distinct from misrepresentation, is alleged. The controversy is therefore narrowed to the specific issues of misrepresentation or breach of warranty as follows: That the insured premises were disconnected from the shingle mill; that there was no planing-machine in the saw-mill or shingle-mill; that there was no woods or woodlands within one quarter of a mile; that there were no other buildings, except those shown in the survey, within 150 feet of the insured premises; that there was no mortgage to Dodge upon the property; and whether there was a breach of condition whereby the policies are void because of the conveyance of Adams to his son.

There were no oral representations made by Adams, or in his behalf, as a basis for the insurance. The policies were obtained through one Moies, an insurance broker employed by Adams. Moies applied to one Woodward, an insurance agent, and produced to him a written application which had been used by Adams several years before for obtaining a policy on the same property from the Imperial Fire Insurance Company. There was a survey or diagram showing the ground plan of the saw-mill, the shingle-mill, and the chimney, annexed to the application. Woodward was agent for four insurance companies—the Farmville, the Humboldt, the Safeguard, and the Royal Canadian. He made a synopsis of the Imperial application, which is spoken of in the proofs as a "digest," annexing to it a copy of the diagram and a description of the property to be insured. This was shown by him to the officers or agents of some of the companies, and the policies issued by these companies were based upon it as the application for insurance. Every policy in suit was obtained upon this "digest," except the policies issued by the companies for which Woodward was agent and those issued by the Merchants Insurance Company, the St. Louis Insurance Company, and the American Central Insurance Company. The policies issued by the Farmville, the Humboldt, the Safeguard, the Royal Canadian, the Merchants, the St. Louis, and the American Central Companies were obtained upon the original or Imperial application.

1. There was no misrepresentation or breach of warranty which avoids the policies issued upon the basis of the "digest." Every representation contained in this application was a warranty by the terms of the policies, but none of the representations were untrue. By this application the assured represented that there was no planing-machine in the saw-mill building and no woodland within a quarter of a mile. Both of these representations were true. He did not represent,

however, that the saw-mill was disconnected from the shingle-mill, or that there were no other buildings within 150 feet of the property to be insured. The diagram purported to give only the ground plan of the buildings shown upon it. The shingle-mill was properly described as an "adjoining building."

2. There was no misrepresentation or breach of warranty which avoids the policies issued upon the basis of the "Imperial survey" except respecting the existence of a mortgage upon the property. This application consisted of a printed blank containing questions to be answered by the applicant, and an instruction to annex a diagram with a full explanation of the buildings to be insured, and of all buildings within 150 feet. The diagram annexed showed a ground plan of the saw-mill, boiler-room, lath and shingle mill, the side track of a railway, and the location of the water which supplied the mill. An important feature of the application consists in an agreement at the end whereby the applicant covenanted that the application was a just, full, and true exposition of all the facts and circumstances in regard to the condition, situation, value, and risk of the property to be insured, "so far as the same were known to him, and were material to the risk." This agreement restricts the effect of the representations contained in the application. Whether they are treated as a warranty of their truth or as representations merely is not material, because, in either view, the applicant only undertook responsibility for the truth of the representations, so far as the facts were known to him and were material to the risk. *Houghton v. Manuf'rs' Ins. Co.* 8 Mete. 114. The application and the policies are to be read together, and it is a familiar rule in the interpretation of conditions which work a forfeiture that they are not to be extended by construction, and, being inserted for the benefit of the insurer, they are to be liberally construed in favor of the assured. No effect can be given to the covenant on the part of the applicant at the end of the application, unless it is construed as restricting his undertaking and holding him accountable for the accuracy of his statements, so far only as the facts stated are material to the risk. If every statement and the truth of every answer were to be treated as material, there would be nothing upon which the restriction could operate. In this application the assured represented by his answer to the eighteenth question that there was no planing-machine upon the premises, but the premises to which the question and answer refer are the insured premises, not the adjuncts or adjoining premises. *Northwestern Ins. Co. v. Germania Ins. Co.* 40 Wis. 446; *Curlin v. Western Assurance Co.* 57 Md. 515. There was therefore no misrepresentation.

If the first subdivision of the answer should be regarded as an answer to the first subdivision of the question, it is not responsive. When a question is not answered it is not to be inferred that there was nothing which required an answer, and in such case if the answer is not responsive or satisfactory the insurer waives a full answer. *Higgins*

v. *Phoenix Ins. Co.* 74 N. Y. 6; *Carson v. Jersey City Ins. Co.* 43 N. J. Law, 30; *Com. v. Hide & Leather Ins. Co.* 112 Mass. 186. A reference to the original application, however, shows that this subdivision of the answer was intended as a response to the last subdivision of question 17. The answer to the thirty-fourth question is to be regarded as making the diagram an exhibit and description of all buildings within 150 feet of the insured building, and is equivalent, therefore, to a representation that all such buildings were shown upon it. As it did not disclose the existence of certain buildings within that distance, the omission would be fatal to the validity of the policies were it not that the assured only undertook to be responsible for the truth of his representations, so far as the representations were material to the risk. The materiality of a representation is a question of fact; the test is the probable influence of the representation upon the judgment of the insurer. The testimony of the experts here is sufficient to indicate that the existence of buildings not within 100 feet of the insured property would not be deemed to increase the risk. The omission to describe those outside of that distance must, therefore, be held to be immaterial. This application also contained a representation that there was no mortgage or incumbrance upon the property to be insured. This representation was untrue.

3. Under the allegations of the bill, the only breach of warranty or misrepresentation concerning incumbrances or mortgages upon the insured property is such as arises from the existence of a mortgage to Dodge. At the time the application was originally prepared, there was no mortgage on the property, so far as appears by the proofs. While there is no reason to suppose that Adams intended to misrepresent the fact when the policies in suit were obtained, the inadvertent representation must, of course, be given full effect. The only policies issued upon this application were those of the Merchants' Insurance Company, the St. Louis Insurance Company, the American Central Insurance Company, The Farmville Insurance & Banking Company, the Humboldt Insurance Company, the Safeguard Fire Insurance Company, and the Royal Canadian Insurance Company. Woodward, who was the agent of four of these companies, (the Farmville, the Humboldt, the Safeguard, and the Royal Canadian,) knew of the existence of the mortgage to Dodge at the time the policies were issued. The policies issued by these companies are therefore not invalidated by reason of its existence. His knowledge is imputable to them, and no misrepresentation can be predicated of a fact of which the insurers were fully cognizant. Ang. Ins. § 324. This branch of the controversy is thus narrowed to the policies issued by the Merchants' Insurance Company, the St. Louis Insurance Company, and the American Central Insurance Company. The policy issued by the Merchants' Insurance Company may also be excluded because the evidence shows that the secretary of that company knew of the existence of the Dodge mortgage. The loss in that policy was

originally made payable to Dodge as mortgagee. The policies of the St. Louis Insurance Company and the American Central Insurance Company were obtained through Messrs. Monroe & Melville, the agents of those companies, and were issued by them upon the faith of the statements contained in the Imperial application. As to these policies it must be held that the misrepresentation was fatal to the insurance.

4. The only policies as to which a breach of the condition respecting a sale or conveyance of the property covered by the insurance can be alleged are those issued by the Franklin Insurance Company and the German-American Insurance Company, all the others having been made and delivered after the date of the conveyance by Adams to his son. The proofs show that while these policies were in force, and previous to the fire, Adams made and acknowledged a conveyance of the property to his son, and three days afterwards the son made and acknowledged a conveyance back to the father. The first deed was put on record shortly after the fire. Both the parties to the conveyance testify that it was never delivered, and the father testifies that he put it on record to prevent judgments which were about to be entered against him from becoming liens on the property. The theory of the non-delivery of the deed is so inconsistent with the execution and delivery of the reconveyance by the son that it should not be regarded as true. The act of the son in making a conveyance back, and of the father in accepting it, was an authentic declaration by both, made at a time when neither of them had any interest to subserve by a perversion of the facts, that the former had a title to transfer. These policies are therefore held to have become void. It follows that none of the policies are invalid upon the grounds alleged in the bill except those issued by the Franklin Insurance Company, the German-American Insurance Company, the St. Louis Insurance Company, and the American Central Insurance Company. The amount due upon the several policies is not in issue, because the bill does not charge that the loss was less than the insurance. The proofs, however, show that it was equal at least to the total insurance. Neither is there any issue as to the invalidity of Adams' discharge in bankruptcy which is set up in the answer as a defense to any decree against him upon his bond. The validity of the discharge is not put in issue by a replication. Story, Eq. Pl. § 878. It is needless to say that no facts are properly in issue unless charged in the bill; that every fact essential to obtain the relief desired must be alleged; and that no relief can be granted for matters not charged, although they may be apparent from other parts of the pleadings and evidence. Id. § 257.

A decree is directed for the complainant, with a reference to a master to ascertain the amount due upon the mortgage. In ascertaining this the master will apply the insurance moneys due upon all the policies, except the four declared void, as a payment upon the mortgage at the date of the assignment to complainant.

UNITED STATES v. AUFFMORDT and another.

(District Court, S. D. New York. March, 1884.)

1 PENALTIES AND FORFEITURES—MOIETY ACT OF JUNE 22, 1874—FRAUDS ON REVENUE.

The moiety act passed June 22, 1874, was designed to cover the whole ground of frauds on the revenue in the entry of imported goods at the custom-house, embracing the punishment of offenders criminally, as well as indemnity to the government; and it therefore supersedes, by implication, the different provisions of sections 2839 and 2864 of the Revised Statutes on the same subject.

2 SAME—REV. ST. §§ 2839, 2864.

The absolute forfeiture of goods fraudulently entered, which is prescribed by section 12 of the moiety act, is inconsistent with, and repugnant to, the forfeiture in the alternative only of either the goods or their value, as prescribed by sections 2839 and 2864. Under the former, the title of the goods vests in the United States from the moment when the fraud is committed, and prevails against *bona fide* purchasers before seizure; under the latter, the title of the government vests only from the time of its election to proceed against the goods, rather than for their value, and a *bona fide* sale in the mean time will pass a good title against the government. The absolute forfeiture under section 12 of the moiety act, and the alternative forfeiture under sections 2839 and 2864, for the same frauds, cannot co-exist; the alternative forfeiture of value under those sections is, therefore, within the repealing clause of the moiety act, which repeals all acts or parts of acts inconsistent therewith.

3 SAME—ACT OF FEBRUARY 18, 1875—CONSTRUCTION—REPEAL—PROCEEDING AGAINST GOODS.

The act of February 18, 1875, amending the Revised Statutes, was not designed as new legislation, but only to make the text of the Revised Statutes express truly the law as it existed on December 1, 1873. The amendment of section 2864 by that act is to be read and construed as though it were a part of the Revised Statutes, as originally enacted, and subject, therefore, to the provisions of sections 5596 and 5601. *Held, therefore*, that the amendment of section 2864, by the act of February 18, 1875, does not supersede the moiety act as subsequent legislation. *Held, accordingly*, that forfeitures of value for fraudulent undervaluations can no longer be enforced under sections 2839 and 2864; the remedy is confined to proceedings against the goods under section 12 of the moiety act.

4 SAME—SUIT IN PERSONAM.

Whether the language of section 2864, prescribing forfeiture of "value" without saying, like section 2839, of whom to be recovered, is sufficient to authorize a suit *in personam*, *quære*.

The above suit was brought *in personam* to recover \$321,519.29, the value of a large quantity of silk ribbons imported from Switzerland into the port of New York, during the years 1879, 1880, 1881, and 1882, and entered in the custom-house by the defendants, as it is alleged, by means of fraudulent undervaluations in the invoices as to the market value of the goods. The importations and entries are 91 in number. The declaration alleges that the value of such goods, by reason of such fraudulent undervaluations, became forfeited to the United States under sections 2864 and 2839, Rev. St. None of the goods were seized, nor were any proceedings ever taken to forfeit the goods.

By the plaintiff's bill of particulars the record shows that the goods were sent by the manufacturers in Switzerland to the defendants here for sale on commission, none of them being purchased goods. The

cause came on for trial on the thirteenth of February, 1884, before the district judge and a jury; and after the opening by the plaintiff's counsel, stating in substance the above matters, the defendant's counsel moved, upon the record and the facts stated in the opening, that a verdict be directed for the defendant, on the ground that forfeitures of value under section 2864 had been superseded by section 12 of the act of June 22, 1874, and that since that act the goods only, and not their value, could be forfeited. After elaborate argument, the court, on the next morning, granted the motion, upon the grounds stated in the following opinion:

Elihu Root and John Proctor Clarke, for the United States.

Tremain & Tyler and Charles M. Da Costa, for defendant.

BROWN, J. The claim of the plaintiff in this case is founded upon alleged fraudulent undervaluations of imported goods consigned to the defendants for sale by the manufacturers in Europe. Such frauds fall clearly within the provisions of section 12 of the act of June 22, 1874, which, for convenience sake, I shall call the moiety act. They also fall equally clearly within section 1 of the act of March 3, 1863, and section 2864, Rev. St., if the forfeitures of value provided by those sections are still in force. The latter prescribe a "forfeiture of the merchandise, or the value thereof;" and this suit is based upon that provision. The moiety act prescribes a forfeiture of the goods only.

The point raised by the motion does not appear to have been previously considered in any reported case. But few suits for the forfeiture of the value of goods, instituted since the passage of the moiety act, have been brought to trial within this district; and in none of them do I find that the attention of the court was called to the point now raised, namely, that the moiety act, by prescribing fine, imprisonment, and the absolute forfeiture of the goods, as the remedies of the government in cases of fraudulent undervaluation, omitting any forfeiture of value, has superseded and repealed section 1 of the act of March 3, 1863, (section 2864, Rev. St.,) which in similar cases prescribed only an alternative forfeiture of the goods or the value thereof.

Section 2839 provides for the forfeiture of merchandise or the value thereof, "to be recovered of the person making entry," where the goods are "not invoiced according to the actual cost thereof at the place of exportation, with the design to evade payment of duty." This section, taken from section 66 of the act of March 27, 1799, (1 St. at Large, 677,) is applicable only to goods purchased. *Alfonso v. U. S.* 2 Story, 421, 429, 432. Where goods are imported into this country by the manufacturer, the invoice is required to state, not the actual cost at the place of exportation, but the "true market value thereof." Sections 2841, 2845, 2854.

The only statute under which a forfeiture of value can be claimed in cases like the present, that is, of goods obtained otherwise than

by purchase, is section 2864, taken from section 1 of the act of March 3, 1863, (12 St. at Large, 763.) That section reads as follows:

"If any owner, consignee, or agent of any merchandise shall knowingly make, or attempt to make, an entry thereof by means of any false invoice, or false certificate of a consul, vice consul, or commercial agent, or of any invoice which does not contain a true statement of all the particulars hereinbefore required, or by means of any other false or fraudulent document or paper, or of any other false or fraudulent practice or appliance whatsoever, such merchandise, or the value thereof, shall be forfeited."

As an original question, it might well be doubted whether the mere words of section 2864 and of section 1 of the act of 1863, declaring a forfeiture of the goods or the value thereof, would be sufficient to sustain a suit *in personam* against the importer for such value without any seizure of the goods. I do not know of any analogy supporting such penal actions *in personam* upon such loose statutory words. The section does not specify who is to be sued in person, or against whom any recovery is to be sought; whether against the owner of the goods, his agent, or against the person making the entry. Suppose the owner guilty of fraud, but the agent making the entry innocent, is the latter, after having sold the goods and turned over the proceeds to his principal, to be held liable to pay the value over again to the United States, without any more explicit language making him liable than simply that the value shall be forfeited, without saying from whom to be recovered?

The act of 1799, (section 2839,) after declaring a forfeiture of value, adds "to be recovered of the person making entry." By the omission of these, and any equivalent words, in the act of 1863, it might well be considered that the intention of the latter act was only to provide for the forfeiture of the value of the goods in those cases where the goods had been seized and allowed to be bonded under other provisions of law, a power concerning which some question has been repeatedly made. Though many suits for value have been brought since the act of 1863, I am not aware that the attention of the court has been called to this objection in any previous action. Omitting, therefore, any further reference to this question, I proceed to the main ground of the motion, assuming that section 2864, like section 2839, authorizes a suit for value, independent of any seizure of the goods.

Section 12 of the moiety act, passed June 22, 1874, (1 Sup. Rev. St. 79,) is as follows:

"Any owner, importer, consignee, agent, or other person who shall, with intent to defraud the revenue, make, or attempt to make, any entry of imported merchandise, by means of any fraudulent or false invoice, affidavit, letter, or paper, or by means of any false statement, written or verbal, or who shall be guilty of any willful act or omission by means whereof the United States shall be deprived of the lawful duties, or any portion thereof, embraced or referred to in such invoice, affidavit, letter, paper, or statement, or affected by such act or omission, shall for each offense be fined in any

sum not exceeding five thousand dollars nor less than fifty dollars, or be imprisoned for any time not exceeding two years, or both; and, in addition to such fine, such merchandise shall be forfeited; which forfeiture shall only apply to the whole of the merchandise in the case or package containing the particular article or articles of merchandise to which such fraud or alleged fraud relates. And anything contained in any act which provides for the forfeiture or confiscation of an entire invoice in consequence of any item or items contained in the same being undervalued, be and the same is hereby repealed."

Section 13 provides that any merchandise entered by any person violating the preceding section, but not subject to forfeiture under the same section, may, "while owned by him, or while in his possession, to double the amount claimed, be taken by the collector and held as security for the payment of any fine incurred." Section 14 of the same act provides that the omission, without intent to defraud the revenue, or any of the various shipping charges, commissions, port duties, etc., which may be required by law, shall not be a cause of forfeiture of goods or their value; but requires that in such cases the collector shall add to such charges the further sum of 100 per cent., which addition shall constitute a part of the dutiable value. Section 16 permits no fine, penalty, or forfeiture in any case, existing or subsequent, unless the jury finds specially an actual intent to defraud. Section 22 provides that no suit to recover "any pecuniary penalty or forfeiture of property" under the revenue laws shall be instituted except within three years, etc. Section 26 repeals all acts and parts of acts inconsistent therewith. The section last cited does not in terms refer to sections 2839 and 2864, nor to the corresponding sections of the acts of 1799 and 1863, from which they were taken, but repeals whatever is inconsistent with it.

Although the moiety act was passed on the same day with the enactment of the Revision of the Statutes, the latter is only declaratory of the law as it existed on December 1, 1873, (section 5595;) and all acts of congress passed after the latter date are to be construed as subsequent enactments, and modify the Revised Statutes accordingly. Section 5601; *U. S. v. Bowen*, 100 U. S. 508, 513; *Brown v. Jefferson Co. Nat. Bank*, 9 FED. REP. 258-260; *In re Oregon, etc., Co.* 3 Sawy. 614, 617; *U. S. v. Bain*, 5 FED. REP. 192, 195. The single question, therefore, is, whether the forfeiture of the value of goods, by reason of fraudulent undervaluations on the entry thereof, has been repealed by the provisions of the moiety act. Such consideration as I have been able to give to the subject satisfies me that the forfeiture of value in such cases must be deemed superseded and repealed by that act,—*First*, because in the passage of the moiety act the whole subject of fraudulent importations, and the remedies and punishments to be enforced therefor, were evidently fully and deliberately considered; new and different fines, punishments, and remedies were thereby provided, which include both punishment of the offender and indemnity to the government; and these, by implication, supersede the former and dif-

ferent provisions on the same subject: *second*, because the absolute forfeiture of the goods denounced by the moiety act is clearly repugnant to the alternative forfeiture only "of the goods *or* the value thereof," as prescribed in the previous acts, so that both cannot possibly co-exist; and, *third*, upon the decisions of the supreme court in analogous cases.

The rule of construction where a subsequent statute covers the same ground as a former one has been frequently defined by the supreme court. Thus, in the case of *Norris v. Crocker*, 13 How. 429, 438, Mr. Justice CARROX, delivering the unanimous opinion of the court, said:

"As a general rule, it is not open to controversy that where a new statute covers the whole subject-matter of an old one, adds offenses and prescribes different penalties for those enumerated in the old law, that then the former statute is repealed by implication, as the provisions of both cannot stand together."

Mr. Justice FIELD, in *U. S. v. Tynen*, 11 Wall. 88, said, (p. 92:)

"It is a familiar doctrine that repeals by implication are not favored. When there are two acts on the same subject, the rule is to give effect to both, if possible. But if the two are repugnant in any of their provisions, the latter act, without any repealing clause, operates, to the extent of the repugnance, as a repeal of the first; and even where two acts are not in express terms repugnant, yet if the latter act covers the whole subject of the first, and embraces new provisions, plainly showing that it was intended as a substitute for the first act, it will operate as a repeal of that act."

The same rule was reaffirmed and applied in the case of *King v. Cornell*, 106 U. S. 395, 396, S. C. 1 Sup. Ct. Rep. 312, in the case of *Pana v. Bowler*, 107 U. S. 529, 538, S. C. 2 Sup. Ct. Rep. 704, and in *Murdock v. City of Memphis*, 20 Wall. 590, 617. In the case last cited, Mr. Justice MILLER, in delivering the opinion of the court, says, (p. 617:)

"A careful comparison of these two sections can leave no doubt that it was the intention of congress, by the latter statute, to revise the entire matter to which they both had reference; to make such changes in the law as it stood as they thought best; and to substitute their will in that regard entirely for the old law upon the subject. We are of opinion that it was their intention to make a new law, as far as the present law differed from the former; and that the new law, embracing all that was intended to be preserved of the old, omitting what was not so intended, became complete in itself, and repealed all other law on the subject embraced within it."

The language quoted from these cases seems to me to be specially applicable here. In scarcely any of the cases cited, where a later statute was held to repeal a former one by implication, was the evidence so clear, as it seems to me, both from the provisions of the statute itself and the history of its passage, that congress intended to deal with the whole subject, and to declare what in the future should be the whole law of remedy and punishment, as in the case of the moiety act, in its dealing with the subject of fraudulent importations, and the punishment and remedies of the government therefor.

The attention of congress had been called to the whole subject by what had been deemed to be crying abuses in the administration of
v.19,no.13—57

the former law. There were widespread complaints that the machinery of the law then existing was skillfully worked by agents and informers of the government for their own benefit, to extort large sums of money from the merchants for trifling and uncertain irregularities or violations of law. The chief means by which these extortions were alleged to be practiced were by the institution of suits for vast sums of money, alleged to have become due to the government through forfeitures of the value of goods entered during a series of years preceding. In such suits, by a preliminary seizure of the books and papers of the merchant and the detention of them in custody, and by reason of technical forfeitures unaccompanied by fraud, and of the forfeiture of whole invoices for irregularities in a single item, merchants, deprived of their books and uncertain of the precise facts, were often constrained, through their uncertainty as to the result, and the injury to their credit by the long pendency of suits for such large demands against them, to pay great sums in settlement, far beyond the bounds of reasonable forfeiture or of legitimate punishment.

The moiety act, passed under these circumstances, shows, by its own provisions, that it was designed to correct the evils complained of, by means of changes broad and radical: (1) By abolishing the moiety system entirely; (2) by prescribing more definite rules under which the books and papers of merchants might be seized and examined; (3) by preventing the forfeiture of a whole invoice when only a part of the cases or packages included in it might be affected by fraud, (section 12;); (4) by abolishing (section 16) all fines and forfeitures, except where a jury should find an actual intent to defraud; (5) by enacting, in cases of actual fraud, new and heavy punishments, by fine and imprisonment, (section 12;); (6) by enacting, also, in cases of actual fraud, the absolute forfeiture of the goods to which the fraud relates, in place of the former alternative of a forfeiture of the goods or their value, and thus disallowing civil suits for value merely, which had furnished the chief means of the previous abuses; (7) by providing security (section 13) for the collection of fines where the goods were not seized; (8) by limiting suits to three years, (section 22.)

This act, moreover, is more precise and definite in its provisions than are the former acts, in defining the frauds to be punished; it embraces every conceivable act of commission or of omission, accompanied by fraud. There are new conditions and qualifications applying to every part of the former law. As a condition of forfeiture, in every act of commission, the moiety act requires an actual intent to defraud; and in every act of omission, it adds, as a further condition, that the United States be thereby "deprived of its lawful duties," (section 12,) a qualification not existing under section 2864. But why should congress add such a qualification to acts of omission, if for precisely the same acts of omission a forfeiture was still to be incurred under section 2864 without any such qualification? The

two are inconsistent in intention, and the latter act therefore supercedes the former. The case of *Davies v. Fairbairn*, 3 How. 636, is exactly analogous, where a new qualification upon the power of a justice of the peace to take acknowledgments, was held to repeal by implication a former statute without such qualification.

Section 12, moreover, creates a new criminal offense for the same frauds, punishable by heavy fine and imprisonment; and while, in its remedial parts, providing for the indemnity of the government, it limits the remedy by forfeiture to the goods only, it makes this forfeiture absolute, so that even *bona fide* purchasers get no title as against the government; and if this remedy be lost by a dispersion of the goods before seizure, it still provides additional means for indemnifying the government, not merely by the heavy fines which it imposes on conviction for the same acts, but by authorizing a seizure by the collector of any other imported goods of the same merchant, as security for the payment of any such fines as may be recovered. Section 13. These fines themselves would, as a general rule, furnish complete indemnity to the government for fraudulent importations. In the present case they would exceed by nearly one-half the entire amount claimed in this action, if the facts alleged were proved on indictment. There is no inadequacy in the law, therefore, as a means of indemnity to the government, through the repeal of forfeitures of value by civil action. The limitation of forfeiture to the goods themselves tends to promote vigilance in discovering fraud before the dispersion of the goods, and the trial of the questions in dispute while the transactions are recent. To the honest merchant, the restriction of suits based upon old transactions to criminal proceedings, operates as some check against abuses, because criminal proceedings are less likely to be instituted lightly upon trifling irregularities or small differences on estimated values, about which the opinion of experts might differ; while if fraud be proved, the court, through the discretion provided by the moiety act, can adjust the fines and the imprisonment, so as to bear some reasonable relation to the loss of the government and to legitimate punishment. The moiety act, therefore, as it seems to me, falls clearly within the general doctrine of the cases above cited. It covers the whole field of former acts; it creates new offenses and new punishments for the same subject-matter; it adds new and important qualifications to the former law; and it provides fully, though in a different way, for the indemnity of the government and for the punishment of offenders.

Again, it is to be noted that under the provisions forbidding any fine, forfeiture, or penalty, except in case of actual intent to defraud, and the prohibition of the forfeiture of any packages except those to which the fraud relates, not a single previous statute can be enforced in the shape in which it stands. Section 2864 contains no clause even which can be thus enforced just as it exists in the statute. All that could possibly be done with it would be to pick out portions of

it, and apply to them the provisions of the moiety act as modifications, and enforce them as thus modified. But the moiety act does not seek or profess to modify these former acts when inconsistent with it. It enacts its own remedies for the same subject-matter, and declares by section 26 that all acts and parts of acts "inconsistent with" itself are not modified accordingly, but repealed.

The debates in congress show clearly an intention to enact, not cumulative remedies, but a new system in place of the old.

Mr. Roberts, in reporting the bill to the house, said:

"We have endeavored to provide for adequate punishment in all cases of guilty intent to defraud, and to furnish relief in case of accident or mistake. We have sought to provide for penalties proportionate to the offenses proved which the present laws utterly ignore." Cong. Rec. 43d Cong. 1st Sess. vol. 2, pt. 5, p. 4039.

Senator Stewart, (page 4809,) in reference to the twelfth section, says, in opposition:

"I do not think they could have seen how far this section goes to break up all laws on the subject; for remember this is to take the place of other statutes, as I understand."

At page 4813, Senator Edmunds says:

"This bill is apparently a substitute for the provisions about frauds on the revenue which the act of 1799 and of 1830 and of 1832 and of 1866 contained."

Senator Conkling, (pages 4815, 4816,) in answer to the inquiry of Senator Thurman as to how far the twelfth section would affect existing laws, said:

"When you describe an offense and provide a punishment and repeal of other statutes, the general rule certainly is that you occupy the ground with the new statute, and you annul that which before operated upon the same subject in a different way. The senator will see, if he will read the whole of this twelfth section, that not in one respect alone, but with great particularity, in all respects of general scope, it covers the ground of the section to which he has referred."

From the clear expressions of the framers of the law, therefore, as well as from the provisions of the law itself, the intent to supersede former acts appears evident; and the forfeiture of value would be deemed repealed by implication, even if there were no special repugnancy to it in the new law. See, also, *Pana v. Bowler*, *supra*; *Cook Co. Bank v. U. S.* 107 U. S. 445, 451; S. C. 2 Sup. Ct. Rep. 561; *Bartlet v. King*, 12 Mass. 537; *Nichols v. Squires*, 5 Pick. 168.

2. But there is also a clear repugnancy between the provisions of the moiety act and those of section 2864. Section 12 of the moiety act, in cases like the present, declares an absolute forfeiture of the goods. Section 1 of the act of March 3, 1863, (section 2864, Rev. St.,) declares the alternative forfeiture of the goods or their value. Under the earlier law the forfeiture was not absolute, but only at the election of the government; under the moiety act there can be no

election in the government, for the forfeiture of the goods is made absolute. Under the former, the government might have either the goods or their value, but not both; and before it could have either it must elect which it would pursue. The old law not only permitted, but enforced, an election by the government. The moiety act permits no election, since, as I have said, the forfeiture of the goods is made absolute. These two provisions of the statute, therefore, cannot co-exist. There cannot be an election to have either the goods or their value, and, at the same moment, an absolute statutory forfeiture of the goods themselves. The two provisions are mutually exclusive.

The distinction between the two acts in this respect is of very great practical importance. Where the law makes the forfeiture absolute, as the moiety act makes it, the title of the goods is vested in the government at once, from the moment when the unlawful acts are committed; so that a sale of the goods by the importer, before seizure, to *bona fide* purchasers even, will not oust the title of the government. *Caldwell v. U. S.* 8 How. 366; *Henderson's Spirits*, 14 Wall. 44; *U. S. v. 76,125 Cigars*, 18 Fed. Rep. 147. But where the forfeiture is only in the alternative of "the goods or their value," a sale to a *bona fide* purchaser, before the government has exercised its right of election to resort to the goods, will pass a good title, and prevail against any subsequent seizure by the government. *Caldwell v. U. S.*, *supra*; *U. S. v. York St. Flax Spinning Co.* 17 Blatchf. 138; *U. S. v. Four Cases of Lastings*, 10 Ben. 371. Where, as in section 2864, the forfeiture is in the alternative, the government's right of election to pursue the goods or their value, so long as the goods have not passed into *bona fide* hands, remains absolute. Though the goods be at hand and capable of immediate seizure, the government is not bound to resort to them; but, at its option, may pass them by and sue the importers for their value. This is expressly stated by the chief justice in the case of *U. S. v. York St. Flax Spinning Co.*, *supra*, where he says, (page 140:)

"Until the sale the government may seize the goods and realize their value by a sale; or it may pass by the goods and look directly to the wrong-doer for their value. The effect of a sale is to take away all right of proceeding against the goods, and leave the government to its original right of action against the fraudulent importer, for the value only."

But, under section 12 of the moiety act, no such election can possibly exist to pass by the goods and sue for their value. The act itself determines that election by decreeing the absolute forfeiture of the goods. The two sections are therefore clearly repugnant in this respect; and the earlier statute is, therefore, necessarily repealed *pro tanto*, and falls within the express language of the repealing clause. Section 26. No suit for value, therefore, can be maintained so long as section 12 of the moiety act is in force.

The repeal of the former forfeiture of value, through this repugnancy of section 12 of the moiety act, is so clear that no authorities

seem needed to sustain it. I cite, however, a few instances somewhat analogous.

In the case of *U. S. v. Tynen*, *supra*, the court held that there was a clear repugnance between the acts of 1813 and 1870 there referred to, because "the first act makes the punishment of the offense designated imprisonment or fine; it provides that the punishment shall be one or the other, and in so doing declares that it shall not be both. The second act allows both punishments, in the discretion of the court; it thus permits what the first law prohibits." There were similar differences also as respects the term of imprisonment, and the amount of fine; and the court adds:

"When repugnant provisions like these exist between two acts, the latter is held, according to all the authorities, to operate as a repeal of the first act, for the latter act expresses the will of the government as to the manner in which the offenses shall be subsequently treated."

So in *Com. v. Kimball*, 21 Pick, 373, the court (SHAW, C. J.) held that a former statute imposing a penalty of \$20 for each offense was essentially and substantially inconsistent with a later statute which provided a penalty of not more than \$20 nor less than \$10 for the same offense; because the former was absolute and imperative, and the latter allowed a discretion.

In *Norris v. Crocker*, 13 How. 439, the prior statute of 1793, giving a penalty of \$500, to be recovered by the claimants by civil action for harboring fugitive slaves, was held plainly repugnant to the act of 1850, which for the same offense imposed a fine not exceeding \$1,000, and imprisonment not exceeding six months, on conviction by indictment.

On this ground alone, therefore, I should feel compelled to hold that the forfeiture of value provided by the act of 1863, and under section 2864, was repealed.

3. The recent decision of the supreme court, in the case of *U. S. v. Claffin*, 97 U. S. 546, affords so strong an analogy to the present, though without the absolute repugnancy last mentioned, as to be controlling in this case. That action was brought under the act of 1823, which declared that persons knowingly receiving smuggled goods should "forfeit and pay double their value." The act of July, 1866, for the same offense, imposed, like the moiety act, a forfeiture of the goods, and a fine, on conviction, not exceeding \$5,000, nor less than \$50, together with imprisonment, not exceeding two years, in the discretion of the court; but omitting any forfeiture of value. It did not repeal in express terms the act of 1823; but it did repeal "all other acts or parts of acts conflicting with or supplied by it." The court held that the later act would be deemed a repeal of the former by implication, even had it contained no repealing clause; that where the objects of two statutes are the same, whether by way of punishment for the offense or of indemnity for the loss, and the later act covers the same ground as the former, in that case the later statute must be

deemed not cumulative, but as a substitute for the earlier one. The decision in that case is the more noteworthy and emphatic, since it modified the view of the same statutes previously expressed in the case of *Stockwell v. U. S.* 13 Wall. 531, where the former statute was regarded as wholly remedial, and the latter as wholly punitive; and both were consequently held to be in force. In the *Case of Claflin*, the court say, (97 U. S. 552, 553:)

"If this were truly the purpose of those acts their objects would not have been the same, and therefore the second statute could not be regarded as repealing the former. But a renewed and more careful examination of the two statutes has convinced us that congress, in the act of 1866, had in view not only punishment of the offense described, but indemnity to the government for loss sustained in consequence of the criminal conduct of those guilty of the offense. The later act denounces a forfeiture of the goods concealed, etc., no matter in whose hands they may be found. If the forfeiture of double the value of the goods denounced by the act of 1823 was designed to secure indemnity to the government for the wrong done, the *forfeiture of the goods themselves*, declared in the act of 1866, must have been intended for the same purpose, and the fine and imprisonment were superadded as a vindication of public justice. If this is so, as we now think it is, the act of 1866 supplied the provisions of the second section of the act of 1823, and consequently would have repealed them had it contained no repealing clause."

In the *Claflin Case*, it will be observed, there was no absolute repugnancy between the act of 1823 and that of 1866; the former forfeited double the value; the latter forfeited the goods themselves. A single statute, however, might have imposed both of those forfeitures, and the government would then have derived thrice the value of the goods—a measure of damages not unfamiliar in revenue legislation. That case, therefore, was not one of absolute repugnancy, but of substitution by implication. The later act, besides providing criminal punishments, also defined the indemnity of the government; and this, the supreme court held, must be deemed to be a substitute for the indemnity provided by the preceding act.

In the present case, in lieu of the alternative forfeiture of the goods or their value, under the act of 1863 and section 2864, the moiety act, for the indemnity of the government, denounces the absolute forfeiture of the goods, just as the act of 1866 did in the *Claflin Case*; and like that act, also, it superadds the same fine and imprisonment. In the *Claflin Case*, the later act provided a forfeiture of the goods, where the former act provided a forfeiture of double their value. In the present case the moiety act provides absolute forfeiture of the goods, where, for the same offense, the earlier act provides an alternative forfeiture of the goods or their value. The present case is as clearly one of substitution as that of *Claflin*. The principles upon which the *Case of Claflin* was decided apply, therefore, in full force to the present case; and, in addition, we have here a clear repugnancy between the later and the former acts, such as did not there exist.

4. A few other sections of the moiety act furnish some considerations bearing on the subject under discussion; but none of them, as

it seems to me, are very important or decisive. The only section in which any reference is made to forfeiture of value is section 14. That section provides that no omission to state in the entries any of the various small matters there referred to, "without intent to defraud the revenue," shall be a cause of forfeiture of goods or their value; but it requires the collector in such cases to add double the amount omitted. This, it may be said, is an implied recognition of the existence of some statute providing for the forfeiture of value on account of such omissions, and the continuance of such statutes in force, where there is intent to defraud. This section, however, applies to a very small and limited class of errors or omissions having nothing to do with the present case. There were pending suits to which the first part of this section was intended to apply, and that alone would be a sufficient reason for the reference to forfeitures of values. The inference sought to be drawn from it is of a negative character, and, as respects any subject clearly embraced in section 12, has no force as against the express provision of the latter section. The first part of section 14 is in reality surplusage, except as introduction to the last clause; since under section 16 no such forfeiture, either of goods or their value, in existing or subsequent suits, could be had without an actual intent to defraud. The essential part of the section is the latter half of it, which authorizes the collector to impose double the omitted amounts in cases free from fraud.

Section 22 assigns a limitation of three years for the recovery of any pecuniary penalty or forfeiture of property. This section could only apply to future suits. If forfeitures of value were supposed to be continued thereafter, no reason appears why suits for value should not have been included within the period of limitation, and the language have been made to read, "forfeiture of property or the value thereof." So, also, in the last paragraph of section 12, we find no recognition of any future forfeiture of value, such as would have been expected if such forfeiture was intended to remain as part of the existing law. This paragraph declares that "anything contained in any act which provides for the forfeiture or confiscation of the entire invoice in consequence of any item or items contained in the same being undervalued, be and the same is hereby repealed." The paragraph seems to have been inserted shortly before the passage of the bill, by amendment, out of abundant caution; and the same caution which dictated that would naturally have provided, not merely against a forfeiture or confiscation of all the goods invoiced, but also against forfeiture of the value thereof, if forfeitures of value had been supposed to be retained. On the whole, the other provisions of the moiety act seem to me to accord, rather than to disagree, with the construction I have given to section 12.

5. In what has been said, the subject has been considered as though sections 2864 had contained, when enacted on the twenty-second of June, 1874, a forfeiture of the goods or the value thereof,

like section 1 of the act of March 3, 1863, from which section 2864 was taken. In fact, however, in the Revised Statutes, as originally enacted, section 2864 did not contain the words "or the value thereof," but provided for the simple forfeiture of the goods. By the act of February 18, 1875, entitled "An act to correct errors and to supply omissions in the Revised Statutes of the United States," this omission in section 2864 was corrected by restoring the words "or the value thereof," as they stood in section 1 of the act of March 3, 1863, and as section 2864 now stands in the second edition of the Revised Statutes.

On behalf of the government it is claimed that this act of 1875 has re-enacted forfeitures of value in the cases provided by section 2864, because it is an act later than the moiety act, and directs that section 2864 be amended by inserting the words "or the value thereof." If the act of 1875 had been designed as new legislation intended to change the law existing at the time of its passage, in spite of any statutes passed after December 1, 1873, it would undoubtedly have the effect claimed for it. A slight consideration, however, of the circumstances and of the enacting clause of the act itself, are sufficient to show that such was not the intent of the act of 1875, and that no such effect can be given to it. The sole purpose of that act was evidently to correct textual errors and omissions in the work of revising the statutes, and to make the printed volume called the Revised Statutes state truly and correctly what it was intended to state, namely, the statutory law as it existed on the first of December, 1873. That such only was the purpose of the act of 1875, is stated, as it seems to me, as clearly and emphatically as words can express, in the enacting clause of the act itself, which is as follows: "Be it enacted, etc., that for the purpose of correcting errors and supplying omissions in the act entitled 'An act to revise and consolidate the statutes of the United States in force on the first day of December, 1873,' so as to make the same *truly express such laws*, the following amendments are hereby made therein:" Then follow 67 amendments. The thirty-third is the one here in question, amending section 2864 by inserting after the word "merchandise" the words "or value thereof." The enacting clause above quoted declares that this amendment to section 2864 "is hereby made" so as to make the same (section 2864) "*truly express such law*;" that is, the law on that subject in force on December 1, 1873. Necessarily, therefore, this amendment must be read, not as new legislation, or as a new law enacted on February 18, 1875, to take effect from that time, and to change intermediate legislation, but simply as a correction of the text of the Revised Statutes, so as to make section 2864 express what it was intended to express, namely, that by the law as it existed on the first day of December, 1873, for the causes there mentioned, the merchandise or its value should be forfeited.

In so far as the former law, by an unintentional omission, was unwittingly repealed by force of section 5596, the object of the act of 1875 was to restore the law as expressed in the Revised Statutes to what it actually was on December 1, 1873, and to what the revisors and congress intended to express in them. If there were no independent statutes in the mean time modifying the law as it existed on December 1, 1873, the effect of the act of 1875 was, indirectly, also to restore the law on and after February 12, 1875, to what it was on December 1, 1873, by doing away with the effect of the repealing clause of the Revised Statutes on that particular subject, (section 5596.) That, however, was the indirect result, not the direct object, of the law of 1875. The object was to make the Revised Statutes what they professed and were intended to be—a true statement of the law existing on December 1, 1873; and where there were other subsequent statutes designed to change the law existing on that date, the act of 1875 plainly had no reference to them, and no design to abrogate those changes. Such subsequent acts modify the Revised Statutes as amended by the act of 1875, because the amendments of 1875 were designed as corrections of, and as a part of, the Revised Statutes themselves, and not as new legislation on the topics to which they relate. The amendment must be treated, for all purposes, precisely as if it had been a part of section 2864 as originally enacted; and section 2864 is therefore subject, in its amended form, to the provisions of section 5601, declaring that all acts passed after December 1, 1873, in conflict with any provision contained in the Revised Statutes, shall have effect as subsequent statutes, and as repealing any portion of the Revision inconsistent therewith, and hence subject to the modifications of the moiety act as a subsequent statute. This intention, so plainly indicated by the enacting clause, is still further indicated from the last section of the act of 1875, namely, that the secretary of state is "directed, if practicable, to cause this to be printed and bound in the volume of the Revised Statutes of the United States."

This precise question, as to the construction of the act of February 18, 1875, arose in the court of claims, in *Ludington v. U. S.* 15 Court Cl. 453. In the opinion of the court, RICHARDSON, J., says:

"In our opinion this amendment (*i. e.*, under the act of 1875) was not in the nature of a new enactment; it is to be taken and construed as though the Revised Statutes had been originally adopted, with the alterations thus made incorporated into them in their proper place, as has been done in the second edition; and that they are all subject to the provisions of sections 5595 and 5601."

No case has been referred to intimating any different construction, and it seems to me entirely clear from the language of the act itself. See, also, *Wright's Case*, 15 Court Cl. 80.

A somewhat similar question arose in the case of *Reg. v. Overseers of St. Giles*, 3 El. & El. 223, in which the court of queen's bench held

that the act of 11 & 12 Vict. c. 111, correcting certain errors in the provisions of the act of 9 & 10 Vict. c. 66, must be considered and read as forming parts of the original act.

Prior to the enactment of the Revised Statutes there was no existing law which gave any color to the supposition that the alternative forfeiture of the goods or the value thereof, as provided by section 1 of the act of March 3, 1863, had been repealed. The omission, by the revisors, of the words "or the value thereof," in section 2864, was plainly an error. This appears conclusively on consulting their original report, title 36, entitled "collection of duties upon imports," in which section 2864 is embraced. That report is prefaced by the following note:

"N. B. In this pamphlet, words in the section printed in *italics* are new; those in brackets [thus] are found in the existing law, but are recommended to be omitted."

Section 2864, as contained in that report, has no words either in *italics* or in *brackets*. As it was not the duty of the revisors to change the law, but to consolidate it, and as they were authorized to omit only redundant or obsolete enactments, and to make such alterations as might be necessary to reconcile the contradictions, supply the omissions, and amend the imperfections of the original text, (14 St. at Large, p. 74, § 2,) it is clear that the omission of the words "or the value thereof" in their report of section 2864, without reference to this omission, either in *italics* or in *brackets*, these words being a material part of the existing law, must have been accidental.

The debates in congress show most clearly that the intention of the act of 1875 was to correct errors, and not to enact new legislation to speak from that date. Mr. Poland, in introducing into the house the act of February, 1875, said that the object was simply to correct the errors of the revisors and to make it certain that the law is not changed. Mr. Hoar said:

"We did our very best that our Revision of the law should not change the existing law in any particular. It has been discovered that by misprints, by an occasional omission of a word, by perhaps some misapprehension by the revisors as to the effect of a phrase, the law, in our judgment has been changed in some particulars by the Revision. We have now introduced a bill simply to restore the law to what it was; and I think members of the house should not, because they think particular legislation desirable, endeavor to hold on to what was accidentally done, without its being understood by the house or the committee. I submit that we should pass this bill just as it is, and if a change of the law upon any point be desired, let it be done by affirmative legislation."

In the senate, Senator Conkling, in a striking passage too long to be quoted in full, said:

"Certain words which stood in the law, which are part of the law, which are operative words, which the commissioners originally, and all who followed them, including the two houses of congress, were directed to preserve and reproduce unimpaired, certain such words, it turns out, were dropped," (from the Revision.) "Now, what is the function of this bill? Simply to

put them back—simply to correct this deviation from the statutes. Therefore, it is a great deal more than the senator from California says. It is more than the case where in a single instance, by a simple act of legislation, the two houses of congress inadvertently fall into an error. It is a case where a whole course of legislation required one single thing, to-wit, a truthful and absolute reflex of the whole body of law as it stood; and in attempting to do that, all concerned, including the two houses of Congress, fell into an error. Now we come with this bill, the purpose of which is to correct that error; and what does the honorable senator from Connecticut propose? To hold up for examination the merits of the original provision; *and when we are attempting to verify and correct a purely ministerial proceeding of codifying the laws*, the senator wishes to go into the broad question of the merits of those laws which we proceeded to codify. * * * We are now simply engaged in making a truthful completion of that work in which commissioners, committees, and congress have been engaged, which has no more to do with the merits or the defects of the laws as they exist than the painting of the portrait truthfully has to do with the beauty or the deformity, the hue or the age, of the original from which it is painted. If this codification is true and honest, it is a reproduction of the laws as they stand, and not a production of the laws as the senator from Connecticut thinks they ought to stand, and as he is abundantly able to make them stand, when we are considering a bill appropriate for that purpose."

It is very clear, therefore, that nothing was further from the intention of congress in passing the act of February, 1875, than to enact new legislation, or to abrogate those changes in the law existing on December 1, 1873, which it had designedly made by other statutes passed since the latter date. Had such been the intent of the act of 1875, its passage would have involved a reconsideration and revision of every statute passed between December 1, 1873, and February 18, 1875.

6. It is urged, however, that if, by the moiety act, the forfeitures of value were already repealed, no reason remained why congress, in 1875, should pass the act to amend section 2864 of the revised statutes by inserting the words "or the value thereof," unless they intended to re-enact that provision of the law. What has been already said seems a sufficient answer to this objection. By the Revision congress had undertaken to declare what was the statutory law existing on December 1, 1873. The Revised Statutes as enacted purported and professed to state this law truly, (sections 5595, 5596,) but they did not do so. Section 2864, among others, was a false statement of the law as existing on December 1, 1873, in an important particular, through the omission of the words "or the value thereof." Historical truth, if nothing more, required the omission of these words to be supplied; otherwise, the statutes as enacted would remain a lasting monument of error. This alone, even if there were no practical reasons for correcting the error, would have been a sufficient reason for the amendment made by the act of 1875—an amendment which did not profess to be new legislation, but an amendment of the Revised Statutes only.

But there were reasons of a practical character, also, rendering it, if not essential, at least appropriate and desirable, that the correction should be made, notwithstanding the fact that forfeitures of value under section 2864 were already repealed by the moiety act. For the Revised Statutes, passed June 22, 1874, through the omission of the words "or the value thereof," seemed to declare that on December 1, 1873, and subsequent thereto, no law was in force authorizing a forfeiture of value for the causes stated in section 2864, (section 5596.) This was false and deceptive. The forfeiture of value had not been repealed by any existing law until the passage of the Revised Statutes and of the moiety act, on the same day, in June, 1874. Forfeitures of value might have been incurred upon entries made in the mean time, and suits therefor might have been then pending, in which the right of recovery would appear to be swept away, through the false declaration of the Revised Statutes, that on the first of December, 1873, notwithstanding the act of March 3, 1863, (section 2864,) only a proceeding for the forfeiture of the goods could be maintained. To prevent confusion and embarrassment in suits arising out of transactions occurring during the period from December 1, 1873, to June 22, 1874, it was desirable, if not necessary, that the correction of section 2864 should be made. The law forfeiting value was still in force during this period, notwithstanding the false declaration of section 2864, as originally enacted, and section 5596 to the contrary, (*U. S. v. Claflin*, 97 U. S. 548, 549;) but the false statement of what the law was on December 1, 1873, and afterwards, as presented by section 2864, as originally enacted, was calculated to create great practical embarrassment, and needed to be corrected accordingly.

For these reasons, I must treat the amendments made by the act of February 18, 1875, as parts of the Revised Statutes, and as though section 2864 had been originally enacted in its amended form. The moiety act, under section 5601, is to be regarded as subsequent legislation; and as section 12 of that act, both by implication and by clear repugnancy, repeals the pre-existing law authorizing the alternative forfeiture of the goods or their value in cases of fraudulent undervaluations, it follows that the plaintiff could not, upon any possible proof, recover; and a verdict must, therefore, be directed for the defendant.

This case was affirmed by WALLACE, J., on appeal to the circuit court, May 5, 1884. No opinion rendered.

UNITED STATES v. LANE.

(Circuit Court, E. D. Wisconsin. December 27, 1883.)

PUBLIC LAND—ENTRY—RIGHT TO CUT TIMBER.

One who has entered upon public land according to law for the purpose of claiming a homestead therein, and is residing thereon in good faith, and improving it for agricultural purposes, is entitled to cut so much timber from the land as is necessary for his actual improvements; but until he has received his patent he cannot cut timber for any other purposes nor under any other conditions.

At Law.

G. W. Hazelton, for the United States.

James Freeman, for defendant.

DYER, J., (*charging jury*.) This is an action of replevin to recover a quantity of timber claimed by the government to have been illegally cut by the defendant from certain lands in Langlade county in this state. The claim of the plaintiff is that the defendant cut 152 pine trees standing on this land amounting to 156,851 feet. It seems that in March, 1882, the defendant made an entry of the lands mentioned, being a quarter section, as and for a homestead under the laws of the United States, as every person who is the head of a family, and a citizen of the United States, is entitled to do. There is testimony tending to show that he went into occupancy of the premises, and it does not seem to be disputed that in the winter of 1882-83 he cut from the land a quantity of pine timber growing thereon. The controversy between the parties is concerning his right to cut this timber and the quantity he cut. It is permissible for any such land claimant, provided he is living on the land and improving it for agricultural purposes, to cut and remove from the portion thereof to be cleared for cultivation so much timber as is actually necessary for that purpose, or for buildings, fences, and other improvements on the land entered. This he has a lawful right to do. But where the person does not make the land his actual residence, and cultivate and improve it, or where the timber is not cut for the purpose of clearing and improving the land for agricultural purposes, or where the facts show that the entry was not made in good faith, but for the mere purpose of stripping the land of the valuable timber upon it, the case is one in which the cutting is unlawful. In clearing for cultivation, should there be a surplus of timber over what is needed for purposes of improvement, the claimant may lawfully sell or dispose of such surplus; but it is not lawful for him to strip the lands of its timber for the sole purpose of sale or speculation, until he has made final proof and acquired title.

These are the principles of law governing this case, and, as you perceive, the primary question here is, did the defendant cut this timber for agricultural purposes; that is, in good faith, for the pur-

pose of improving the land? What was his object? Was it to clear the land for cultivation? Was it in pursuance of a purpose to improve the land and to make it his home? Or was his purpose merely to cut the timber off without reference to immediate future use of the land, and to sell and make money out of the timber so cut? Incidental to these points of inquiry is the question whether or not he entered the land in good faith, intending to use and occupy it as a homestead. Indeed, as you see, the question involved is largely one of good faith, and, in determining whether the timber was cut for purposes of husbandry, or merely for purposes of sale and pecuniary profit, you will look into the circumstances under which the cutting was done, the manner in which the timber was cut with reference to localities on the land, and the kind and quantity of timber cut. You will consider what improvements there were upon the land, whether the defendant was living on the land; in short, whether he was dealing with it in good faith intending to cultivate and improve it for farming purposes.

You understand what the claims of the parties are. The defendant insists that he in good faith entered the land for a homestead; that he made improvements upon it; that he was making preparations for other improvements when notice was given him of the cancellation of his entry and claim; that he occupied and lived on the land; and that the timber in question was cut for the sole purpose of improving the land and devoting it to agricultural uses. If this be so, then the plaintiff is not entitled to recover. But the contrary of all this is claimed by the government, and its contention is that the land was not occupied by the defendant in good faith as and for a homestead; that this timber was cut with the primary purpose of selling it and making money out of it; that it was not the intention of the defendant in good faith to cultivate and improve the land; and that the cutting of the timber was not done for the purpose of clearing the land for agricultural uses. Various circumstances are relied on in support of this claim, and, if the government's contention is supported by the facts of the case, then the conclusion must be that the timber was illegally cut, and the plaintiff, in that state of the case, would be entitled to recover it in this action.

Verdict for plaintiff.

UNITED STATES v. EVANS.

(District Court, D. California. April 3, 1884.)

PROCURING THE COMMISSION OF PERJURY—ELEMENTS OF THE CRIME—KNOWLEDGE.

To constitute the crime of procuring perjury to be committed, it is not enough that both the accused and the false witness knew the falsity of the statements sworn to, but the accused must also have known that the witness knew the statements to be false.

Indictment for Subornation of Perjury. On demurrer.

S. G. Hilborn, U. S. Atty., and *Carroll Cook*, Asst. U. S. Atty., for the United States.

A. P. Van Duzer and *J. J. De Haven*, for defendant.

HOFFMAN, J. The indictment, after the usual formal allegations, which seem to be quite sufficient, charges in substance that the defendant procured one Burnett to commit the crime of perjury by swearing to certain allegations contained in an affidavit made and subscribed by him on an application for an entry of certain timber lands. It avers that Burnett knew that these allegations were false, and it negatives them by averring what the facts were. It also avers that the defendant, when he procured Burnett to swear to these allegations, also knew that they were false. It does not aver that he knew that Burnett was aware of their falsehood. To sustain an indictment for procuring a person to commit perjury it is obviously necessary that perjury has in fact been committed. It cannot be committed unless the person taking the oath not only swears to what was false, but does so willfully and knowingly. He who procures another to commit perjury must not only know that the statements to be sworn to are false, but also that the person who is to swear to them knows them to be false; for unless the witness has that knowledge the intent to swear falsely is wanting, and he commits no perjury. It is therefore essential that the indictment should aver, not only that the statements made by the witness were false in fact, and that he knew them to be false, but also that the party procuring him to make those statements knew that they would be intentionally and willfully false on the part of the witness, and thus the crime of perjury would be committed by him.

The allegations of the indictment in this case are consistent with a belief on the part of the defendant that the party alleged to have been suborned supposed the statements he was expected to make to be true. In that case he would not be guilty of perjury, nor could the defendant be adjudged guilty of procuring him to commit perjury.

Demurrer sustained.

See *U. S. v. Dennee*, 3 Woods, 39; *Com. v. Douglass*, 5 Metc. 244; 2 Archb. Crim. Pr. & Pl. Pom. Notes, 1750; 2 Whart. Crim. Law, (8th Ed.) 1329.

BRADLEY and others v. DULL and others.

(Circuit Court, W. D. Pennsylvania. March 24, 1884.)

1. PATENTS FOR INVENTIONS—DEATH OF PATENTEE—TITLE VESTS IN ADMINISTRATOR.

Under the act of July 8, 1870, and the Revised Statutes, upon the death of a patentee intestate, the title to the patent vests in his administrator, and not in his heirs.

2. SAME—CONSTRUCTION OF PATENT.

In the interpretation of a patent, the court, proceeding in a liberal spirit, should sustain the construction claimed by the patentee himself, if this can be done consistently with the language he has employed.

3. SAME—PATENT No. 121,746—INFRINGEMENT.

Letters patent No. 121,746, for an apparatus for drying sand and gravel, granted to Allen H. Bauman, December 12, 1871, construed, and the defendants held to infringe.

In Equity.

Bakewell & Kerr, for complainants.

George H. Christy, for defendants.

ACHESON, J. The grounds of defense are—*First*, that the plaintiffs have not shown title to the patent sued on; and, *secondly*, that there has been no infringement by the defendants.

1. The patent was granted on December 12, 1871, to Allen H. Bauman. He subsequently died intestate, and letters of administration upon his estate were duly issued to Reuben F. Bauman, who as administrator sold and assigned the patent to the plaintiffs. The defendants controvert the title thus acquired, maintaining that upon the death of the patentee, intestate, the patent became vested in his heirs, and therefore that the administrator was without authority to make sale and assignment thereof. The argument is based on the change in the patent law made by the twenty-second section of the act of July 8, 1870, (reproduced in section 4884 of the Revised Statutes,) whereby it is enacted that the patent shall contain "a grant to the patentee, his heirs or assigns," the previous legislation having provided for a grant to the patentee, his heirs, administrators, executors, or assigns. This change, in connection with some other provisions of the existing law, it is contended indicates an intention on the part of congress to secure the benefits of the invention to the heirs of the deceased patentee, in case of intestacy, to the exclusion of the administrator. An impressive argument was made by counsel in support of this view. But the contrary has just been decided in the first circuit in the case of *Shaw Relief Valve Co. v. City of New Bedford*, 19 FED. REP. 753, in which was involved the identical question now before me. To the able opinion of Judge LOWELL in that case I can add nothing. Adopting his conclusion I must overrule this defense.

2. Whether or not the defendants infringe depends on the construction to be given to the claim. The subject-matter of the patent is a
v.19,no.13—58

machine for drying sand and gravel. The invention (so the specification declares) relates to the combination of iron or metal pipe or pipes, so constructed and arranged in parallel and longitudinal lines as to form a surface upon which the wet sand or gravel is placed to be dried by the application of fire or steam. The surface formed by the pipe or pipes forms the bottom of a box or frame which contains the wet sand or gravel. The pipe or pipes throughout the whole surface are heated by fire or steam passing through them, so as to dry the sand or gravel, which, when dried, slips and passes through the openings or spaces between the lines of pipe, the wet sand or gravel in the box or frame above drying gradually and passing through, ready for shipment and use. "AA is the box or frame in which the wet sand or gravel is placed preparatory to being dried. The bottom of this box or frame is formed by the sets of pipes shown by cc, etc. On the surface formed by these pipes the wet sand or gravel rests and adheres until it becomes dried, when it passes through the openings or spaces between the pipes." If fire is used, the pipes are heated from a fire-chamber at one end, the fire, heat, and smoke passing through the pipes into flues at the other end; but the arrangement described for heating the pipes is somewhat different when steam is employed.

In the body of the specification occurs the following passage:

"Immediately underneath the whole of the surface formed by the pipes is placed a wire sieve, FF, to prevent the sand or gravel from passing too rapidly through the spaces or openings between the pipes, and before the same is sufficiently dried; the sieve so used to be coarse or fine, according as the sand or gravel is coarse or fine."

There is but a single claim, which is in these words:

"The apparatus herein described for drying gravel or sand, consisting of the fire-chamber, flues, heating pipes, and case, all constructed and arranged substantially as set forth."

The word "case" does not appear in the descriptive part of the specification, and is used in the claim only. What does the term comprehend? The defendants insist that it includes the sieve, FF, as an essential constituent; and as they do not use a sieve or any substitute therefor, it is contended that they do not infringe. Webster defines "case" to be "a covering, box, or sheath; that which incloses or contains." Now, turning to the specification we discover that AA is a "box or frame" in which the wet sand or gravel is placed to be dried. What constitutes the bottom of this box? Is it the sieve? Certainly not, if the specification is to furnish the answer; for it distinctly asserts, not once only, but twice, that the bottom of the box or frame, AA, is composed of sets of pipes so constructed as to form a surface upon which the wet sand or gravel rests during the drying process. We have, therefore, the "case" complete in all its parts without the aid of the sieve, FF. In fact, it is not an essential part of the machine, for without its co-operation the apparatus successfully performs

its contemplated work. The truth seems to be that the sieve, under certain conditions, may be a serviceable addition to the machine, but is not an indispensable part. And as it is not mentioned in the claim, and is not necessary either to constitute the "case" or to the successful working of the apparatus, it would seem to be a fair conclusion that is not an element of the patented combination. This view but conforms to the spirit of the rule for the interpretation of patents authoritatively declared in *Klein v. Russell*, 19 Wall. 466, where it is said:

"The court should proceed in a liberal spirit, so as to sustain the patent and the construction claimed by the patentee himself, if this can be done consistently with the language he has employed."

Let a decree be entered in favor of the plaintiffs.

LLOYD v. MILLER and others.

(Circuit Court, W. D. Pennsylvania. February 12, 1884.)

1. PATENTS FOR INVENTIONS—PUDDLING-FURNACE.

Letters patent No. 135,650, granted February 11, 1873, to E. Lloyd, for an improvement in puddling-furnaces, construed, and held, not to be infringed by the defendants

2. SAME—INFRINGEMENT.

The plaintiffs' invention, which secures protection from the intense heat to the walls of the chimney or stack of the puddling-furnace, by means of an opening into the stack at its base, whereby a current of air drawn from an air-conduit underneath the furnace-bed is permitted to enter the stack, held not to be infringed by a construction which secures such protection to said walls at the base of the stack by an external circulation of air.

In Equity.

D. F. Patterson and E. E. Cotton, for complainant.

Bakewell & Kerr and George H. Christy, for respondents.

ACHESON, J. The plaintiff's letters patent—No. 135,650, dated February 11, 1873—are for an improvement in furnaces for boiling, heating, and puddling iron. The objects to be attained thereby as stated in the specification, are the prevention of the rapid burning out of the hearth-plate and the base of the chimney or stack, and the facilitating of the combustion of the inflammable gases in the furnace by supplying air thereto, thereby utilizing fuel and preventing largely the escape of smoke. The furnace described in the specification and accompanying drawing—aside from the plaintiff's improvements—is a puddling furnace of the well-known kind, having the ordinary exit-flue leading into the high chimney or stack.

The invention is thus described:

"Beneath the hearth-plate, c, and a plate, e, [which is merely the continuation of the hearth-plate under the neck] is an air-conduit, G, which extends.

from the ash-pit opening, E, to the back wall of the stack, C, *and communicates with this stack at its base by means of an opening, g.* This will allow [the specification proceeds to declare] a current of air induced by the draft of the stack, C, *to enter the stack at its junction with the flue, h."*

The resulting advantages thereby secured (as is affirmed) are the following: *First*, the current of air so entering the stack will "violently turn back the flames rushing through the flue, h," retard the escape of inflammable gases, and mixing therewith promote their combustion in the furnace. *Second*, the air in its passage through the conduit, G, will absorb heat from the hearth-plate and plate, e, and keeping down their temperature, preserve them. *Third*, "and as the air impinges on the walls of the chimney at its base, these walls will be protected from the intense heat to which they are subjected in other puddling furnaces."

The claim is in these words:

"The air-conduit, G, arranged beneath the hearth and communicating with the chimney or stack at the base thereof, for the purposes and in the manner substantially as described."

It was not a new thing to let air circulate underneath the hearth of a puddling furnace to cool and preserve it; and it is shown that for many years prior to the plaintiff's invention such furnaces were constructed with a passage-way or conduit for air beneath the hearth and extending from the ash-pit opening to the back-wall of the stack, with an aperture through that wall outwardly into the external air; so that this conduit was supplied with air from both ends, the fresh air coming in at the stack-end passing underneath the base of the stack on its way to the ash-pit. Nor was it new to promote combustion in the furnace by a supply of heated air drawn from underneath the puddling hearth. I incline, however, to think that the plaintiff's method of construction whereby communication is secured between the air conduit, G, and the base of the stack, by means of an opening into the stack, is new, at least in puddling furnaces. And, assuming that the defense of anticipation has not been made out successfully, I address myself to the inquiry whether the defendants infringe the plaintiff's patent.

The distinguishing feature of the plaintiff's invention is the opening, g, into the stack at its base, whereby a current of air, induced by the draft of the stack, is permitted "*to enter the stack.*" Great prominence is given to that opening in the specification and accompanying drawing, and, although not expressly mentioned in the claim, it is necessarily implied. It is indeed indispensable, for without the opening, g, there would be no communication whatever between the air-conduit, G, and the chimney or stack. Every advantage specified or contemplated is altogether due to that opening, which, in my judgment, is of the essence of the invention.

The alleged infringing furnaces were constructed by William Swindell under three patents for improvements in metallurgic furnaces

granted to him in the years 1875 and 1878. In the defendants' furnaces the gas from the producer—where the fuel is consumed—is admitted to the bed through a number of ports arranged below an equal number of hot air ports. A series of air-flues pass under the bed—but not in contact with the bottom—and over the crown or arch of the furnace to the end where the gas enters, and the gas and air there meeting, pass together into the combustion chamber, which contains the iron to be worked. The in-going air is heated, and becomes more and more heated, as it passes over the arch towards the discharge ports, by reason of the flues through which it courses being in contact with alternate flues which conduct the waste heat from the combustion chamber. Combustion begins when the gas from the producer meets the hot air, and uniting they enter the bed. The waste and heated products of combustion pass out of the opposite end of the bed into flues which extend over the crown or arch of the furnace and lead to the stack. No part of the air enters the waste-flues without first passing through the combustion chamber and it reaches the stack altogether through the waste-flues.

It cannot be pretended, and indeed it is not urged, that the method of construction found in the defendants' furnaces secures the first two above-enumerated advantages which appertain to the plaintiff's invention. Swindell's air-conduits have no tendency to cool the hearth-plate or bottom of the furnace, and he does not conduct into the stack a current of air to retard the escape of inflammable gases or promote their consumption in the furnace. There is indeed no connection or direct communication between his air-flues and the stack, the air as we have seen, reaching the stack through the waste-flues after it has fully served its purpose in the combustion chamber.

It is, however, earnestly contended that Swindell, by a mere structural or formal change has secured, and that the defendants enjoy the third advantage due to the plaintiff's invention, viz., protection to "the walls of the chimney at its base," from the intense heat to which they are subjected in other puddling furnaces. The plaintiff's theory is that the arched waste flues of the defendant's furnace are part of the chimney or stack, which, he insists, begins at the point where these flues leave the combustion chamber, and, as at that point the air passing in through the air flues absorbs heat from, and tends to preserve the walls of the waste flues, he maintains that there is an infringement of his patent. I have great difficulty in accepting the hypothesis that the arched waste flues are part of the chimney or stack within the meaning of the plaintiff's patent. It is plain to me that when his specification speaks of the chimney it means the high stack, the two words being used as equivalents. Now I do not see that the defendant's arched waste-flues are any more a part of the chimney or stack than is the flue, *h*, in the plaintiff's furnace. The function of each is to convey the waste heat, smoke, etc., from the combustion chamber to the stack. But if the arched waste-flues be

considered as part of the chimney or stack, the fact remains that there is no communication between the air-flues and waste-flues by means of an opening. In truth, there is no communication whatever between them. They alternate, and are built side by side, up, over, and around the arch of the furnace, but they are completely separated from each other by brick walls, four and one-half inches thick. It is also an assumption of the plaintiff that the defendant's arched air-flues are "compartments of the chimney." But surely they come not within his own counsel's definition of a chimney, viz., "the flue which leads from the combustion chamber to conduct waste heat and smoke away." They perform no such service. Their function is, to supply the working chamber with hot air to promote a vivid combustion. Incidentally the in-going air does absorb heat from the common division walls between the two sets of flues, and thus tends to the preservation of these walls, but this is not effected by any means disclosed by the plaintiff's patent, nor by any method analogous thereto, or suggested thereby. In no possible view of the case can the plaintiff's pretensions be sustained without holding that the opening, *g*, into the chimney or stack for the admission thereof of a current of air is non-essential, and that *external contact* with the walls of the chimney or stack at its base is "communication" within the meaning of his specification. But such constructive expansion of the specification is, it seems to me, utterly inadmissible. Moreover a claim so comprehensive could scarcely stand, in view of the prior state of the art. Let a decree be drawn, dismissing the bill, with costs.

THE DANIEL STEINMAN.*

(*District Court, E. D. New York. March 29, 1884.*)

SALVAGE SERVICE — AWARD — \$25,000 ALLOWED ON VALUATION OF \$252,500 — COSTS.

The steamship *Daniel Steinman*, 1,790 tons, on a voyage from Antwerp to New York, with general cargo and 335 steerage passengers, lost her propeller. She set all the sail she could, but made no headway. The same day the steamship *R.*, of the White Star line, bound from Liverpool to New York with cargo and mails, and 697 passengers, came near, and the master of the *S.* applied to her to be towed to Halifax, 280 miles distant. This the *R.* was not willing to do, but was willing to attempt to tow her to New York, 630 miles distant. An agreement was made between the two masters, by which the *R.* was to receive £10,000 if she brought the *S.* to New York, which she proceeded to do, being detained some two days, of which 36 hours were occupied in towing, and bringing the *S.* to New York by the time the *S.* was due there. No damage of consequence was sustained by either, beyond the breaking of a hawser belonging to the *R.* The weather was fair and the sea smooth during all the time. The value of the *S.*, cargo and freight, was \$252,500; that of the *R.*, cargo and freight, was \$780,000. The owners of the *S.* were not satisfied to pay the

* Reported by R. D. & Wyllys Benedict, of the New York bar.

£10,000, but offered \$7,500; the owners of the R. did not insist on the agreement, but considered \$25,000 net to be their proper reward. *Held*, that an important salvage service was rendered by the R. in rescuing the S. and her passengers from a position of danger, and enabling her to reach her port of destination without loss of time, for which the R. should receive a salvage compensation of \$25,000. Expenditures of the R., amounting to \$2,800, were not allowed in addition, as these were taken into consideration in fixing the award; but it was directed that the owners be reimbursed out of the gross amount before its distribution. As no tender was made, costs were allowed libelants. Particular comparison of this case with the circumstances and the award of the English court in the case of *The Silesia* and *The Vaterland*, L. R. 5 Prob. Div. 177.

In Admiralty.

McDaniel, Wheeler & Souther, for libelants.

Jas. K. Hill, Wing & Shoudy, for claimants.

BENEDICT, J. This action is to recover salvage compensation for services rendered by the steam-ship Republic to the steam-ship Daniel Steinman. In June, 1882, the steam-ship Daniel Steinman, while prosecuting a regular trip from Antwerp to New York, while in latitude 41 deg. 12 min., longitude 58 deg. 50 min., lost her propeller. Owing, as is supposed, to striking something in the water, the propeller shaft broke off just outside the hull, and the propeller dropped into the sea without injury being done to her hull. She was a steamer of 1,790 tons burden, built full forward. She had two masts, and was able to spread about 1,200 yards of canvas, which is not more than one-third the ordinary amount of canvas spread by a sailing vessel of equal size. Her crew consisted of fourteen men all told, so that with one man at the wheel and one man on the lookout she had only a boatswain and two seamen in each watch to handle the sails. She had a general cargo and 335 steerage passengers. Her provisions were sufficient for about four weeks. Upon losing her propeller she set all sail, but made no headway. Towards night of the same day the steam-ship Republic, bound from Liverpool to New York, was discovered approaching. When she came near, the chief officer and afterwards the master of the Daniel Steinman boarded her, and applied to be towed to Halifax, then some 280 miles distant to the northward. The master of the Republic was not willing to go to Halifax with the steamer, but was willing to attempt to tow her to New York. After some negotiation a written agreement was signed by the masters of the two steamers, whereby the Republic was to take the disabled steamer in tow, and in case she was brought to New York in safety the Republic was to receive £10,000 for the service. The agreement, however, contained a provision that in case the amount of £10,000 proved unsatisfactory to the owners of either vessel the case should be sent for settlement to the court of admiralty in London. Thereafter, and at about 9 p. m., the Republic began to tow the steamer towards New York. The weather continued fine, and although the Steinman steered badly the Republic took her along so fast that she was safely moored in the port of New York by the time she was there due, and

thus lost no time by the disaster. The Republic was detained some two days, thirty-six hours having been occupied in towing. No damage of any consequence was sustained by either vessel beyond the breaking of a hawser belonging to the Republic. A difference then arose in regard to the compensation to be paid the Republic for this service. The owners of the Daniel Steinman were not satisfied to pay the £10,000 named in the agreement made by the masters, and consider \$7,500 a sufficient compensation. The owners of the Republic do not insist upon the agreement, and consider \$25,000 net to be their proper reward.

Upon a full consideration of all the circumstances, I am of the opinion that an important salvage service was rendered by the Republic to the Steinman on the occasion in question, for which the Republic should receive a salvage compensation of \$25,000. In reaching this conclusion I have taken into view the fact that a disabled steamer, having on board 335 passengers, was by the efforts of the Republic rescued from a position of danger, and enabled to make her port of destination without loss of time. It is no doubt true that the Steinman could have turned back, and by means of sails have regained her port of departure without assistance; and, unless the winds were unusually adverse, she could have done this before her provisions would have given out. But such a course would have been attended with some risk, and would have involved a large loss of money to her owners, besides the loss and suffering entailed upon the 335 passengers. It is probable, also, that the Steinman could have reached Halifax by means of her sails without assistance. This course would have subjected her owners to a large loss, and her passengers to no small loss and suffering, and it would have been attended with a very considerable risk. The coast of Nova Scotia is none too safe a place for steamers well equipped, and a disabled steamer cannot approach it without danger.¹ It is possible, also, that the Steinman might, by means of her sails, have reached New York, then 630 miles distant to westward, although upon this point the testimony discloses two opinions. With the wind as it was when she was taken in tow, the Steinman would never have reached New York. With the wind as she had it until her arrival in New York, she would never have reached New York. With some winds, she would have reached New York in the course of three or four weeks; but I recall no instance of a steamer situated as she was, and of her size and rig, making 600 miles to westward under sails alone. It seems, therefore, entirely proper to conclude that the efforts of the Republic relieved the Steinman from a position of danger. I have also taken into consideration the value of the property thus relieved,—the value of the Daniel Steinman, her cargo and freight, amounting in all to \$252,500. I have also taken into consideration the fact that although the mas-

¹ Five days after this opinion was handed down, this very steamer went ashore on the coast of Nova Scotia, and became a total wreck, with a loss of 117 lives.

ter of the Steinman, according to his statement, was of the opinion that he was in the track of steamers, and could, therefore, have waited to be assisted by some other steamer than the Republic, and although he believed himself able to reach a port of safety without assistance, still he applied for the services of the Republic. In applying to the Republic he was calling no mean instrument of commerce to his aid. The Republic was a powerful steamer, able, loaded as she was with passengers and freight, to tow the Steinman for 600 miles at as great a rate of speed as the Steinman could steam by her own engines. She was one of the White Star steamers, running in a line where regularity of arrival and departure are considered of the greatest importance. These circumstances were known to the master of the Steinman, and when, having the option to await the coming of a different vessel, he applied for the services of the Republic, it must have been with the understanding that these circumstances would be taken into account in fixing the compensation for those services. This is shown by the fact that he was willing to submit to his owners for their consideration the sum of £10,000, as he did by the agreement. I have also considered the risk incurred by the Republic. It is true that the weather was fair and the sea smooth during the whole time that the Republic had the Steinman in tow, but it is also true that towing a disabled steamer of the size of the Steinman by a steamer of the size of the Republic is always attended with danger. In such a service care and watchfulness will not always prevent disaster. Says Sir ROBERT PHILLIMORE, in deciding the case of *The City of Chester*, 26 Mitch. Mar. Reg. 111:

"It is well known, and the Elder Brethren say, that in all these cases of large steam-ships rendering service to each other there is very great danger, and they will require skillful navigation to avoid it."

It is a service not deemed desirable by owners of steamers, and the increasing importance of encouraging it has called from this court expressions which need not be repeated here. *The Edam*, 13 FED. REP. 135. In *The Rio Lima*, 24 Mitch. Mar. Reg. 628, Sir ROBERT PHILLIMORE says:

"It has been impressed on the minds of the court that there seems to be a growing dislike on the part of owners of ships to allow their vessels to render assistance, even where no jeopardy of life is concerned. That must be met by a liberal allowance on the part of the court whose duty it is to consider all the circumstances of the case."

In this connection, the circumstance is worthy of attention that the agreement made by the masters of these two steamers provided for a submission of the case to an English court of admiralty in the event that their owners should not feel satisfied with the sum mentioned in the agreement. Such a provision can, of course, have no effect to render the decisions of the English admiralty authoritative here, but it may justify a somewhat particular comparison between the case at bar and one heretofore determined by an English court, where the

steam-ship *Silesia*, having broken her propeller shaft, was towed to a port of safety by the steam-ship *Vaderland*. L. R. 5 Prob. Div. 177. In that case, the salving vessel, the steam-ship *Vaderland*, was bound from Antwerp to Philadelphia with general cargo, 274 passengers, and mails. In the present case, the salving vessel was the steam-ship *Republic*, bound from Liverpool to New York with cargo, 697 passengers, and mails. The *Vaderland's* crew numbered 76, the *Republic's*, 135. The *Vaderland's* cargo and freight were valued at £72,000. The *Republic's* cargo and freight are valued at \$780,000. The *Silesia*, towed by the *Vaderland*, was valued, cargo and freight, at £108,000. The *Steinman*, towed by the *Republic*, is valued, with cargo and freight, at \$252,500. The *Silesia* was bound to Hamburg. The *Steinman* was bound to New York. The *Silesia* was towed 340 miles by the *Vaderland*. The *Steinman* was towed 630 miles by the *Republic*. The time occupied in towing the *Silesia* was three days. The time occupied in towing the *Steinman* was thirty-six hours. The *Vaderland* turned back from her voyage and went to Queenstown, and her loss of time by performing the service was six days. The *Republic* did not turn back, and by performing the service lost only two days. In the case of *The Silesia*, the masters made an agreement for a compensation of £15,000. In this case, the agreement provided for £10,000. In the case of *The Silesia*, the English court of admiralty awarded £7,000; and it would seem, from this comparison, that the English court of admiralty, in a case like the present, would give no smaller reward than \$25,000.

In view of the considerations I have now alluded to, it seems to me proper to fix \$25,000 as the proper salvage reward for the service in question. I have been urged in behalf of the libellant to allow, in addition, the cost of the provisions for the passengers on the *Republic* for two days, the cost of extra coal used, the cost of extra work, and the injury to the hawser, amounting in all, it is said, to \$2,800. These expenditures I have taken into consideration in fixing the reward at \$25,000. That sum I consider to be sufficient without further allowance; but, in the distribution of the salvage, the amount of money expended by the owners in performing the service may be shown, and they may be reimbursed for that expenditure out of the gross reward before distribution. As no tender was made, the libellants must recover their costs.

Let a decree be entered in accordance with this opinion.

THE LAHAINA.¹*(District Court, E. D. New York. March 15, 1884.)***SALVAGE—AMOUNT—ALL THE CARGO AND HALF THE VESSEL ALLOWED.**

The steam-ship C., valued at \$180,000, the day after leaving New York, found the schooner L. in the trough of the sea, without steerage-way, a large hole in her side, and seriously damaged forward. The L.'s crew announced their intention to abandon her in case the C. declined to take her in tow. The C. towed the L. back to New York, losing thereby three days' time, breaking a steel hawser, and paying pilotage and towage, amounting to \$279. The schooner and cargo were sold, the net proceeds being \$3,514.25. The proof showed that the cargo of the L., from its nature, would have been wholly lost if the L. had not been taken in tow by the C. No one appeared to claim the cargo. The court allowed the whole of the proceeds of the cargo—not a large sum—and one-half the net proceeds of the vessel, to be paid the salvors for salvage, and, in addition, the above expenses of the steamship and \$200 for damages to hawsers, to be first deducted from the proceeds and also costs.

In Admiralty.

Jas. K. Hill, Wing & Shoudy, for libelants.

Goodrich, Deady & Platt, for claimants.

BENEDIOT, J. This is an action for salvage services rendered by the steam-ship *Caledonia* to the schooner *Lahaina* and her cargo. The *Caledonia* was an iron steam-ship, engaged in the Mediterranean trade, and bound from New York to Glasgow with a general cargo, including 300 cattle. The day after leaving New York, when *Shinnecock* bore N. W. about 25 miles distant, she sighted the three-masted schooner *Lahaina* flying a signal of distress. The schooner was six to eight miles distant, some three points on the port bow. The steamer bore away for the schooner, and, coming along-side, found her in the trough of the sea, without steerage-way, a large hole in her side, and seriously damaged forward. The crew of the schooner asked to be taken to a harbor of safety, and announced their intention to abandon their vessel in case the steam-ship declined to take her in tow. The master of the steam-ship concluded to endeavor to take the schooner to New York, the nearest port of safety, and, having made fast to her by a four-inch steel hawser, started back for his port of departure. The swell was heavy, and the steel hawser parted. Then a thirteen-inch hemp hawser was put on, which held. The next morning they were off Sandy Hook, and that day the wreck was left safe in harbor at New York. The steam-ship lost three days' time, and she paid pilotage and tow-boat expenses amounting to \$279. The value of the steam-ship was \$180,000. The schooner and her cargo were sold in this proceeding, and the net proceeds, after paying all expenses, amount to \$3,514.25. The proof shows that the cargo, from its nature, would have been wholly lost if the wreck had not been taken in tow by the *Caledonia*, and it seems to

¹ Reported by R. D. & Wyllys Benedict, of the New York bar.

have been supposed that, owing to the condition of the cargo, the proceeds would barely equal the duties upon it and the expenses of its sale. No one has appeared to claim the cargo, although considerable time has elapsed since the filing of the libel, and notice of the proceeding has been sent to the party in interest. So far as the cargo is concerned, therefore, the proceeding is by default.

Under such circumstances, I am justified in allowing the whole of the proceeds of the cargo in court, the same not amounting to a large sum, to be paid to the salvors, whose exertions saved the same from certain loss. In regard to the schooner, where an appearance has been entered for the owners, and they have been heard upon the question of the amount of salvage proper to be allowed out of the proceeds of the vessel, considering, in connection with the circumstances already mentioned, the small value of the property saved, the value of the salving ship, and the fact that, had not the schooner been taken in tow, she would have been abandoned, a water-logged wreck, in the track of vessels bound to New York, I am of the opinion that one-half the net proceeds of the schooner must be allowed to the salvors for salvage. In addition, the expenses paid out by the owners of the steam-ship, amounting to \$279, and \$200 for damages to the hawsers are, however, to be first deducted and paid to them. The libelants must also recover their costs.

THE BELLE OF OREGON.¹

(District Court, E. D. New York. March 8, 1884.)

SEAMEN—CONTRACT TO SEND THEM HOME—DAMAGES—MITIGATION.

Where natives of the Philippine islands shipped as seaman on an American vessel at Iloilo for a voyage to New York, and the master bound himself to return them to their country at his expense, and the men left the vessel at New York without objection, no provision being made for their remaining on board, and afterwards the master offered to the boarding-house man at whose house the men were that the men should return to the vessel and go in her to Portland, Oregon, *held*, that on the proof the men did not desert the vessel at New York, and were not bound to remain on board her; that under the agreement the men were to be sent home direct, and not by way of Oregon, and that no offer had been shown to send them home, even via Oregon; that there had been, therefore, a violation of the contract on the part of the vessel, and the vessel was liable for the damages that the libelants might have sustained, to be ascertained by a reference. As a matter of protection to the foreign sailors, the vessel was allowed now to provide them with a passage home, and to show this in mitigation of damages.

In Admiralty.

Beebe & Wilcox, for libelants.

W. H. Field, for claimant.

¹Reported by R. D. & Wyllys Benedict, of the New York bar.

BENEDICT, J. On the twenty-seventh of August, 1883, at Iloilo in the Philippine islands, the libelants, "natives of these islands," shipped as seamen on board the American bark *Belle of Oregon*. A written agreement was entered into with them, in which, among other things, it was provided that "the contract of the sailors aforesaid is only for the voyage from this port to the port of New York;" and it was also provided that the master "further binds himself to return at his expense to their country the said sailors." Thereafter the bark proceeded to New York, and there safely arrived, the libelants having duly performed their duty during the voyage. After the vessel was in her berth, and the decks cleared up, all the crew left the vessel, including the libelants. No objection was made to the libelants leaving the vessel, nor was there any provision made for their remaining on board, or their return to their country. After some days it would seem that the master was willing that the men should return to the bark and was willing to take them in the bark to Portland, Oregon, to which port the bark was about to proceed from New York. It is not proved that this offer was brought home to the sailors, it apparently having been considered by the ship sufficient, as decidedly it was not, to make the offer to the boarding-house man, at whose house the men are boarding.

On the part of the ship it is contended that the men deserted in New York, and a consul's certificate to that effect is produced. But the proof is beyond dispute that the men left the bark without objection, if not by the direction of the master. Besides, they had the right to leave the ship when they did, for the voyage was ended. The covenant on the part of the master to return them to their country did not bind them to remain on board the vessel after the completion of the voyage.

Next, it is contended that the men have had the opportunity to return to their country in the same vessel, and have refused to do so. This defense is not proved. At the most, all that has been done is to offer to take the men in the bark to Portland, Oregon, whither, as it appears, the vessel proceeds from New York. The contract, as I incline to think, is a contract to send the men from New York to the Philippine islands direct; and an offer to take the men to the Philippine islands, via Portland, Oregon, would not, therefore, be a fulfillment of the agreement. The case contains nothing from which it can be inferred that any other voyage was contemplated at the time of hiring than a voyage from Iloilo to New York, and thence back direct. But if this be otherwise, and a voyage home by the way of Oregon be held to be within the meaning of the contract, then it is to be said that no offer to send the men home via Portland has been shown. There is no evidence that the bark intends to proceed from Oregon to the Philippine islands. All the offer made was to give the men a passage in the bark from New York to Oregon, with the chance of a passage thence to their country. Such an offer was no tender of

performance of the contract. The men are not bound to go to Oregon, and take the chance of being left there if the bark should go elsewhere than to the Philippine islands, as, for aught that appears, she will do. No other conclusion is therefore possible, upon this evidence, than that a violation of the contract on the part of the bark has been shown, because of the failure to provide the libelants with a passage to their native country, from which arises a liability to pay any damages that the libelants may have sustained thereby. What the amount of that damage is may be ascertained by a reference. But, as a matter of protection to these foreign sailors, I will allow the ship, if it be so desired in her behalf, now to provide the men with a passage to the Philippine islands, and to show such provision made in mitigation of damages.

THE RHEOLA.

COUGHLIN v. THE RHEOLA and another.

(Circuit Court, S. D. New York. April 12, 1884.)

NEGLIGENCE—PRIVITY OF CONTRACT—RESPONSIBILITY.

A stevedore employed by another, who has contracted to unload a vessel, can recover for injuries sustained by the defective appliances furnished him by the vessel, upon the same evidence which would enable his employer to recover. Though there is no privity of contract between the ship-owners and him, they were under the same obligation to him as they were to his employer. What would be negligence to one would be negligence to the other.

In Admiralty.

Beebe, Wilcox & Hobbs, for libelant.

W. W. Goodrich, for claimants.

WALLACE, J. The libelant has appealed from a decree of the district court for the Southern district of New York dismissing the libel. The suit is *in rem*, and is brought to recover for personal injuries sustained by the libelant while unloading the *Rheola*, in July, 1879, when she was discharging cargo along-side a pier in the port of New York. The libelant was one of a number of laborers employed by one Hogan, a master stevedore, to discharge cargo, which consisted of tin in cases and iron ore in bulk. He and others, in all a gang of six men, were in the lower hold of the ship, filling the hoisting tubs with iron. He had hooked one of the tubs to the chain, and was in the act of filling another, when the chain broke while the tub was suspended over the hatchway, and the tub fell upon him. Three tubs were being used, and the work was done rapidly. The chain and hoisting apparatus were furnished by the steamer, under the bargain with the stevedore.

It is not suggested that the suit is not properly brought *in rem*, if the master, while acting within the scope of the authority conferred upon him by the owners, in the management of the vessel, was guilty of negligence towards the libellant. Negligence, when committed upon navigable waters, is a maritime tort which subjects the vessel to liability to an extent coincident with the liability of the owner. *Com'rs v. Lucas*, 93 U. S. 108. If the relations of the master of the steamer towards the libellant were such as to create a duty not to be negligent, the latter is entitled to recover if there was a breach of that duty. *Sherlock v. Alling*, 93 U. S. 99.

The learned judge in the court below was of the opinion that, as there was no privity of contract between the libellant and the owners of the steamer, they were not liable unless the thing by which he was injured was imminently dangerous; but he was also of opinion that if the degree of negligence which would make an employer liable to his employe were enough, such negligence was not established by the proofs. As the libellant was not directly employed by the master, and could only look to the master stavedore for his pay, there was no privity of contract between him and the ship-owners. Nor did the relation of master and servant, in its technical sense, exist between the libellant and the ship-owner. But it is conceived that this does not in the least affect the obligation of the master not to be negligent towards the libellant, or the degree of care which it was incumbent upon him to exercise. The libellant was performing a service in which the ship-owners had an interest, and which they contemplated would be performed by the use of appliances which they had agreed to provide. They were under the same obligation to him not to expose him to unnecessary danger, that they were under to the master stavedore, his employer. There was no express contract obligation on their part to either to provide safe and suitable appliances, but they were under an implied duty to each; and the measure of the duty towards each was the same. What would be negligence towards one would be towards the other. *Coughtry v. Globe Co.* 56 N. Y. 124; *Mulchey v. Methodist Society*, 125 Mass. 487. The implied obligation on the part of one who is to provide machinery or means by which a given service is to be performed by another, is to use proper care and diligence to see that such instrumentalities are safe and suitable for the purpose. "It is the duty of an employer inviting employes to use his structures and machinery, to use proper care and diligence to make such structures and machinery fit for use." Whart. Neg. § 211. If he knows, or by the use of due care might have known, that they were insufficient, he fails in his duty. This doctrine is cited with approval in *Hough v. Ry. Co.* 100 U. S. 220. Due care or ordinary care implies the use of such vigilance as is proportional to the danger to be avoided, judged by the standard of common prudence and experience. Applying this test here, where, if the appliances to be used were defective, serious casualties were to be apprehended, it

was the duty of the master of the steamer to exercise a corresponding vigilance to provide against them.

The proofs show that the average weight of the tubs which were being hoisted out of the hold was about 1,800 pounds; that on the day before one of the chains of the steamer, which was being used in the same work, broke; that both of these chains had been in use about two years; that the one that broke first had been used more than the other; and that such chains, when in proper condition, were sufficiently strong to sustain a hoisting weight of six or seven tons. Concededly the chain was defective, as it broke with a weight of 1,800 pounds, after it had only been used to hoist four or five tubs. It was rusted, and considerably worn in appearance. The breaking of the other chain was a circumstance to attract attention, and put the master of the steamer on inquiry. Under these circumstances it must be held that the casual examination of the chain which was given to it while it was being brought from the other hatch was not sufficient to exonerate the master from the charge of negligence. Before he permitted it to be employed in a use which was so hazardous to those who were to use it, he should have made a careful and thorough test or examination. Anything less than this was a failure to observe proper care.

The proofs do not justify the inference that the libelant was negligent. If he had had any reason to anticipate the accident he could undoubtedly have escaped; but this may be said in almost every conceivable case where an accident has happened. It was not indispensable for him to remain exposed under the hatchway while actually filling the tubs, but part of the time he and the other laborers were necessarily there, because they had to unhook the empty tubs, hook on the full ones, and steady them until they were hauled out of the hold. The work was being done with great dispatch; there were six men doing it, and a limited place in which to do it; the tubs, while being filled, stood near the hatchway and part of the time under it; and under all the circumstances it would seem that the libelant was as careful as in the hurry and excitement of the occasion could be reasonably expected of him, and should not be deemed in fault.

The proofs show that while the libelant sustained painful injuries they were not of a permanent character, nor did they incapacitate him long from doing his ordinary work. A decree for \$750 will be a fair compensation to him, and is accordingly ordered.

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IN THE

CIRCUIT AND DISTRICT COURTS

OF THE

UNITED STATES.

MAY—AUGUST, 1884.

ROBERT DESTY, EDITOR.

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HON. MATTHEW P. DEADY, DISTRICT JUDGE, OREGON.

¹ Resigned May 1, 1884. Hon. DAVID J. BREWER, of Kansas, appointed.

CASES REPORTED.

	Page		Page
Abbott v. Worthington	495	Bartlett, Jeffries v.	496
Accams, C., The.	642	Bate Refrig. Co. v. Gillett.	192
Adams, Kirkpatrick v.	287	Berlin & Jones Envelope Co., Reay v.	506
Addler v. Dreyfus.	426	Berthelet, Potter v.	240
Ætna L. Ins. Co., Davey v.	482	Bischoffsheim v. Baltzer.	890
Ætna L. Ins. Co., Davey v.	494	Blair v. St. Louis, H. & K. R. Co.	348
Alabama Marshalship, In re.	379	Blair v. St. Louis, H. & K. R. Co.	351
Albany Steam Trap Co. v. Felthousen.	633	Block v. Dreyfus.	428
Alexandria & W. R. Co., Hay v.	15	Boston, City of, Brickley v.	207
Alford v. Wilson.	96	Boylston Mut. Ins. Co., Teutonia Ins. Co. v.	148
Altsheid v. Dreyfus.	426	Brett, Lawler v.	219
American Grape Sugar Co., New York Grape Sugar Co. v.	505	Brickley v. City of Boston.	207
Amaden v. Steam Stone Cutter Co.	479	Bristol, The.	800
Anderson v. Carll.	245	Bristow, United States v.	378
Anderson, Hallock v.	245	Brook, Rice v.	611
Andrews v. Cole.	410	Brown's Adm'rs, Linton v.	455
Andrews v. Fielding.	123	Brush v. Condit.	826
Annie Williams, The.	866	Brush-Swan Elec. Light Co., Consol. Elec. Light Co. v.	502
Anschutz v. Miller.	376	Buck, Rumsey v.	697
Arms, etc., Two Hundred and Fourteen Boxes of, United States v.	50	Buffalo, City of, Worwick Manuf'g Co. v.	128
Armstrong, Stutz v.	843	Buffalo Grape Sugar Co., New York Grape Sugar Co. v.	505
Arnold v. Phelps.	315	Buffalo Lubricating Oil Co., Everest v.	848
Arnoux, Weston Dynamo-Elec. M. Co. v.	112	Buffalo L. Oil Co., Vacuum Oil Co. v.	850
Atherton Co., J. M., v. Ives.	894	Burdsall v. Curran.	839
Atlantic Milling Co. v. Robinson.	217	Burdsall, Curran v.	835
Atlantic & P. R. Co., Pacific R. R. v.	277	Burlington, C. R. & N. R. Co., Northwestern Fuel Co. v.	712
Attrill, Cassard v.	570	Cadiz, The.	157
Attrill, Chism v.	570	Cairnsmore, The.	519
Attrill, Fee v.	570	Callaghan, Myers v.	441
Attrill, Gillespie v.	570	Cape Fear Bank, Terry v.	778
Attrill, Hellman v.	570	Cape Fear Bank, Terry v.	777
Attrill, Oglesby v.	570	Carll, In re.	245
Attrill, Sears v.	570	Carll, Anderson v.	245
Aurora F. & M. Ins. Co., Ball & Sage Wagon Co. v.	232	Carll, The Erastus Wiman v.	245
Avery v. Wilson.	856	Carrick v. Landman.	209
Ayres v. Hamrick.	553	Cassard v. Attrill.	570
Baker, Pioneer Gold Min. Co. v.	4	Caswell, Sumner v.	249
Baker, Smith v.	709	Cent. R. Co., Mills v.	449
Ball & Sage Wagon Co. v. Aurora F. & M. Ins. Co.	232	Central Trust Co. v. Ohio Cent. R. Co.	10
Baltimore & O. R. Co., Western U. Tel. Co. v.	572	Chas. P. Harris Manuf'g Co., Banks v.	667
Baltzer, Bischoffsheim v.	890	Chattanooga, City of, Stevenson v.	556
Banks v. Chas. P. Harris Manuf'g Co.	667		
Barger, United States v.	500		

v.20—FAD.

(vii)

	Page		Page
Chicago Manuf'g Co., Royer v., (two cases),.....	853	Devato v. Eight Hundred and Twenty-three Barrels of Plumbago	610
Chicago & N. W. Ry. Co., Crane v..	402	Dorian v. Shreveport.....	401
Chism v. Attrill.....	570	Dorset Pipe & Pav. Co., Nat. Bank of Clinton v.....	707
City of Macon, The.....	159	Dow v. Memphis & L. R. R. Co.....	280
City of Macon, The, Ramsay v.....	159	Dow v. Memphis & L. R. R. Co.....	788
City of New Bedford, The.....	57	Drennan v. London Assurance Corp.	657
Clare v. Providence & S. S. Co.....	535	Dreyfus v. Dreyfus.....	426
Clark, Lull v.....	454	Dreyfus, Adler v.....	426
Clayton v. Four Hundred and Ten Tons of Coal.....	799	Dreyfus, Altsheed v.....	426
Cleveland, Lockwood v.....	164	Dreyfus, Block v.....	426
Clinton Nat. Bank v. Dorset Pipe & Pav. Co.....	707	Dreyfus, Corning v.....	426
Coburn v. Factors' & Traders' Ins. Co.....	644	Dreyfus, Hoffholmer v.....	426
Cole, Andrews v.....	410	Dreyfus, Krebs v.....	426
Coles v. The Niagara.....	152	Dreyfus, Lazard v.....	426
Com. of Va., Harvey v.....	411	Dreyfus, Maddox v.....	426
Condit, Brush v.....	826	Dreyfus, Weiller v.....	426
Connecticut Mut. L. Ins. Co., Edwards v.....	452	Duff, Patterson v.....	641
Connecticut Riv. Co., Holyoke Water-power Co. v.....	71	Dundee Mfg. & Tr. Inv. Co. v. Hughes.....	39
Consol. Elec. Light Co. v. Brush-Swan Elec. Light Co.....	502	Edwards v. Conn. Mut. L. Ins. Co..	452
Continental L. Ins. Co., Hale v.....	344	Edwards v. Davenport.....	766
Continental L. Ins. Co., Heusser v.....	222	Edwards v. Trav. Life Ins. Co.....	661
Convillon, Letchford v.....	608	Eggers, Morgan v.....	666
Cook v. Sherman, (two cases,).....	167	Elkins, Land Co. of New Mexico v..	545
Corning v. Dreyfus.....	426	Erastus Wiman, The, Carll v.....	245
Cottier v. Stimson.....	906	Erastus Wiman, The, Smith v.....	245
Cotton, Fourteen Hundred and Sixty-seven Bales of, Gardner v..	529	Erie Belle, The.....	63
Craigallion, The.....	747	Ervin v. Oregon Ry. & Nav. Co....	577
Crandal v. Parker Carriage Goods Co.....	851	Everest v. Buffalo Lubricating Oil Co.....	848
Crane v. Chicago & N. W. Ry. Co..	402	Exile, The.....	878
Crew v. St. Louis, K. & N. W. Ry. Co.....	87	Explorer, The.....	126
Cross, In re.....	824	Factors' & Traders' Ins. Co., Coburn v.....	644
Crossley v. City of New Orleans....	352	Farmers' Loan & Trust Co. v. Stone.	270
Culliford, Gomila v.....	734	Fee v. Attrill.....	570
Curran v. Burdsall.....	835	Felthousen, Albany Steam Trap Co. v.....	633
Curran, Burdsall v.....	839	Ferdinand, Hicks v.....	111
Curry v. McCauley.....	583	Fetter v. Newhall.....	118
Cyprus, The.....	144	Fetter v. Oliver.....	114
Dauphin, United States v., (several cases,).....	625	Fielding, Andrews v.....	128
Davenport, Edwards v.....	756	Fire Ins. Ass'n, Fitton v.....	766
Davey v. Aetna L. Ins. Co.....	482	Firemen's Ins. Co., Hardman v.....	594
Davey v. Aetna L. Ins. Co.....	494	First Nat. Bank v. Ohio Falls Car & Locomotive Works.....	65
Davis, Mundy v.....	353	Fish v. One Hundred and Fifty Tons of Brown Stone.....	201
Davis Improved Wrought Iron W. Co. v. Davis Wrought I. W. Co.	699	Fitton v. Fire Ins. Ass'n.....	766
Davis Wrought Iron W. Co., Davis Improved Wrought Iron W. W. Co. v.....	699	Flash v. Wilkerson.....	257
Dayton, Hayes v.....	690	Fleisher v. Greenwald.....	547
Deering, Hussey Manuf'g Co. v.....	795	Fletcher v. New Orleans N. E. R. Co.	345
Delaware, The.....	797	Fletcher, New Orleans N. E. R. Co. v.	345
Dendel v. Sutton.....	787	Fosdick, Hersey v.....	44
		Four Hundred and Ten Tons of Coal, Clayton v.....	799
		Fourth Nat. Bank, McLeod v.....	225
		Fox v. The Niagara.....	152
		Fox, Mallory Manuf'g Co. v.....	406

	Page		Page
Francis, Spink v.....	567	Heward v. The Two Brothers.....	391
Francis, Williams v.....	567	Howell, United States v.....	718
Frantzen, In re.....	785	Hughes, Dundee Mfg. & Tr. Inv.	
Fryer v. Maurer.....	916	Co. v.....	39
Gardner v. Fourteen Hundred and		Hunt, Pennington v.....	195
Sixty-seven Bales of Cotton.....	529	Hussey Manuf'g Co. v. Deering.....	795
Gartside Coal Co. v. Maxwell.....	187	Hynes, Liggett v.....	883
Gen. Meade, The.....	923	Illinois Cent. R. Co. v. Stone.....	468
George v. Steam Stone Cutter Co....	478	Illinois Cent. R. Co., Turrill v.....	912
George Heaton, The, (two cases,)....	323	Irwin, Taylor v.....	615
George L. Garlick, The.....	647	Iscenhart, Patrick v.....	339
Gillespie v. Attrill.....	570	Ives, J. M. Atherton Co. v.....	894
Gillett, Bate Refrig. Co. v.....	192	James, Yale Lock Manuf'g Co. v.....	908
Glen Iron Works, In re.....	674	Jeannot, Untermeyer v.....	503
Golden Mule, The.....	198	Jeffersonville, First Nat. Bank of, v.	
Gomila v. Culliford.....	734	Ohio Falls Car & L. Works.....	65
Goodwin, United States v.....	237	Jeffries v. Bartlett.....	496
Goucher v. N. W. Trav. Men's Ass'n.	596	Jennie B. Gilkey, The.....	161
Gould v. Spicers.....	317	Jewell, Hentz v.....	592
Greenwald, Fleisher v.....	547	Jones v. Steam Stone Cutter Co....	477
Gretna Green, The.....	901	Jones, City and County of San Fran-	
Griggs v. St. Croix Co.....	341	cisco v.....	188
Guadalupe, The.....	443	Junkermann, Shuenfeldt v.....	357
Gumbirner, Wooster v.....	167	Keller v. Stolzenbach.....	47
Gunpowder, One Hundred and Forty		Kelly v. Herrall.....	364
Kegs of, United States v.....	50	Kempahall Manuf'g Co., Morris v..	121
Hadji, The.....	875	King v. Shepherd.....	337
Hahn v. Salmon.....	801	Kirby, Pentlarge v.....	893
Hale v. Continental L. Ins. Co.....	344	Kirkpatrick v. Adams.....	287
Hall v. Stern.....	788	Knights of Honor, McMurphy v.....	107
Hallock v. Anderson.....	245	Krebs v. Dreyfus.....	426
Hamrick, Ayres v.....	553	Ladd v. Mills.....	792
Hamrick, Openheimer v.....	553	La Fayette Lamb, The.....	319
Hardman v. Firemen's Ins. Co.....	594	Land Co. of New Mexico v. Elkins..	545
Hart v. Thayer.....	696	Landman, Carrick v.....	209
Hart, Thayer v.....	693	Langbein, Wells v.....	183
Harvey v. Com. of Va.....	411	Large, McCullough v.....	309
Hattie M. Bain, The.....	389	Lawler v. Brett.....	219
Hay v. Alexandria & W. R. Co.....	15	Lazard v. Dreyfus.....	426
Hayes v. Dayton.....	690	Leonard, Ozark Land Co. v.....	881
Hays, United States v.....	710	Letchford v. Convillon.....	608
Hayward, Town of, Schulenberg-		Lidgerwood Manuf'g Co., Mundy v..	114
Boeckeler L. Co. v.....	422	Lidgerwood Manuf'g Co., Mundy v..	191
Heenrich v. Pullman Pal. Car Co....	100	Liggett v. Hynes.....	883
Hellman v. Attrill.....	570	Linton v. Brown's Adm'rs.....	455
Henderson v. L. & N. R. Co.....	430	Lizzie Henderson, The.....	524
Hentz v. Jewell.....	592	Lockwood v. Cleveland.....	164
Hercules, The.....	205	London Assurance Corp., Drennen v.	657
Herrall, Kelly v.....	864	Loring, Loud v.....	161
Hersey v. Fosdick.....	44	Lorraine, Town of, Nelson L. Co. v.	422
Hettie Ellis, The.....	393	Loud v. Loring.....	161
Hettie Ellis, The.....	507	Louisiana Lottery Cases.....	625
Heusser v. Continental L. Ins. Co....	222	Louisville & N. R. C., Henderson v.	430
Hickok, Mallory Manuf'g Co. v.....	116	Lull v. Clark.....	454
Hicks v. Ferdinand.....	111	Maddox v. Dreyfus.....	426
Hill, Sharon v.....	1	Maggie Burke, The.....	741
Hilmers, Oregon & Trans. Co. v.....	717	Mallory Manuf'g Co. v. Fox.....	409
Hoffheimer v. Dreyfus.....	426	Mallory Manuf'g Co. v. Hickok.....	116
Holyoke Water-power Co. v. Conn.			
R. Co.....	71		
Howard v. The Manhattan No. 12..	391		

	Page		Page
Manhattan L. Ins. Co., Sheerer v...	886	New York Grape Sugar Co. v. Buf-	
Manhattan No. 12, The, Howard v...	391	falo Grape Sugar Co.....	505
Marble, Vermont F. M. Co. v.....	117	New York Ninth Nat. Bank v. Ralls	
Marshalship, In re.....	379	Co.....	874
Mary Ida, The.....	741	New York Shipping Comm'r., In re	
Mason v. McMurray.....	80	Acc'ts of.....	211
Mathewson v. Phoenix I. Foundry..	281	Newhall, Fetter v.....	113
Maurer, Fryer v.....	916	Niagara, The.....	152
Maus, New Process Fer. Co. v.....	725	Niagara, The, Coles v.....	152
Maxwell, Gartside Coal Co. v.....	187	Niagara, The, Fox v.....	152
McCauley, Curry v.....	583	Niagara, The, Mechanics' & Traders'	
McCullough v. Large.....	309	Ins. Co. v.....	152
McLeod v. Fourth Nat. Bank of St.		Niagara, The, Packer v.....	152
Louis.....	225	Nicewonger, United States v.....	433
McMurray, Mason v.....	80	Ninth Nat. Bank v. Ralls Co.....	874
McMurry v. Supreme Lodge Knights		Northern Pacific R. Co., Small v....	753
of Honor.....	107	Northern R. Co. v. Ogdensburg &	
Meadow Spring Distilling Co., Pope v	85	L. C. R. Co.....	347
Meadow Spring Distilling Co., Ryan v	85	Northwestern Fuel Co. v. Burling-	
Mechanics' & Traders' Ins. Co. v.		ton, C. R. & N. R. Co.....	712
The Niagara.....	152	Northwestern Trav. Men's Ass'n,	
Memphis & L. R. R. Co., Dow v....	260	Goucher v.....	596
Memphis & L. R. R. Co., Dow v....	768	Ogdensburg & L. C. R. Co., North-	
Merchants' Nat. Bank v. Samuel....	664	ern R. Co. v.....	347
Michigan S. & N. I. R. Co., Turrill v.	912	Oglesby v. Attrill.....	570
Miller, Anschutz v.....	376	Ohio Cent. R. Co., Central Trust	
Mills v. Cent. R. Co.....	449	Co. v.....	10
Mills, Ladd v.....	792	Ohio Cent. R. Co., Owens v.....	10
Minnie, The.....	543	Ohio Falls Car & Locomotive Works,	
Modoc, The.....	398	First Nat. Bank v.....	65
Monona School-dist., United States		Ole Oleson, The.....	384
ex rel. v.....	294	Oliver, Fetter v.....	114
Morgan, Ex parte.....	298	One Hundred and Forty Kegs, etc.,	
Morgan v. Eggers.....	666	United States v.....	50
Morris v. Kempshall Manuf'g Co....	121	Openheimer v. Hararick.....	553
Mundy v. Davis.....	353	Openheimer, Simon v.....	553
Mundy v. Lidgerwood Manuf'g Co..	114	Oregon Ry. & Nav. Co., Ervin v....	577
Mundy v. Lidgerwood Manuf'g Co..	191	Oregon & Trans. Co. v. Hilmers....	717
Muser, Wooster v.....	162	Owens v. Ohio Cent. R. Co.....	10
Myers v. Callaghan.....	441	Ozark Land Co. v. Leonard.....	681
Narragansett, The.....	894	Pacific R. R. v. Atlantic & P. R. Co.	277
National Wire Mattress Co. v. N. Y.		Packer, E. A., The.....	327
B. M. Co.....	119	Packer v. The Niagara.....	152
Negaunee, The.....	918	Palmer v. Travers.....	501
Negley, In re.....	499	Parker Carriage Goods Co., Cran-	
Nelson L. Co. v. Town of Lorraine..	422	dal v.....	851
Neumann, Simon v.....	196	Parks v. Watson.....	764
Nevada & O. R. Co., Union Trust		Patrick v. Isenhardt.....	339
Co. v.....	80	Patterson v. Duff.....	641
New Orleans, City of, Crossley v....	352	Payne, The Wm. H.....	650
New Orleans N. E. R. Co. v. Fletch-		Pennington v. Hunt.....	193
er.....	245	Pentlarge v. Kirby.....	898
New Orleans N. E. R. Co., Fletcher		Pentlarge v. New York B. & B. Co.	314
v.....	845	Peoria Sugar Ref. v. Susquehanna	
New Process Fer. Co. v. Maus.....	725	Mut. F. Ins. Co.....	480
New York B. & B. Co., Pentlarge v.	314	Perkins, Phila. & R. R. Co. v.....	205
New York Braided-wire M. Co., Nat.		Peters v. Robertson.....	818
Wire M. Co. v.....	119	Phelps, Arnold v.....	315
New York Cent. & H. R. R. Co.,		Philadelphia & R. R. Co. v. Perkins.	205
Rintoul v.....	813	Philadelphia & R. R. Co. v. Warren	
New York Grape Sugar Co. v. Amer.		F. & M. Co.....	203
Grape Sugar Co.....	505		

	Page		Page
Phoenix I. Foundry, Mathewson v.	281	Shively v. Welch.	28
Pioneer Gold Min. Co. v. Baker.	4	Shreveport, City of, Dorian v.	401
Pilot, The.	860	Shreveport, City of, Scott's Ex'rs v.	714
Plumbago, Eight Hundred and Twenty-three Barrels of, Deveto v.	510	Shuenfeldt v. Junkermann.	357
Pope v. Meadow Spring Distilling Co.	35	Sibley v. Simonton.	784
Potter v. Berthelet.	240	Signer, In re	236
Prentice v. Stearns.	819	Simon v. Neumann.	196
Protector, The.	207	Simon v. Oppenheimer.	553
Providence & S. S. Co., Clare v.	535	Simon, Roemer v.	197
Pullman Pal. Car Co., Hearnich v.	100	Simonson, Wooster v.	316
		Simonton, Sibley v.	784
Racine Wagon & Carriage Co., Sal- adee v.	686	Small v. Northern Pac. R. Co.	753
Ralls Co., New York Ninth Nat. Bank v.	374	Smith v. Baker.	709
Ramsay v. The City of Macon.	159	Smith v. The Erastus Wiman.	245
Reay v. Berlin & Jones Envelope Co.	506	Soule, Shaw v.	790
Reilley, United States v.	46	Spaulding, Roundy v.	43
Reinhardt, Werner v.	163	Spicers, Gould v.	317
Rice v. Brook.	611	Spink v. Francis.	567
Richard Vaux, The.	654	Stafford, United States v.	720
Rintoul v. New York Cent. & H. R. R. Co.	313	State of Texas, The.	254
Robertson, Peters v.	818	Steam Stone Cutter Co., Amsden v.	479
Robinson, Atlantic Milling Co. v.	217	Steam Stone Cutter Co., George v.	478
Rock Island Paper Co., Wilson v.	705	Steam Stone Cutter Co., Jones v.	477
Roemer v. Simon.	197	Stearns, Prentice v.	819
Roosevelt v. Western Elec. Co.	724	Sterling, The.	751
Rosedale, The.	447	Stern, Hall v.	788
Roundy v. Spaulding.	43	Stevenson v. City of Chattanooga.	586
Royer v. Chicago Manuf'g Co., (two cases.)	853	Stimson, Cottier v.	906
Rumsey v. Buck.	697	Stolzenbach, Keller v.	47
Rumsey v. Town.	558	Stone, Farmers' Loan & T. Co. v.	270
Ryan v. Meadow Spring Distilling Co.	85	Stone, Illinois Cent. R. Co. v.	468
		Stone, One Hundred and Fifty Tons of, Fish v.	201
St. Croix Co., Griggs v.	341	Stutz v. Armstrong.	843
St. Louis, Fourth Nat. Bank of, Mc- Leod v.	225	Sumner v. Caswell.	249
St. Louis, H. & K. R. Co., Blair v.	348	Susquehanna Mut. F. Ins. Co., Pe- oria Sugar Ref. v.	480
St. Louis, H. & K. R. Co., Blair v.	351	Sutton, Dendel v.	787
St. Louis, K. & N. W. Ry. Co., Crew v.	87	Szymski, Heirs of, v. Zunts.	361
Saladee v. Racine Wagon & Carriage Co.	686		
Salmon, Hahn v.	801	Taylor v. Irwin.	615
Sam Rotan, The.	333	Terry v. Bank of Cape Fear.	773
Samuel, Merchants' Nat. Bank v.	664	Terry v. Bank of Cape Fear.	777
San Francisco, City and County of, v. Jones.	188	Teutonia Ins. Co. v. Boylston Mut. Ins. Co.	148
Saratoga, The.	869	Thayer v. Hart.	693
Schulenberg-Boeckeler L. Co. v. Town of Hayward.	422	Thayer, Hart v.	696
Scott's Ex'rs v. Shreveport.	714	Town, Rumsey v.	553
Sears v. Attrill.	570	Travellers' Life Ins. Co., Edwards v.	661
Sharon v. Hill.	1	Travers, Palmer v.	501
Shaw v. Soule.	790	Tucker, J. W., The.	129
Sheerer v. Manhattan L. Ins. Co.	886	Tully, In re	812
Shepherd, King v.	337	Turesaud, United States v., (several cases.)	621
Sherman, Cook v., (two cases,)	167	Turrill v. Illinois Cent. R. Co.	912
Shipping Com'r, In re Acc'ts. of.	211	Turrill v. Mich. S. & N. I. R. Co.	912
		Two Brothers, The, Howard v.	391
		Two Hundred and Fourteen Boxes, etc., United States v.	50
		Union, The.	539
		Union Trust Co. v. Nevada & O. R. Co.	80

	Page		Page
United States v. Barger.....	500	Warren F. & M. Co., Phila. & R. R. Co. v.....	205
United States v. Bristow.....	378	Washington, United States v.....	630
United States v. Dauphin, (several cases,).....	625	Watson, Parks v.....	764
United States v. Goodwin.....	237	Weiller v. Dreyfus.....	426
United States v. Hays.....	710	Welch, Shively v.....	28
United States v. Howell.....	718	Wells v. Langhein.....	183
United States v. Nicewonger.....	438	Werner v. Reinhardt.....	163
United States v. One Hundred and Forty Kegs, etc.	50	Western Elec. Co., Roosevelt v.....	724
United States v. Reilley.....	46	Western Union Tel. Co. v. Baltimore & O. R. Co.....	572
United States v. Stafford.....	720	Weston Dynamo-Elec. M. Co. v. Arnoux.....	112
United States v. Tureaud, (several cases,).....	621	White Fawn, The.....	647
United States v. Two Hundred and Fourteen Boxes, etc.....	50	Wilkerson, Flash v.....	257
United States v. Washington.....	630	Williams v. Francis.....	567
United States ex rel. v. Monona School-dist.....	294	Wilson, Alford v.....	96
Untermeyer v. Jeannot.....	503	Wilson, Avery v.....	856
Vacuum Oil Co. v. Buffalo L. Oil Co.....	850	Wilson v. Rock Island Paper Co....	705
Vanderbilt, The.....	650	Wooster v. Gumbirnnner.....	167
Vermont F. M. Co. v. Marble.....	117	Wooster v. Muser.....	162
Vetterlein & Co., In re.....	109	Wooster v. Simonson.....	316
Virginia, Com. of, Harvey v.....	411	Worthington, Abbott v.....	495
Wanderer, The.....	140	Worswick Manuf'g Co. v. City of Buffalo.....	126
Wanderer, The.....	655	Yale Lock Manuf'g Co. v. James....	903
Ward, E. B., Jr., The.....	702	Yeager, The.....	653
		Young America, The.....	926
		Zanta, Heirs of Szymanski v.....	361

CASES REPORTED.

ARRANGED UNDER THEIR RESPECTIVE CIRCUITS
AND DISTRICTS.

FIRST CIRCUIT.

CIRCUIT COURT, D. MASSACHUSETTS.

	Page
Abbott v. Worthington	495
Atlantic & P. R. Co., Pacific R. R. v.	277
Boston, City of, Brickley v.	207
Brickley v. City of Boston	207
Fosdick, Hersey v.	44
Hercules, The	205
Hersey v. Fosdick	44
Jennie B. Gilkey, The	161
Loring, Loud v.	161
Loud v. Loring	161
Pacific R. R. v. Atlantic & P. R. Co.	277
Perkins, Phila. & R. R. Co. v.	205
Philadelphia & R. R. Co. v. Perkins.	205
Philadelphia & R. R. Co. v. Warren F. & M. Co.	205
Protector, The	207
Warren F. & M. Co., Phila. & R. R. Co. v.	205
Worthington, Abbott v.	495

CIRCUIT COURT, D. NEW HAMPSHIRE.

Goodwin, United States v.	237
Northern R. Co. v. Ogdensburg & L. C. R. Co.	347
Ogdensburg & L. C. R. Co., North- ern R. Co. v.	347
United States v. Goodwin	237

CIRCUIT COURT, D. RHODE ISLAND.

Gould v. Spicers	317
Mathewson v. Phoenix I. Foundry..	281
Narragansett, The	394
Phoenix I. Foundry, Mathewson v.	281
Spicers, Gould v.	317

SECOND CIRCUIT.

CIRCUIT COURT, D. CONNECTICUT.

Alford v. Wilson	96
------------------------	----

v.20—FEB.

	Page
Andrews v. Fielding	123
Connecticut Riv. Co., Holyoke Wa- ter-power Co. v.	71
Continental L. Ins. Co., Heusser v.	222
Fielding, Andrews v.	123
Heusser v. Continental L. Ins. Co.	222
Hickok, Mallory Manuf'g Co. v.	116
Holyoke Water-power Co. v. Conn. Riv. Co.	71
Kempshall Manuf'g Co., Morris v.	121
Mallory Manuf'g Co. v. Hickok.	116
Morris v. Kempshall Manuf'g Co.	121
Wilson, Alford v.	96

DISTRICT COURT, D. CONNECTICUT.

Howard v. The Manhattan No. 12..	391
Howard v. The Two Brothers.	391
Manhattan No. 12, The, Howard v.	391
Minnie, The	543
Rosedale, The	447
Sterling, The	751
Two Brothers, The, Howard v.	391

CIRCUIT COURT, N. D. NEW YORK.

Albany Steam Trap Co. v. Felthousen	633
American Grape Sugar Co., New York Grape Sugar Co. v.	505
Andrews v. Cole	410
Buffalo, City of, Worswick Manuf'g Co. v.	126
Buffalo Grape Sugar Co., New York Grape Sugar Co. v.	505
Buffalo Lubricating Oil Co., Ever- est v.	848
Buffalo L. Oil Co., Vacuum Oil Co. v.	850
Clark, Lull v.	454
Cole, Andrews v.	410
Connecticut Mut. L. Ins. Co., Ed- wards v.	452
Crandal v. Parker Carriage Goods Co.	851
Davis Improved Wrought Iron W. Co. v. Davis Wrought I. W. Co.	699

(xiii)

	Page
Wooster v. Gumbirner.....	167
Wooster v. Muser.....	162
Wooster v. Simonson.....	316
Yale Lock Manuf'g Co. v. James....	903

DISTRICT COURT, S. D. NEW YORK.

Anderson v. Carll.....	245
Anderson, Hallock v.....	245
Brown Stone, One Hundred and Fifty Tons of, Fish v.....	201
Carll v. The Erastus Wiman.....	245
Carll, Anderson v.....	245
Carll, In re.....	245
Caswell, Sumner v.....	249
City of Macon, The.....	159
City of Macon, The, Ramsay v.....	159
City of New Bedford, The.....	57
Clayton v. Four Hundred and Ten Tons of Coal.....	799
Coles v. The Niagara.....	152
Devato v. Eight Hundred and Twenty-three Barrels of Plumbago	510
Erastus Wiman, The, Carll v.....	245
Erastus Wiman, The, Smith v.....	245
Fish v. One Hundred and Fifty Tons of Brown Stone.....	201
Four Hundred and Ten Tons of Coal, Clayton v.....	799
Fox v. The Niagara.....	152
George L. Garlick, The.....	647
Hallock v. Anderson.....	245
Hattie M. Bain, The.....	389
Mechanics' & Traders' Ins. Co. v. The Niagara.....	152
Niagara, The.....	152
Niagara, The, Coles v.....	152
Niagara, The, Fox v.....	152
Niagara, The, Mechanics' & Traders' Ins. Co. v.....	152
Niagara, The, Packer v.....	152
Packer v. The Niagara.....	152
Packer, E. A., The.....	327
Payne, Wm. H., The.....	650
Plumbago, Eight Hundred and Twenty-three Barrels of, Devato v.	510
Ramsay v. The City of Macon.....	159
Richard Vaux, The.....	654
Sam Rotan, The.....	333
Saratoga, The.....	869
Signer, In re.....	236
Smith v. The Erastus Wiman.....	245
State of Texas, The.....	254
Sumner v. Caswell.....	249
Tucker, J. W., The.....	129
Vanderbilt, The.....	650
Vetterlein & Co., In re.....	109
White Fawn, The.....	647
Wm. H. Payne, The.....	650

CIRCUIT COURT, D. VERMONT.

Amsden v. Steam Stone Cutter Co..	479
-----------------------------------	-----

	Page
Banks v. Chas. P. Harris Manuf'g Co.....	667
Chas. P. Harris Manuf'g Co., Banks v.....	667
Continental L. Ins. Co., Hale v.....	344
Fire Ins. Ass'n, Fitton v.....	766
Fitton v. Fire Ins. Ass'n.....	766
George v. Steam Stone Cutter Co....	478
Hale v. Continental L. Ins. Co.....	344
Jones v. Steam Stone Cutter Co.....	477
Marble, Vermont F. M. Co. v.....	117
Shaw v. Soule.....	790
Soule, Shaw v.....	790
Steam Stone Cutter Co., Amsden v.	479
Steam Stone Cutter Co., George v..	478
Steam Stone Cutter Co., Jones v....	477
Vermont F. M. Co. v. Marble.....	117

THIRD CIRCUIT.

CIRCUIT COURT, D. NEW JERSEY.

Ætna L. Ins. Co., Davey v.....	482
Ætna L. Ins. Co., Davey v.....	494
Bate Refrig. Co. v. Gillett.....	192
Cent. R. Co., Mills v.....	449
Cleveland, Lockwood v.....	164
Davey v. Ætna L. Ins. Co.....	482
Davey v. Ætna L. Ins. Co.....	494
Gillett, Bate Refrig. Co. v.....	192
Hunt, Pennington v.....	195
Lockwood v. Cleveland.....	164
Mills v. Cent. R. Co.....	449
Pennington v. Hunt.....	195

DISTRICT COURT, D. NEW JERSEY.

Annie Williams, The.....	866
Exile, The.....	878
Young America, The.....	926

CIRCUIT COURT, E. D. PENNSYLVANIA.

Glen Iron Works, In re.....	674
Peoria Sugar Ref. v. Susquehanna Mut. F. Ins. Co.....	480
Susquehanna Mut. F. Ins. Co., Pe- oria Sugar Ref. v.....	480

CIRCUIT COURT, W. D. PENNSYLVANIA.

Armstrong, Stutz v.....	843
Brown's Adm'rs, Linton v.....	455
Curry v. McCauley.....	588
Deering, Hussey Manuf'g Co. v.....	795
Duff, Patterson v.....	641
Hussey Manuf'g Co. v. Deering.....	795
Keller v. Stolzenbach.....	47
Large, McCullough v.....	309
Linton v. Brown's Adm'rs.....	455

	Page
McCauley, Curry v.....	583
McCullough v. Large.....	309
Patterson v. Duff	641
Stolzenbach, Keller v.....	47
Stutz v. Armstrong.....	843

DISTRICT COURT, W. D. PENNSYLVANIA.

Barger, United States v.....	500
Modoc, The.....	398
Negley, In re.....	499
Nicewonger, United States v.....	438
United States v. Barger.....	500
United States v. Nicewonger.....	438

FOURTH CIRCUIT.

CIRCUIT COURT, D. MARYLAND.

Baltimore & O. R. Co., Western U. Tel. Co. v.....	572
Western Union Tel. Co. v. Baltimore & O. R. Co.....	572

DISTRICT COURT, D. MARYLAND.

Craigallion, The.....	747
Cross, In re.....	824
George Heaton, The, (two cases,)...	323

CIRCUIT COURT, W. D. NORTH CAROLINA.

Avery v. Wilson.....	856
Cape Fear Bank, Terry v.....	773
Cape Fear Bank, Terry v.....	777
Sibley v. Simonton.....	784
Simonton, Sibley v.....	784
Terry v. Bank of Cape Fear.....	773
Terry v. Bank of Cape Fear.....	777
Wilson, Avery v.....	856

CIRCUIT COURT, E. D. VIRGINIA.

Alexandria & W. R. Co., Hay v.....	15
Harvey v. Com. of Va.....	411
Hay v. Alexandria & W. R. Co.....	15
Virginia, Com. of, Harvey v.....	411

DISTRICT COURT, E. D. VIRGINIA.

Arms, etc., Two Hundred and Four- teen Boxes of, United States v.....	50
Gunpowder, One Hundred and Forty Kegs of, United States v.....	50
Pilot, The.....	860
United States v. One Hundred and Forty Kegs of Gunpowder.....	50
United States v. Two Hundred and Fourteen Boxes of Arms, etc.....	50

CIRCUIT COURT, D. WEST VIRGINIA.

Central Trust Co. v. Ohio Cent. R. Co.....	10
Ohio Cent. R. Co., Central Trust Co. v.....	10
Ohio Cent. R. Co., Owens v.....	10
Owens v. Ohio Cent. R. Co.....	10

FIFTH CIRCUIT.

DISTRICT COURT, M. D. ALABAMA.

Alabama Marshalship, In re.....	379
---------------------------------	-----

CIRCUIT COURT, N. D. ALABAMA.

Carrick v. Landman.....	209
Landman, Carrick v.....	209

DISTRICT COURT, S. D. ALABAMA.

Maggie Burke, The.....	741
Mary Ida, The.....	741

CIRCUIT COURT, N. D. FLORIDA.

Accame, C., The.....	642
----------------------	-----

CIRCUIT COURT, S. D. FLORIDA.

Cotton, Fourteen Hundred and Sixty-seven Bales of, Gardner v.....	529
Gardner v. Fourteen Hundred and Sixty-seven Bales of Cotton.....	529

DISTRICT COURT, S. D. FLORIDA.

Lizzie Henderson, The.....	524
----------------------------	-----

CIRCUIT COURT, N. D. GEORGIA.

Bartlett, Jeffries v.....	496
Jeffries v. Bartlett.....	496

CIRCUIT COURT, D. LOUISIANA.

Wanderer, The.....	655
Yeager, The.....	653

CIRCUIT COURT, E. D. LOUISIANA.

Addler v. Dreyfus.....	426
Altsheed v. Dreyfus.....	426
Block v. Dreyfus.....	426
Boylston Mut. Ins. Co., Teutonia Ins. Co. v.....	148
Cadiz, The.....	157

	Page
Coburn v. Factors' & Traders' Ins. Co.	644
Convillon, Letchford v.	608
Corning v. Dreyfus	426
Crossley v. City of New Orleans	352
Cyprus, The	144
Dauphin, United States v., (several cases,)	626
Dreyfus v. Dreyfus	426
Dreyfus, Adler v.	426
Dreyfus, Altsheed v.	426
Dreyfus, Block v.	426
Dreyfus, Corning v.	426
Dreyfus, Hoffheimer v.	426
Dreyfus, Krebs v.	426
Dreyfus, Lazard v.	426
Dreyfus, Maddox v.	426
Dreyfus, Weiller v.	426
Explorer, The	135
Factors' & Traders' Ins. Co., Coburn v.	644
Firemen's Ins. Co., Hardman v.	594
Fletcher v. New Orleans N. E. R. Co.	345
Fletcher, New Orleans N. E. R. Co. v.	345
Francis, Spink v.	567
Francis, Williams v.	567
Golden Rule, The	198
Hardman v. Firemen's Ins. Co.	594
Henderson v. L. & N. R. Co.	430
Hettie Ellis, The	507
Hoffheimer v. Dreyfus	426
Krebs v. Dreyfus	426
Lazard v. Dreyfus	426
Letchford v. Convillon	608
Louisiana Lottery Cases	625
Louisville & N. R. C., Henderson v.	430
Maddox v. Dreyfus	426
New Orleans, City of, Crossley v.	352
New Orleans N. E. R. Co. v. Fletcher	845
New Orleans N. E. R. Co., Fletcher v.	345
Spink v. Francis	567
Szymanski, Heirs of, v. Zunts	361
Teutonia Ins. Co. v. Boylston Mut. Ins. Co.	148
Tureaud, United States v., (several cases,)	621
United States v. Dauphin, (several cases,)	625
United States v. Tureaud, (several cases,)	621
Wanderer, The	140
Ward, E. B., Jr., The	702
Weiller v. Dreyfus	426
Williams v. Francis	567
Zunts, Heirs of Szymanski v.	361

DISTRICT COURT, E. D. LOUISIANA.

Culliford, Gomila v.	734
Gomila v. Culliford	734
Hettie Ellis, The	393

v.20 FED.—b

CIRCUIT COURT, W. D. LOUISIANA.

Dorian v. City of Shreveport	401
Howell, United States v.	718
Scott's Ex'rs v. City of Shreveport	714
Shreveport, City of, Dorian v.	401
Shreveport, City of, Scott's Ex'rs v.	714
United States v. Howell	718

CIRCUIT COURT, S. D. MISSISSIPPI.

Farmers' Loan & Trust Co. v. Stone	270
Hentz v. Jewell	592
Illinois Cent. R. Co. v. Stone	468
Jewell, Hentz v.	592
Stone, Farmers' Loan & T. Co. v.	270
Stone, Illinois Cent. R. Co. v.	468

DISTRICT COURT, D. TEXAS.

Guadalupe, The	443
----------------	-----

CIRCUIT COURT, W. D. TEXAS.

United States v. Washington	630
Washington, United States v.	630

SIXTH CIRCUIT.

CIRCUIT COURT, D. KENTUCKY.

Atherton Co., J. M., v. Ives	894
Bristow, United States v.	378
Davis, Mundy v.	353
Ives, J. M. Atherton Co. v.	894
Manhattan L. Ins. Co., Sheerer v.	886
Mundy v. Davis	353
Sheerer v. Manhattan L. Ins. Co.	886
United States v. Bristow	378

DISTRICT COURT, E. D. MICHIGAN.

Erie Belle, The	63
-----------------	----

DISTRICT COURT, S. D. OHIO.

Gretna Green, The	901
-------------------	-----

CIRCUIT COURT, E. D. TENNESSEE, S. D.

Chattanooga, City of, Stevenson v.	586
Stevenson v. City of Chattanooga	586

CIRCUIT COURT, M. D. TENNESSEE.

McMurry v. Supreme Lodge Knights of Honor	107
Knights of Honor, McMurry v.	107

	Page		Page
CIRCUIT COURT, W. D. TENNESSEE.		CIRCUIT COURT, N. D. INDIANA.	
Adams, Kirkpatrick v.....	287	Maus, New Process Fer. Co. v.....	725
Flash v. Wilkerson.....	257	New Process Fer. Co. v. Maus.....	725
Kirkpatrick v. Adams.....	287		
Wilkerson, Flash v.....	257	CIRCUIT COURT, E. D. WISCONSIN.	
SEVENTH CIRCUIT.		Berthelet, Potter v.....	240
CIRCUIT COURT, N. D. ILLINOIS.		Brook, Rice v.....	611
Burdsall v. Curran.....	839	Goucher v. N. W. Trav. Men's Ass'n.	596
Callaghan, Myers v.....	441	Meadow Spring Distilling Co., Pope v	35
Chicago Manuf'g Co., Royer v., (two		Meadow Spring Distilling Co., Ryan v	35
cases,).....	853	Northwestern Trav. Men's Ass'n,	
Clinton Nat. Bank v. Dorset Pipe &		Goucher v.....	596
Pav. Co.....	707	Ole Oleson, The.....	384
Curran, Burdsall v.....	839	Pope v. Meadow Spring Distilling Co.	35
Dorset Pipe & Pav. Co., Nat. Bank		Potter v. Berthelet.....	240
of Clinton v.....	707	Racine Wagon & Carriage Co., Sal-	
Frantzen, In re.....	785	adee v.....	686
Illinois Cent. R. Co., Turrill v.....	912	Rice v. Brook.....	611
Michigan S. & N. I. R. Co., Turrill		Ryan v. Meadow Spring Distilling	
v.....	912	Co.....	35
Myers v. Callaghan.....	441	Saladee v. Racine Wagon & Carriage	
Rock Island Paper Co., Wilson v....	705	Co.....	686
Roundy v. Spaulding.....	43		
Royer v. Chicago Manuf'g Co., (two		CIRCUIT COURT, W. D. WISCONSIN.	
cases,).....	853	Griggs v. St. Croix Co.....	341
Spaulding, Roundy v.....	43	Hayward, Town of, Schulenberg-	
Turrill v. Illinois Cent. R. Co.....	912	Boeckeler L. Co. v.....	422
Turrill v. Michigan S. & N. I. R.		Lorraine, Town of, Nelson L. Co. v.	422
Co.....	912	Nelson L. Co. v. Town of Lorraine..	422
Wilson v. Rock Island Paper Co....	705	St. Croix Co., Griggs v.....	341
		Schulenberg-Boeckeler L. Co. v.	
		Town of Hayward.....	422
DISTRICT COURT, N. D. ILLINOIS.		DISTRICT COURT, W. D. WISCONSIN.	
Burdsall, Curran v.....	835	La Fayette Lamb, The.....	319
Curran v. Burdsall.....	835		
Negaunee, The.....	918		
Union, The.....	539		
		EIGHTH CIRCUIT.	
CIRCUIT COURT, S. D. ILLINOIS.		CIRCUIT COURT, E. D. ARKANSAS.	
Dendel v. Sutton.....	787	Dow v. Memphis & L. R. R. Co....	260
Sutton, Dendel v.....	787	Dow v. Memphis & L. R. R. Co.....	763
		Leonard, Ozark Land Co. v.....	881
CIRCUIT COURT, D. INDIANA.		Memphis & L. R. R. Co., Dow v....	260
Aurora F. & M. Ins. Co., Ball & Sage		Memphis & L. R. R. Co., Dow v.,...	768
Wagon Co. v.....	232	Ozark Land Co. v. Leonard.....	881
Ball & Sage Wagon Co. v. Aurora F.			
& M. Ins. Co.....	232	DISTRICT COURT, E. D. ARKANSAS.	
Eggers, Morgan v.....	666	Stafford, United States v.....	720
First Nat. Bank v. Ohio Falls Car &		United States v. Stafford.....	720
Locomotive Works.....	65		
Morgan v. Eggers.....	666	DISTRICT COURT, W. D. ARKANSAS.	
Ohio Falls Car & Locomotive Works,		Hynes, Liggett v.....	883
First Nat. Bank v.....	65		

	Page
Liggett v. Hynes.....	888
Morgan, Ex parte.....	298

CIRCUIT COURT, D. IOWA, C. D.

Cook v. Sherman, (two cases,).....	167
Sherman, Cook v., (two cases,).....	167

CIRCUIT COURT, N. D. IOWA, C. D.

Irwin, Taylor v.....	615
Taylor v. Irwin.....	615

CIRCUIT COURT, N. D. IOWA, E. D.

Junkermann, Shuenfeldt v.....	357
King v. Shepherd.....	337
Langbein, Wells v.....	183
Shepherd, King v.....	337
Shuenfeldt v. Junkermann.....	357
Wells v. Langbein.....	183

CIRCUIT COURT, N. D. IOWA, W. D.

Fleisher v. Greenwald.....	547
Greenwald, Fleisher v.....	547

CIRCUIT COURT, S. D. IOWA.

Davenport, Edwards v.....	756
Edwards v. Davenport.....	756

CIRCUIT COURT, S. D. IOWA, C. D.

Ayres v. Hamrick.....	553
Brett, Lawler v.....	219
Chicago & N. W. Ry. Co., Crane v..	402
Crane v. Chicago & N. W. Ry. Co..	402
Hamrick, Ayres v.....	553
Hamrick, Openheimer v.....	553
Lawler v. Brett.....	219
Monona School-dist., United States ex rel. v.....	294
Openheimer v. Hamrick.....	553
Openheimer, Simon v.....	553
Rumsey v. Town.....	558
Simon v. Openheimer.....	553
Town, Rumsey v.....	558
United States ex rel. v. Monona School-dist.....	294

CIRCUIT COURT, D. KANSAS.

Isehart, Patrick v.....	339
Patrick v. Isehart.....	339

CIRCUIT COURT, D. MINNESOTA.

Burlington, C. R. & N. R. Co., Northwestern Fuel Co. v.....	712
--	-----

	Page
Drennan v. London Assurance Corp.	657
London Assurance Corp., Drennan v.	657
Northern Pacific R. Co., Small v....	753
Northwestern Fuel Co. v. Burling- ton, C. R. & N. R. Co.....	712
Prentice v. Stearns.....	819
Small v. Northern Pac. R. Co.....	753
Stearns, Prentice v.....	819

CIRCUIT COURT, E. D. MISSOURI.

Anschutz v. Miller.....	376
Blair v. St. Louis, H. & K. R. Co...	348
Blair v. St. Louis, H. & K. R. Co...	351
Buck, Rumsey v.....	697
Crew v. St. Louis, K. & N. W. Ry. Co.....	87
Fourth Nat. Bank of St. Louis, Mc- Leod v.....	225
Gartside Coal Co. v. Maxwell.....	187
Maxwell, Gartside Coal Co. v.....	187
McLeod v. Fourth Nat. Bank of St. Louis.....	225
Merchants' Nat. Bank v. Samuel....	664
Miller, Anschutz v.....	376
Ninth Nat. Bank of New York v. Ralls Co.....	374
Ralls Co., Ninth Nat. Bank of New York v.....	374
Rumsey v. Buck.....	697
St. Louis, H. & K. R. Co., Blair v..	348
St. Louis, H. & K. R. Co., Blair v..	351
St. Louis, K. & N. W. Ry. Co., Crew v.....	87
Samuel, Merchants' Nat. Bank v...	664

CIRCUIT COURT, W. D. MISSOURI.

Hays, United States v.....	710
United States v. Hays.....	710

CIRCUIT COURT, D. NEBRASKA.

Gen. Meade, The.....	923
Parks v. Watson.....	764
Watson, Parks v.....	764

NINTH CIRCUIT.

CIRCUIT COURT, D. CALIFORNIA.

Baker, Pioneer Gold Min. Co. v.....	4
Hill, Sharon v.....	1
Jones, City and County of San Fran- cisco v.....	188
Pioneer Gold Min. Co. v. Baker.....	4
San Francisco, City and County of, v. Jones.....	188
Sharon v. Hill.....	1

	Page		Page
CIRCUIT COURT, D. NEVADA.		Hahn v. Salmon	801
Mason v. McMurray	80	Herrall, Kelly v.	364
McMurray, Mason v.	80	Hughes, Dundee Mtge. & Tr. Inv.	
Nevada & O. R. Co., Union Trust		Co. v.	39
Co. v.	80	Kelly v. Herrall.	364
Reilley, United States v.	46	Salmon, Hahn v.	801
Union Trust Co. v. Nevada & O. R.		Shively v. Welch.	28
Co.	80	Stimson, Cottier v.	906
United States v. Reilley	46	Welch, Shively v.	28
CIRCUIT COURT, D. OREGON.		DISTRICT COURT, D. OREGON.	
Cottier v. Stimson	906	Cairnsmore, The.	519
Dundee Mtge. & Tr. Inv. Co. v.		Heenrich v. Pullman Pal. Car Co. ..	100
Hughes	39	Pullman Pal. Car Co., Heenrich v. ..	100

CASES

ARGUED AND DETERMINED

IN THE

United States Circuit and District Courts.

SHARON *v.* HILL.

(Circuit Court, D. California. March 3, 1884.)

EQUITY — JURISDICTION TO ANTICIPATE THE COMMISSION OF A FRAUD — FORGED MARRIAGE CONTRACT.

Courts of equity may inquire into and annul a forged or fraudulent instrument of writing claimed to be a contract of marriage before it is sought to be put into effect, in order to disarm the fraudulent beneficiary of a dangerous power that might hereafter be exerted to the detriment of innocent parties.

This is a suit in equity to declare null and void, and to cancel, an instrument claimed to be a contract of marriage, executed under the laws of the state of California, between William Sharon, of the state of Nevada, complainant, and Sarah Althea Hill, of the state of California, defendant, said contract being claimed to be a forgery. This contract is in the words and figures following, to-wit:

"In the city and county of San Francisco, state of California, on the twenty-fifth day of August, A. D. 1880, I, Sarah Althea Hill, of the city and county of San Francisco, state of California, aged 27 years, do here, in the presence of Almighty God, take Senator William Sharon, of the state of Nevada, to be my lawful and wedded husband, and do here acknowledge and declare myself to be the wife of Senator William Sharon, of the state of Nevada.

"SARAH ALTHEA HILL.

"August 25, 1880, *San Francisco, Cal.*

"I agree not to make known the contents of this paper or its existence for two years, unless Mr. Sharon himself see fit to make it known.

"S. A. HILL.

"In the city and county of San Francisco, state of California, on the twenty-fifth day of August, A. D. 1880, I, Senator Wm. Sharon, of the state of Ne-

v.20,no.1—1

vada, aged 60 years, do here, in the presence of Almighty God, take Sarah Althea Hill, of the city and county of San Francisco, Cal., to be my lawful and wedded wife, and do here acknowledge myself to be the husband of Sarah Althea Hill.

"WM. SHARON, Nevada.

"August 25, 1880."

There was at the time of the commencement of this action, and is still pending and on trial, an action by the defendant herein, in the state courts, for a divorce from the complainant herein, based on the marriage claimed to be consummated by this contract.

The defendant demurred to the bill herein on the ground that it does not present a case for equitable relief.

W. H. L. Barnes, for complainant.

Tyler & Tyler, for defendant.

Before SAWYER and SABIN, JJ.

SAWYER, J., (*orally*.) This is a suit in equity to declare null and void, and to cancel, an instrument which is claimed to be a contract of marriage between William Sharon, complainant, and Sarah Althea Hill, defendant. The point of the demurrer interposed is that the bill does not present a case for equitable relief. We have examined the question fully, and we are satisfied, upon the principles established by the various authorities cited by complainant's counsel, that it is a proper case for equitable jurisdiction. The bill presents a case of forgery and fraud. The contract purports to have been drawn and executed in pursuance of the provisions of section 75 of the Civil Code of California. The Code of California makes a marriage contract purely a civil contract for all legal purposes, like any other civil contract. This supposed contract is alleged to be a forgery, and to be fraudulent. It purports to be in writing, and to be signed by the parties; and the defendant claims, by virtue of it, to be the wife of complainant, and to have an interest in his property, which is alleged to be of the value of several millions of dollars. There is no adequate remedy at law for complainant against the claim set up under the alleged contract, and no means at law to annul it at the suit of complainant. The defendant can choose her own time for enforcing her claim under the alleged contract, even after the death of the other party. Fraud has always been one of the principal heads of equity jurisdiction.

The instrument in question is alleged to be a forgery and a fraud. If it is a forgery, it is of course a fraud also. The only parties who appear to have any personal knowledge of the facts, so far as indicated,—who, personally, know anything about this transaction,—are the two parties to the alleged fraudulent contract. One is alleged to be many years older than the other; the complainant being alleged to be 60, and defendant 27, years old. The elder, in the ordinary course of nature, is more liable to die, and the contract, in such an event, would be in control of defendant, without any testimony to defeat the

fraud, if fraud there be. The right to several millions of property might be, in after years, affected and controlled by reason of the alleged fraud. A great wrong and injustice may be thus perpetrated in consequence of it, unless a court of equity can take hold of and cancel it. There is no way, by an action at law, that we are aware of, to meet the conditions, or effectually dispose of this instrument. We are satisfied from the authority we shall cite, and numerous other authorities to the same effect, that this is a proper case for equitable relief, if the allegations in the bill be true; and, for the purposes of the demurrer, their truth is admitted.

We think this case is within the rule that is often laid down on this subject. Story, in his work on Equity Jurisprudence, § 700, after speaking of various instruments that may be used for fraudulent or improper purposes, and which may be canceled by a court of equity on the ground of fraud, says:

"If it is a mere written agreement, solemn or otherwise, still, while it exists, it is always liable to be applied to improper purposes, and it may be litigated at a distance of time when the proper evidence to repel the claim may be lost or obscured, or when the other party may be disabled from contesting its validity with as much ability and force as he can contest it at the present time."

Story says further, in section 701:

"The whole doctrine of courts of equity on this subject is referable to the general jurisdiction which it exercises in favor of a party *quia timet*. It is not confined to cases where the instrument, having been executed, is void upon grounds of law and equity, but it is applied, even in cases of forged instruments which may be decreed to be given up without any prior trial at law, on the point of forgery."

If this instrument is not void upon its face, then its validity depends upon testimony *aliunde*, and testimony which rests wholly in *parol*, which is liable at any time to be wholly lost, or placed beyond the reach of the parties injured by the fraud. In case of the death of complainant, the contract, and the means of enforcing it, honest or otherwise, would be wholly in the control of the alleged forger and fraudulent claimant. She would be mistress of the situation, and the heirs of a large estate might be wholly at her mercy. There is a charge of forgery and fraud; and we think the instrument, if a forgery and fraud, ought to be canceled. If there be no remedy in equity for such a wrong as is charged, then the law is, indeed, impotent to protect the community against frauds of the most far-reaching and astounding character. If there is no precedent for a case upon the exact state of facts disclosed by the bill, it must be because no instance exactly like it has ever before arisen. The principle, however, is established, and the occasion has arisen for making a precedent, if none ever existed before.

The demurrer is therefore overruled, with leave to answer on or before the next rule-day, on payment of the usual costs.

PIONEER GOLD MINING CO. v. BAKER.

(Circuit Court, D. California. March, 1884.)

1. INVALID CONTRACT—CONTRACT ULTRA VIRES CONFERS NO BENEFIT.

No benefit can accrue to a party in derogation of the interests of a corporation through a contract with any of its officers acting *ultra vires*.

2. SAME—QUASI TRUSTEE

A creditor holding the property of a corporation in order to apply the profits thereof to the reimbursement of himself and the payment of its other debts, is analogous to a trustee, and must return to the stockholders the remnant of the property in his hands after the purposes of his *quasi* trust have been subserved.

3. SAME—DEFENDANT PARTY MAY TAKE BENEFIT OF THE FRAUD.

The stockholders of a corporation may enjoy a benefit that has arisen out of an act done by their officers in the effort to defraud them.

4. SAME—PRACTICE—PARTIES.

It is not essential, in a suit brought by a corporation against one who retains its property through the invalid contract of its officers, that such officers be made individual parties in the bill.

On Demurrer to Complaint.

Stewart & Herrin, for complainant.

Van Clief & Gear, for defendant.

Before SAWYER and SABIN, JJ.

SABIN, J., (*orally*.) In this suit a demurrer to the bill has been filed. The grounds of demurrer are: *First*, that the bill does not state facts sufficient to constitute a cause of action; and, *second*, that Chapman and Sayre are necessary parties to the bill.

I shall not attempt an extended review of the case, as I do not deem it necessary, nor have I so thoroughly collated the facts in the case as I should desire, were I to attempt to review it upon all the points raised. But it seems to us that the considerations which I am about to submit are controlling in the matter; and, if so, the demurrer upon both points must be overruled.

The bill sets out that in 1876 the defendant, Baker, entered into a certain contract, "A," with the Pioneer Mining Company, the predecessor in interest of plaintiff in this suit. This contract was for the purpose of securing the payment to Baker of an acknowledged indebtedness due him from said company, as provided therein. In case this indebtedness was not paid within three years from the date of said contract, Baker was entitled to take possession of the property and mines of the company, work the mines, and from the net proceeds thereof pay himself the amount due him, with expenses, and a reasonable compensation for his services. Subsequent to that contract, another contract, "B," was entered into between Baker and W. S. Chapman, then president of said Pioneer Mining Company. This contract was made, as alleged in the bill, for the benefit of said company, and, taken in connection with contract "A," there can be little, if any, doubt on this point. It was virtually in aid of contract "A." Its

object was the same,—the payment of this very indebtedness of the company to Baker, and also the indebtedness of the Pioneer Mining Company due to the Bank of La Porte, and also the debt of the company to the California Powder Works, nearly \$20,000 due to the last-named parties. Now, it will be observed that the sole object of this contract "A" was to pay an indebtedness of the company to Baker, and, as modified by contract "B," the indebtedness to the Bank of La Porte and the California Powder Works, in addition to the indebtedness due Baker. These debts paid, Baker had no further demand or claim upon this property. If it be assumed that Chapman, as president of the company, and Sayre, as one of the directors thereof, in any of the contracts which they severally or jointly entered into with Baker, acted solely in their individual capacity, in violation of their duties as directors of the Pioneer Mining Company and in derogation of the rights of the stockholders of that company, it will be sufficient to say it was beyond their capacity as directors of that company to bind the company by such contracts; but if any benefits accrued to the Pioneer Mining Company by virtue of any of those contracts the company is entitled to the benefits arising therefrom. But taking all of the facts together, as alleged in the bill, no such presumption arises. They may have been careless in the manner in which they executed these contracts, but nothing criminal or fraudulent appears therefrom. They were, all of the time and in all of these contracts which were made, contracting about and handling the property of the Pioneer Mining Company for the purpose of paying and discharging those debts. Certain sales were made upon judgments, and the same purpose and object runs through all of those sales. They were permitted to be made, and were made, in the interest of the Pioneer Mining Company, and to save the property, if possible, for the company, and to prevent its passing from its control. They were made pursuant to an understanding and agreement between Baker and the company, and for its benefit and not its ruin. Baker subsequently executed a mortgage upon this property to secure the payment of the judgment of the California Powder Works obtained against the Pioneer Mining Company, but he executed it only upon and with the written consent of Chapman, and all the time, in all their transactions, it seems to me patent, not only that Baker so understood it, but that Chapman and Sayre also understood that they were managing and handling this property for and on behalf of the Pioneer Mining Company, and to save it for the company. Neither Baker nor Chapman nor Sayre ever assumed to contract in reference to this property upon any other basis than that it was the property of the Pioneer Mining Company, and not the property of Chapman or Sayre, or both, and all of the transactions between these parties, from first to last, had but one object, to-wit, the payment of the various debts of the Pioneer Mining Company, due Baker and others. Baker all the time knew that the property involved in these contracts and sales was the prop-

erty of the Pioneer Mining Company; that it did not belong to Chapman and Sayre individually, or to either of them, and he knew their official relation to the Pioneer Mining Company. If, then, it be true, as alleged in the bill, that Baker has been fully paid, or has been tendered the full amount due him, and for which this property was pledged to him, the Pioneer Mining Company, or its successor in interest, the plaintiff herein, is entitled to a surrender of the property. It was upon this very condition that he was given possession of the property, and under which he has held it and worked the mine. All that Baker has a right to demand is that his debt be paid. The bill alleges that Baker has taken from the mine sufficient money to pay his debt; it also alleges that he refuses to account for the moneys taken from the mine; and it also alleges a tender and demand—a tender of anything that may be due. If these matters set forth in the bill are true, and of course we take the bill as true, it seems to us very plain that Baker, having received from the company, after going into possession of the property, all that is due him, ought to, and must, surrender the property to the company or its successor in interest.

I may observe that in the contract made December 20, 1878, between Chapman and Sayre and Baker, Baker expressly agreed that he would not sell or incumber the mine. The contract provides for the redemption of the property when the debt is paid. In 1882 Baker extended the time for the redemption of the property. Now, if these things demonstrate anything, it appears clear to my mind that Baker, in each and every one of these transactions, and Chapman and Sayre also, considered that he, Baker, merely held this property as a pledge to be handled by him to pay himself his indebtedness; and if he has been paid he ought to surrender the property to the owners.

This is all as to the first point of the demurrer.

As to the second point raised, that Chapman and Sayre should be made parties to the bill, whatever Chapman and Sayre may have done in and about this property and in making these contracts, they acted, in their official capacity, for and on behalf of the Pioneer Mining Company. It is possible, and I believe it is true, that they signed some of these contracts individually, and not in their official capacity; and it might seem, viewing the contracts alone, and not in connection with all of the facts set forth in the bill, that they were of a personal nature. As I observed before, if they sought to do anything in derogation of their duties as trustees and directors of the company, to that extent their contracts might be held void; but, to the extent to which their acts and contracts were beneficial to the company, the company would have a right to the enjoyment of such benefit. All of the contracts which they at any time made were made in regard to the property of the company. They did not assume to own any of the property themselves. They were merely stockholders and directors in the Pioneer company, which fact Baker well knew. If Chap-

man and Sayre are now stockholders in the company, they will, by this action, be benefited to the extent of their interest in the company, whatever the interest may be. If they are not stockholders, they have no interest in the matter, one way or the other. It is barely possible that they might have been joined as proper parties, though I do not see that point clearly; but I do not think that in any sense they are necessary parties to the bill as made. There is no relief demanded against them. There is nothing demanded of them, one way or the other. They merely appear in this case as actors in the contracts and matters set forth in the bill. Their actions in the various matters set forth are those of directors of the company, and no claim or demand is made against either of them. We therefore think that, even if, under any construction, they might be proper parties to the bill, they certainly are not, from anything disclosed upon the face of the bill, necessary parties thereto.

The demurrer, therefore, is overruled upon both points.

SAWYER, J., (*orally, concurring.*) I desire to make an observation or two in addition to what has been said by my associate. There is some point made and a considerable argument had on the fact that there was no valid conveyance from the Pioneer Mining Company to Baker. These parties, Chapman and Sayre, so far as appears, were not authorized to convey, and they did not attempt to convey, to Baker. There does not purport to be any conveyance from them to Baker. The legal title, which became vested in Baker, did not pass through that channel, but through a purchase at a sheriff's sale under the judgment in favor of the California Powder Works, instead of another decree of foreclosure in favor of Baker for \$100,000, as it seems to have been at first contemplated. But the sale and purchase were made in pursuance of an express agreement and understanding that the mine and other property of the Pioneer Mining Company should be redeemed upon terms expressed in the agreement. The result of the various agreements, in substance, was that Baker should purchase the property in question at the sheriff's sale under the powder works judgment; should have possession, work, and develop the mine, pay all the necessary expenses, together with a reasonable compensation for his own services, and pay the amount of his own claim against the company, the powder works judgment, and all other indebtedness of the Pioneer Mining Company specified in the agreement, within a designated time, out of the proceeds of the mine; and when this should be accomplished, or when the sums provided for should be otherwise paid, on behalf of the Pioneer company, the property remaining should be restored to said company, or to said Chapman and Sayre. The time within which this was to be done, so as to prevent the title becoming absolute, was limited. The sale took place and the purchase was made by Baker under the powder works judgment, and the title vested in pursuance of the agreement,

and upon the conditions indicated in it. The fact that the legal title of the corporation vested in Baker through a sale on the judgment, instead of a conveyance by the company, under the circumstances, cannot affect the question involved or the rights of the parties. The sheriff's sale is merely the channel through which the legal title passed, but the sale took place, and the title, nevertheless, passed in pursuance of the agreement and subject to its conditions. We must presume that if this agreement had not been made other arrangements would have been made to avert a forced sale on the judgment. The company, at least, had a right to make other arrangements. It cannot be presumed that productive mining property of the value, as alleged and admitted by the demurrer, of half a million dollars, would have been allowed to be sacrificed for the indebtedness provided for in the agreement, of, say, \$150,000. The title passed by virtue of the sheriff's sale, which was made in pursuance of, and in subordination to, the understanding between the parties, and subject to the prescribed conditions that the property should be held and worked until the designated moneys due should be paid, either by the company or Chapman and Sayre themselves, or satisfied out of the proceeds of the mine and property sold. There are subsequent supplementary agreements, whereby Baker extended the time for the performance of the prescribed conditions upon which the title should be restored. The title in Baker was not to become absolute, except upon a failure in the performance of the prescribed conditions to secure payment of the demands provided for. Though not called a defeasance, and not a defeasance in form, the conditions of the several agreements are substantially in the nature of a defeasance, giving and continuing a right of redemption, for the benefit of the Pioneer company. Or the instruments may be regarded, in substance, as declarations of the trusts, upon which the title vested under the sheriff's sale. The corporation was the owner of the property sold, and the first contracts were, in form, made in his name. The corporation was recognized in all subsequent agreements as owner of the property, and it was the corporation's indebtedness that was to be paid out of the property. The transaction was intended to secure Baker for the moneys due him, and such other expenses and indebtedness as he should pay or should accrue in pursuance of the agreements made. The transaction was, in substance, either a mortgage, pledge, or trust, to enable Baker to satisfy the debts of the Pioneer company provided for out of the property sold,—out of its own property. The whole transactions set out in the bill were transactions relating solely to the property and the indebtedness of the Pioneer Mining Company. It is manifest, in the nature of things, from the facts alleged, that these transactions, on one side, were intended to be for and on account of the corporation. Whether we call the sale and conveyance in pursuance of it, under the circumstances set out in the bill, technically, a mortgage, a pledge, a trust, or by any other name, the

facts alleged are such as entitle the complainant to relief upon the face of the bill. Whatever technical name may be given to the transaction, it was intended to put the title of the mine and property of the corporation in the hands of Baker, for the purpose of working and developing the mine, paying the expenses and designated indebtedness of the corporation, and compensation for his own services, out of the proceeds; and when this should be accomplished, or when the money and expenses provided for should be otherwise paid, to restore the property remaining to the Pioneer Mining Company.

It is alleged in the bill that those moneys so intended, and secured to be paid, have all been paid out of the proceeds of the mine. If not, that the complainant has offered to pay, and that it is now ready to pay, any balance that may be found due on an accounting. If these allegations are true, and the demurrer admits their truth, then the indebtedness of the Pioneer Mining Company, contemplated, has been paid out of the proceeds of the property of this company, and not out of the property of Chapman and Sayre, or of either of them; and the complainant, the successor in interest of the Pioneer Mining Company, is entitled to a reconveyance of the mine and other property sold under the judgment mentioned; and if the defendant refuses to reconvey, then, clearly, it seems to me, it is entitled to the relief prayed in the bill.

On the other point, that Chapman and Sayre are indispensable parties to the bill, I do not know what the pleadings and proceedings may develop in the subsequent stages of the case, but there is nothing on the face of the bill, as it now stands, to show that Chapman and Sayre are indispensable or necessary parties to the bill. No relief is asked against them, and it does not appear that they personally claim any interest in their own behalf either against the complainant or the defendant. The court can order them to be brought in at any time when it appears that the rights of the present parties to the bill cannot be fully and finally determined without their presence. They would, perhaps, be proper parties, but there is nothing disclosed on the face of the bill as it now stands to render it necessary to make them parties. As before stated, the agreements first set out were made in the name of the corporation. The subsequent agreements in the names of Chapman and Sayre, in form, all recognize the title of the property as being in the corporation, and all the agreements and proceedings relate exclusively to the property and the indebtedness of the corporation, and are intended to facilitate the payment of the indebtedness of the corporation out of its own property. Chapman and Sayre were, in fact, two out of the three trustees, and they owned all the stock except one forty-eighth part. According to the allegations of the bill, the indebtedness of the corporation had been paid out of the proceeds of the working of the productive mine, owned by the corporation, subject only to the incumbrances indicated, in pursuance of the terms of the various agreements, and of the trusts

thereby imposed on Baker; and the property remaining, after satisfying the demands provided for, is, in equity, the property of complainant. But had Chapman and Sayre redeemed with their own money, in pursuance of the terms of their several agreements, the corporation would doubtless have been entitled to take the property upon payment of their advances. They were trustees for the corporation, and would not be permitted to take advantage of their own position as such to obtain a title to the property as against the corporation, in violation of their trusts, through the transactions set out.

I concur in the order overruling the demurrer.

OWENS and another v. OHIO CENT. R. Co.

CENTRAL TRUST CO. OF NEW YORK v. OHIO CENT. R. Co.

(Circuit Court, D. West Virginia. 1884.)

1. JURISDICTION—SERVICE OF PROCESS.

The jurisdiction of a court attaches upon the service of process, and the court whose process is first served upon the defendant will retain the cause.

2. SAME—POSSESSION OF PROPERTY IN CONTROVERSY.

A court, having gained prior jurisdiction of a cause by the service of its process, is not deprived of its jurisdiction by reason of the actual seizure of the property in controversy by the officer of a court having concurrent jurisdiction.

3. SAME—WHERE JURISDICTION ATTACHES.

The jurisdiction of a court of the United States to which a cause has been removed from a state court relates back to the time of the original service of process.

4. SAME—ADMINISTRATION OF TRUST ESTATE.

The court first gaining jurisdiction of a part of a trust estate is entitled to administer the whole, even though some portion of the property lies within the domain of another court.

5. TRUSTEES—REFUSAL TO SUE—ACTION BY CESTUI QUE TRUST.

When the trustees of a mortgage deed, executed for the security of bondholders, refuse to institute proceedings to enforce the security, the bondholders themselves are entitled to prosecute a suit for that purpose.

In Equity.

E. L. Andrews and *T. L. Brown*, for complainants.

Swayne, Swayne & Hays, for defendant.

JACKSON, J. On the twenty-eighth day of September, 1883, Nelson Robinson filed his petition in the court of common pleas for Lucas county, Ohio, making the Ohio Central Railroad Company and the Central Trust Company of New York defendants, in which petition, among other things, he prayed for the appointment of a receiver for the railroad company whose lines ran from the city of Toledo, in the state of Ohio, to the city of Charleston, in the state of West Virginia, upon which day John E. Martin was appointed receiver of the

entire line of the Ohio Central Railroad; that on the third day of October, 1883, the same bill that was filed in the court of common pleas in Lucas county, in the state of Ohio, was filed in the circuit court of Mason county, in the state of West Virginia, and John E. Martin, by the order of that court, on that day was appointed receiver. On the sixteenth day of October, 1883, Mead & Johnson filed in the circuit court of the United States for the Southern district of Ohio, a bill for the foreclosure of the river division mortgage of the Ohio Central Railroad, on which process was sued out and service had on the twenty-third day of October, 1883, and on the seventh day of November following this bill was dismissed. On the twentieth day of October, 1883, Owens & Johnson filed in the same court a bill for the same purpose, upon which process was issued and service had thereon on the twenty-sixth day of October, 1883. On the thirtieth day of October, 1883, the Central Trust Company of New York, in the same court, filed a bill for the same purpose, to which the appearance of the railroad company was entered. On the thirty-first day of October, 1883, Martin was appointed temporary receiver under the last bill. On the twenty-second day of October, 1883, Owens & Johnson filed in this court their bill of complaint on behalf of themselves, and as the representatives of the first mortgage river division bondholders of the Ohio Central Railroad Company, invoking its power to enforce the mortgage, and asking for the appointment of a receiver. Process was sued out thereon and service had on the defendants on the twenty-fifth day of the same month, and the motion for the appointment of a receiver was entered, and by order of the court set down for hearing on the twentieth day of November following; upon the hearing of which motion and at that time the Central Trust Company of New York filed their bill, claiming the right, as trustee in the first mortgage and other subsequent mortgages, to control the proceedings for the foreclosure of the mortgages and the appointment of a receiver. The two cases were heard together, and Thomas R. Sharp was appointed receiver of that portion of the road lying in this circuit.

Upon this state of facts the complainants in this suit move for an order extending the jurisdiction of Receiver Sharp over that portion of the road in the Sixth circuit lying between the Ohio river and Corning, in the state of Ohio. As a portion of this railroad is found lying in both circuits, the first question that presents itself for consideration is, which court first obtained jurisdiction over the subject-matter in controversy? And in this connection we will first consider the question of jurisdiction arising upon the proceedings had in the federal tribunals. As we have before seen, Owens & Johnson filed their bill in the Sixth circuit on the twentieth day of October, 1883, and in this circuit on the twenty-second day of October, 1883. Under the bill filed in this circuit process was sued out, and service had the day before service was had in the Sixth circuit. Not only

was this true, but there was an absolute seizure of "the *res*" under the proceedings in this court, while, under the bill filed in the Sixth circuit, there was no seizure. It will be observed that every step necessary to complete the jurisdiction of this court was taken before process was served on the defendant company under the bill filed in the Sixth circuit. But it is claimed that the filing of the bill first in the Sixth circuit, which in this proceeding is the commencement of the suit, confers jurisdiction. This of necessity cannot be so. Other necessary steps must be taken to bring the parties before the court, before a complete jurisdiction is acquired. Until that is done, the court could make no order that would affect the rights of a party. The usual mode is by service of process. It may be, and in some cases is, done by an order of the court directing a seizure of the property, when some urgent necessity requires it, before service is had. In this case no such order was made, and we must therefore look to the service of process to ascertain which court first acquired jurisdiction. It is true that process was sued out first under the bill filed in the Sixth circuit, but service of process was first had under the one filed in this circuit. We therefore conclude that, as between these proceedings, the process of this court being first served on the defendant company, it gave this court full, complete, and prior jurisdiction over it, and the right to grant the relief prayed for in the bill. *Union Mut. L. Ins. Co. v. Univ. of Chicago*, 6 FED. REP. 443; *Riggs v. Johnson Co.* 6 Wall. 196.

It is not contended that any seizure of "the *res*" was ever made under either of the bills of the bondholders filed in the Sixth circuit. On the contrary, it was stated on the hearing of the motion for a receiver in this court, and not denied, but in fact conceded, that the court in the Sixth circuit refused the motion for a receiver either under the bill filed by Mead & Johnson on the sixteenth day of October, or under the bill filed by Owens & Johnson on the twentieth day of October, (now the complainants in this court,) upon the distinct ground that no sufficient showing had been made that the trustee, the Central Trust Company, had declined to act. For this reason the court in that circuit not only refused an order of publication against other necessary defendants, but declined to grant any relief prayed for in either bill against the defendant company, the legal effect of which was to discontinue further proceedings under both bills. That this was the position of the court is apparent, for the reason that shortly after the trustee, the Central Trust Company, filed its bill before it, having the same object in view, to which the defendant company immediately appeared, a receiver was appointed under it without regard to either of the preceding bills, both of which, as we are advised, were afterwards dismissed.

In the bill filed in this court it was distinctly alleged, and established by proof, that one of the complainants had requested the trustee in the first mortgage, the Central Trust Company, to bring a suit of foreclos-

ure on that mortgage, and the trustee refused to take any step or to exercise any of the discretionary powers for that purpose. It is now the settled law that whenever a trustee neglects or refuses to institute proceedings for the protection of bondholders secured by a mortgage, that the bondholders themselves may begin proceedings for that purpose. This was done by the present complainants on behalf of themselves and other bondholders, and the case being first fully matured in this court, by reason of that fact, the court in this circuit first took cognizance of the subject-matter in controversy, acquiring full and complete jurisdiction over it, and as an incident to that jurisdiction has possession and control over any property, which may be the subject-matter of the dispute, to the end of the litigation. *Union Trust Co. v. Rockford, etc., R. Co.* 6 Biss. 197; *Riggs v. Johnson Co.* 6 Wall. 187.

It is claimed that Martin, having been appointed receiver on the thirty-first day of October, under the bill filed by the Central Trust Company in the Sixth circuit, and that he having seized and taken actual possession and control of the defendant company's property prior to the appointment of Sharp under the order of this court, that the seizure by him of the road gave to that court prior jurisdiction over it in this proceeding. It will be observed that this proceeding in the Sixth circuit was instituted eight days after the proceedings in this court, and the service of process in this court was five days before service in that court. In this position we cannot concur. The jurisdiction of this court attached as soon as the bill was filed and process served, and the fact that an actual seizure was made under the bill subsequently filed, and after process was served under a bill previously filed in this circuit, will not deprive this court of its jurisdiction. We think the rule of law laid down by the learned judge in the case just cited from 6 Biss. is correct, and that "the proper application of this rule does not require that the court which first takes jurisdiction of the case shall also first take, by its officers, possession of the thing in controversy, if tangible and susceptible of seizure, for such a rule would only lead to unseemly haste on the part of its officer to get the manual possession of the property. While the court first appealed to was investigating the rights of the respective parties, another court, acting with more haste, might by a seizure of the property make the first suit wholly unavailing. To avoid such a result, the broad rule is laid down that the court first invoked will not be interfered with by another court while the jurisdiction is retained." The jurisdiction thus acquired is exclusive, and it is the duty of all other tribunals, both by law and comity, not to interfere with it. Chief Justice MARSHALL, in the case of *Smith v. McIver*, 9 Wheat. 532, says "that in all cases of concurrent jurisdiction the court which first has possession of the subject must decide it." This rule the supreme court of the United States has approved in several subsequent cases, notably, *Buck v. Colbath*, 3 Wall. 341; *Riggs v. Johnson Co.* 6 Wall. 166. It must follow, from

the application of this rule, that under the bill filed by the bondholders in this court, that the jurisdiction thus acquired was prior to that obtained by the court in the Sixth circuit, under the bill filed by the trustee, the Central Trust Company, and that, as a legal consequence, the possession of "the *res*" was in law in the possession of this court to the extent of its jurisdiction, as to which we will speak hereafter. It further follows that the order appointing Martin receiver on the thirty-first of October, under the bill filed by the Central Trust Company on the thirtieth of October, does not entitle him to the custody or control of any portion of the property of the defendant company, as this court first acquired jurisdiction over it, and that, as a consequence, all of his acts as such receiver, in pursuance of that order, over the River Division, are a nullity, having been appointed solely under that bill, while the acts of Receiver Sharp, having been appointed by the court which first acquired jurisdiction over and legal possession of the property, must be held to be legal and valid.

Thus far we have only considered the question of jurisdiction as presented by the proceedings originating in the federal tribunals. We come now to consider it upon the proceedings begun and had in the state court, which it is conceded were had prior to any instituted in the federal courts. It appears that Nelson Robinson filed his bill on the twentieth day of September, 1883, in the court of common pleas for Lucas county, in the state of Ohio, asking for the foreclosure of the mortgage on the Ohio Central Railroad Company, and the appointment of a receiver for that road; that the court exercised jurisdiction, and appointed John E. Martin receiver, and subsequently the case was removed to the circuit court of the United States for the Southern district of Ohio. It was claimed in the discussion of this case by the complainants, and scarcely controverted by the defendants, that the court of common pleas of Lucas county had no jurisdiction over the defendant company or its property under the statutes of Ohio, for the reason that the defendant company did not "reside" in the county, nor was any portion of the defendant's property covered by the mortgage found in that county. This construction of the statutes of Ohio seems to have been adopted by the court of the Sixth circuit in the appointment of its receiver, as Martin's appointment was made solely under the bill filed by the Central Trust Company. In this view of the construction of the statute of Ohio we not only concur, but conclude that the proceedings instituted in the court of common pleas of Lucas county were *coram non judice*, and therefore a nullity. But the case is very different in the courts of the state of West Virginia. The same bill that was filed in the court of common pleas of Lucas county in the state of Ohio was filed in the circuit court of Mason county, in this state, on the third day of October, 1883, at which time the defendant company appeared to said bill, waived service of process, and John E. Martin was appointed receiver. On the twenty-ninth day of the same month the cause was removed to this court and regularly dock-

eted therein. It is conceded that the circuit court of Mason county had jurisdiction over the defendant company's property, and in this respect it was wholly unlike the case in the court of common pleas in Lucas county. It will be observed, then, that the state court in West Virginia acquired full and complete jurisdiction on the third day of October, 1883, the day the bill was filed, and that, by reason of its removal to this court, this court's jurisdiction relates back to that date. Under this proceeding this court acquired jurisdiction as of that date, which is prior to any legal proceeding instituted in the courts of Ohio, and the jurisdiction thus acquired is not only prior, but is complete and exclusive over the defendant company's property. *Miller v. Tobin*, 18 FED. REP. 609; *Osgood v. Railroad Co.* 6 Biss. 330; *Armstrong v. Mech. Nat. Bank*, Id. 524; 12 Chi. Leg. N. 176; *Bills v. Railroad Co.* 13 Blatchf. 227.

But one question remains unnoticed, and that is, can this court extend its jurisdiction over the defendant company's property beyond its geographical or territorial jurisdiction. This is a trust estate, and must be administered as an entirety for the protection of all concerned. It is well settled that the court that first takes jurisdiction of a part of a trust estate has the legal right to administer upon the whole. It follows that this court, having prior jurisdiction over that portion of the trust estate found in this circuit by reason of the jurisdiction thus acquired, has the right to administer upon that portion of the trust estate lying between the Ohio river and Corning, Ohio, and an order will be entered extending the jurisdiction of Receiver Sharp over the entire property of the defendant company to that place; and in the event he is obstructed by any one claiming to act as receiver by another tribunal, he is required and directed to file a motion before the United States circuit court for the Sixth circuit in Ohio, praying that court to vacate or so modify the order appointing Receiver Martin as it may be in conflict with the order of this court appointing him receiver, and extending his jurisdiction to Corning, Ohio.

HAY v. ALEXANDRIA & W. R. Co. and others.

(Circuit Court E. D. Virginia. 1884.)

1. DECISION OF STATE COURT—TRUST DEED—DEFECTIVE REGISTRATION.

A railroad corporation executes a trust deed, giving preference to one of its directors over other creditors, and this deed is acknowledged before, and certified by, that director for registration, as a notary public. The court of highest resort of the state in which this deed is recorded pronounced that it does not create a lien upon the property conveyed, because of its defective registration. The validity of this registration is afterwards assailed in a federal court, which held that it would not reopen the question of registration and would treat the registration as null.

2. SAME—MUNICIPAL BONDS—RIGHTS OF CREDITORS OF RAILROAD CORPORATION.

The charter of a city prohibits its councils from increasing its public debt unless authorized by two-thirds of its qualified voters. A deed is executed by a railroad corporation securing bonds proposed to be issued, and the city guarantees to the bondholders the payment of the bonds, without being authorized by a two-thirds vote, and afterwards, when the bonds mature, pays the bonds and becomes the holder of them. In a subsequent litigation between the city and other lien creditors of the railroad corporation, the court of highest resort of the state in which the railroad lies and in which the railroad company is chartered, decrees that the deed is a lien upon the railroad notwithstanding the aforesaid inhibition in the city charter. In a still later litigation between lien creditors of the railroad corporation in a federal court, that court *held* that the decision of the state appellate court on this point was one that it was proper to follow, and, moreover, that although the city might have contested her liability to pay the bonds, yet that subsequent lienholders were in no condition to make such a contest, the debt being due, the lien being valid, and it being immaterial to them who gets the amount due.

3. SAME—JURISDICTION—ASSIGNMENT OF JUDGMENTS IN STATE COURT—CITIZENSHIP OF PARTIES—SATISFACTION OF JUDGMENTS.

Four state court judgments against a railroad corporation are assigned to Hay, a non-resident of the state. The plaintiffs in two of them are non-residents, and those in the two others are residents. These four judgments, after being assigned to Hay, are by him marked *satisfied*, for a consideration which turns out to be null and void. An equity suit is brought by Hay in the federal court of that state to set aside the *satisfactions* and restore the liens of the original judgments and decree was entered according to the prayer of the bill. In a subsequent creditors' suit to settle liens and priorities, it was contended that this decree was defective for want of jurisdiction in the federal court to entertain the suit as to the two judgments that had been recovered by residents, the second clause of section first of the judiciary act of 1875 denying jurisdiction of the suit of an assignee of a chose in action, where the assignor could not sue, *held*, that the *satisfactions* were marked on the judgments by Hay, on an implied undertaking of the railroad company to make the judgments good if the consideration of marking them satisfied was null and void; that this obligation was to Hay himself and was the real cause of action in the equity suit, and therefore that the second clause of the act of 1875 did not apply. Moreover, that in any event the controversies represented by the two judgments between citizens of different states gave jurisdiction of the *suit* in equity which comprehended the four judgments, and the federal court had a right to decree as to all four judgments, unless it had been shown that the judgments had been assigned for the purpose of creating jurisdiction as prohibited by section 5 of the act of 1875.

4. SAME—STATE STATUTE KEEPING JUDGMENTS ALIVE—MERGER.

The statute law of Virginia provides that judgments may be kept alive in the following manner: Execution may be issued within a year and *scire facias* or action may be brought within 10 years; and where execution issues within the year, other execution may issue, or *scire facias* or action be brought within 10 years from the return-day where there is no return, or within 20 years from the return of an execution where there is a return. Accordingly, on judgments obtained in 1860, on which execution had been issued and returned within a year, actions were brought in 1875 and new judgments obtained, and it was contended that the old judgments were merged in the new; that the liens of the old were lost, and that the liens of the new dated only from the dates of the new judgments, and took priority only as of the later dates. But the court *held* that whatever may be the law as to merger in other jurisdictions, yet if the methods prescribed by the statute law of a state for preserving judgments and their liens are pursued, the doctrine of merger must not be applied in that state in such manner as to defeat the purpose of the law and to destroy priorities expressly intended to be preserved.

In Equity.

The Alexandria & Washington Railroad Company extends from Alexandria to the south end of Long bridge, opposite Washington

city, on the Potomac river. It is less than four miles long, but it is the important link which connects all railroads north with all railroads south of the Potomac river, which lie east of the Blue ridge mountains. The width of ground originally condemned for its construction was 50 feet. Its original track was laid on the east side of this strip of land. It lies wholly in the county of Alexandria, Virginia. The company owning it was chartered on February 27, 1854. Acts Assembly Va. 1853-54, c. 63, p. 41. Its financial condition has always been exceptionally feeble, and its affairs and transactions have been the subject of varied and continued litigation in all courts in which they were cognizable. On the nineteenth of April, 1855, this company, having determined to issue bonds for raising money with which to build and equip its road; and the city of Washington having agreed to guarantee the payment of a portion of the bonds, the company executed a trust deed conveying its franchises, road, and property to J. H. and A. T. Bradley as trustees, for the purpose of securing the city in its guarantee. Owing to some imperfection in this deed a second one ratifying and confirming it was executed on the tenth of July, 1857, and recorded in the Alexandria county court on the twenty-third of July, 1857. The guarantee of the city of Washington was given by authority of an act of its board of aldermen and board of common council passed February 8, 1855, expressly conferring it. It is averred in the briefs of counsel that this act of the Washington councils was *ultra vires*, inasmuch as the charter of the city then in force, (that of May 17, 1848,) in its tenth section contains the following conditional provision :

"The corporation shall not have power to increase the present funded debt of the corporation either by borrowing money or otherwise, unless it shall be agreed to do so by two-thirds of the legal voters of the said city at an annual election."

No such vote was ever taken. Some years after this guarantee was given, when the bonds matured for payment, the corporation of Washington paid them, principal and interest, and now holds them, having cancelled and cut out its own signature to the bonds.

On the thirty-first of December, 1856, the Alexandria & Washington Railroad Company executed to I. L. Kinzer, as trustee, a trust deed conveying all its works and property to secure a bond of some \$15,000 to the holders thereof who were the firm in Alexandria of Fowle, Snowden & Co. This deed was recorded on the third of April, 1857, nearly four months in advance of the Bradley deed. It was acknowledged before and certified by William H. Fowle, as notary public, who was one of the directors of the company and a member of the firm of Fowle, Snowden & Co. Walter Lennox, hereafter to be mentioned, was also a director of the company and was present at the execution of the Kinzer deed. Both Fowle & Lennox, as well as Snowden, of the firm of Fowle, Snowden & Co., had been directors of the company at, and cognizant of, the execution of the previous.

deed of the company to the Bradleys for the benefit of the city of Washington. On the sixteenth of July, 1857, the company executed to Walter Lennox, as trustee, a deed conveying its railroad, franchises, property, rights, and privileges in trust to secure thirty bonds of a thousand dollars each, with interest, to their holders. This deed was duly recorded on the twenty-fourth of July, 1857. None of the foregoing deeds conveyed the income of the Alexandria & Washington Company from its road. A provision of the statute law of Virginia respecting deeds, is as follows:

"Every deed of trust conveying real estate shall be void as to creditors (with or without notice,) and subsequent purchasers for valuable consideration without notice, until and except from the time it is duly admitted to record in the county or corporation wherein the property embraced in such contract may lie." Code 1873, c. 114, § 5, p. 89.

At several dates, about the period of the execution of these deeds, judgments were recorded in the circuit court of Alexandria county, (one judgment in the county court of that county,) against the Alexandria & Washington Railroad Company, viz: One on the twenty-fifth of November, 1857, for \$6,706.70; two on the twenty-seventh of May, 1859, for \$437.17 and \$2,410.87, the term of the court rendering these having commenced on the sixteenth of May, 1859; one on the ninth of February, 1858, for \$1,243.64; one on the twenty-first of March, 1860, for \$1,000; one on the twenty-first of February, 1860, for \$16,606.87; and a seventh on the twenty-first of February, 1860, for \$2,260.04,—all with interest and costs. The two first named of these judgments were obtained by non-residents of Virginia, and the second and third of them, by residents of Virginia. These four first-named judgments were assigned as judgments, by the judgment creditors, to Alexander Hay, the complainant in this suit. In the three cases last named, the causes of action had been assigned to Hay before suit, and judgments had been obtained on them by Hay as assignee. Executions were taken out promptly on the first five of these judgments, and returns duly made on them. The other two were docketed, and so were some of the first five judgments. The first four of these judgments were marked "satisfied" on the thirtieth of November, 1865, under written authority from Hay, dated November-23, 1859.

The statute law of Virginia provides, in respect to judgments, substantially, that,—

Sec. 6. "Every judgment for money rendered in this state against any person shall be a lien on all the real estate of such person as of the date of such judgment; or, if rendered in court, as of the day of the commencement of the term at which it was rendered."

Except—

Sec. 8. That "it shall not be a lien on real estate as against a purchaser for valuable consideration without notice, unless it be docketed on the judgment docket of the county court of the county where the land lies, either within sixty days next after the date of such judgment, or fifteen days before

the conveyance of said estate to such purchaser." Code Va. 1878, c. 182, §§ 6, 8, p. 1166.

As this law stood in the period 1855 to 1860, the time mentioned in the last lines quoted was, "within a year next after the date of such judgment, or ninety days before the conveyance," etc.

Section 9 of the same chapter provides:

"The lien of a judgment may always be enforced in a court of equity. If it appear to such court that the rents and profits of the real estate subject to the lien will not satisfy the judgment in five years, the court may decree the said estate, or any part thereof, to be sold," etc.

Section 12 provides that—

"On a judgment, execution may be issued within a year, and a *scire facias* or action may be brought within ten years after the date of the judgment; and where execution issues within the year, other execution may be issued, or a *scire facias* or action may be brought within ten years from the return-day of an execution on which there is no return of an officer, or within twenty years from the return of an execution on which there is such return; provided, that in computing time under this section, there shall, as to writs of *scire facias*, be omitted from such computation, the time elapsed between the first day of January, 1869, and the passage of this act; [viz: March 28, 1871.]

In 1875 Alexander Hay brought a suit in this, the United States circuit court for the Eastern district of Virginia, at Alexandria, on the equity side, setting out that the consideration had failed, for which he marked as satisfied, the four first-named of his judgments that have heretofore been described; and praying that the "satisfactions" on them should be set aside, and the judgments reinstated with all liens attaining to them at the date of the satisfactions. This suit went on until January, 1881, when a decree was rendered in conformity with the prayer of the bill, from which no appeal has ever been taken. In the same year Hay brought a suit on the common-law side of this court, against the Alexandria & Washington Company, based on the three last-named judgments in his favor which have heretofore been described, and recovered a verdict and judgment anew on the three old judgments.

On the third of February, 1864, the general assembly of Virginia (that which sat at Alexandria) incorporated the Alexandria & Fredericksburg Railway Company, with authority to construct a railroad from Alexandria to the vicinity of Fredericksburg. Acts, 1863-64, c. 17, p. 20. That charter lapsed, but was revived by the general assembly on the fourth of June, 1870, by an act which empowered the company to extend its road to a point on the Potomac river between Alexandria and Washington city, or opposite Washington city, to connect with the bridge of any railroad company chartered by congress, whose road passes, or shall pass, through the District of Columbia. Acts, 1869-70, c. 145, p. 188. This act contained this proviso: "That, in the extension of said railway it shall in no way interfere with the chartered rights or franchises of any railroad extending between Alexandria and Washington," etc. This act virtually

gave authority to the Alexandria & Fredericksburg Company to run a road parallel with that of the Alexandria & Washington Company between Alexandria and the south end of the Long bridge. The Alexandria & Fredericksburg Company soon acquired the property of the Alexandria & Washington Turnpike Company, whose turnpike road runs alongside of the Alexandria & Washington Railroad, its whole length. Instead of determining to lay its track wholly on the turnpike road, the Alexandria & Fredericksburg Company instituted proceedings, on the sixth of February, 1871, in the county court of Alexandria county, for condemning to its use a strip of land $18\frac{1}{2}$ feet in width, taken from the west side of the 50-foot strip of the Alexandria & Washington Railroad. Under these proceedings, which were vigorously opposed by certain private persons and by James S. French, a stockholder in, and the former president of, the Alexandria & Washington Railroad Company, this $18\frac{1}{2}$ -foot strip of land was finally assessed by commissioners at the value of \$407.81, the report of which was confirmed by the court by an order of June 2, 1873, and the amount assessed was paid into court by the Alexandria & Fredericksburg Company. These proceedings do not seem to have been resisted by the officers of the Alexandria & Washington Railroad Company, but were nevertheless strenuously resisted, and delayed for more than two years, as before stated.

The statute law of Virginia provides that upon such judgment as that just described, confirming an assessment, the title to that part of the land for which such compensation is allowed, shall be absolutely vested in the company in fee-simple. Code 1873, c. 56, § 11, p. 538. The Alexandria & Fredericksburg Company at once took possession of the strip of land referred to, and in due course of time laid down a steel rail track upon it at an original cost of \$59,610.37. It may be added here, that, after a considerable flood in the Potomac in the winter of 1881, repairs were put by this company on the whole 50-foot strip of land, including the tracks of both companies, at an outlay of \$11,912.89, and that it has also, since 1870, paid taxes upon this property of the two companies to the amount of \$1,384.57.

The proceedings of condemnation which have been mentioned were made the subject of an appeal to the circuit court of Alexandria county, which terminated on May 23, 1879, in a decree declaring the proceedings illegal, and, of course, invalidating the title of the Alexandria & Fredericksburg Company to the $18\frac{1}{2}$ -foot strip of land on which it had constructed its road. The ground of this decree of the circuit court was that the condemnation had been in violation of the proviso in the amended charter of the Alexandria & Fredericksburg Company, which has been quoted, prohibiting the Alexandria & Fredericksburg Company from interfering with the chartered rights and franchises of the Alexandria & Washington Railroad Company. A majority of the capital stock of the Alexandria & Washington Company was acquired by the Pennsylvania Railroad Company on the

twenty-third of April, 1872. That company held a controlling interest in the Alexandria & Fredericksburg Company from the time it was organized. It also has held a controlling interest in the Baltimore & Potomac Company, whose road extends from Baltimore to Washington, and through Washington to the southern end of the railroad bridge crossing the Potomac at Washington. The decree of the circuit court of Alexandria county invalidating the proceedings in the county court for the condemnation of the 18½-foot strip of land which has been mentioned, was itself made the subject of an appeal to the supreme court of appeals of Virginia, which latter court, on the twenty-fourth of November, 1881, affirmed the decree of the circuit court, and finally invalidated the title of the Alexandria & Fredericksburg Company to the strip of 18½ feet of land in controversy; the Alexandria & Fredericksburg Company having held this strip of land for about nine years under color of title, and put improvements on it, as has been stated, to the value of upwards of \$70,000. The statute law of Virginia provides on this subject, substantially, that, where a jury shall be satisfied that a defendant against whom a decree or judgment shall be rendered for land, made on the premises at a time when there was reason to believe the title good under which he was holding permanent and valuable improvements, they shall estimate in his favor the value of such improvements as were so made before notice in writing of the title under which the plaintiff claims, not exceeding the amount to which the value of the premises is actually increased thereby at the time of the assessment. Code 1873, c. 432, §§ 1, 4, p. 964. Other sections provide that rents for five years are to be credited to the plaintiff, and for other adjustments.

It is not shown that either the Bradleys, or Lennox, or Kinzer, or any of the beneficiaries of the deeds which they represent took any part in resisting the condemnation of the strip of land which was taken and improved by the Alexandria & Fredericksburg Company, or ever gave "notice in writing" to that company of the liens which they held on the Alexandria & Washington Railroad, or made objection, or gave warning in any way against the construction of improvements upon the property which was subject to their liens. It is physically certain, from the conspicuous site of the road in relation to the residences of the trustees and a large portion of the beneficiaries in the deeds, that they must have had actual personal notice of these improvements during all the stages of their progress. In November, 1857, Kinzer, the trustee heretofore mentioned, advertised the property of the Alexandria & Washington Railroad Company for sale in accordance with the terms of his deed; and, on the thirtieth of that month, the company presented a bill to the judge of the circuit court of Alexandria county, praying for an injunction against such sale, attacking the validity of the debt named in the deed, and averring that it was subsequent in dignity to the Bradley deed securing the city of Washington. The Bradleys and city were made parties defendant, and so

were Lennox and James S. French, the president, individually, made defendants. On the third of April, the city of Washington filed a cross-bill in the same suit asking affirmative relief. On the twenty-fifth of May, 1859, the circuit court of Alexandria county made a decree in the suit thus described, containing, among others, the following clauses:

"The court doth adjudge, order, and decree that the certificate of acknowledgment to the deed of trust from the Alexandria & Washington Railroad Company to I. Louis Kinzer, dated on the thirty-first of December, 1856, and filed in this cause, not being in conformity with the statute of Virginia in such case made and provided, the said deed was illegally admitted to record, and that the said deed from the Alexander & Washington Railroad Company to Joseph H. and Thomas A. Bradley, dated on the tenth day of July, 1857, and recorded on the twenty-third day of July, 1857, having been recorded according to law, created a lien in favor of said city of Washington upon the property and works of the said Alexandria & Washington Company, paramount to the lien created by the said deed of trust to the said I. Louis Kinzer, etc. And the court doth further adjudge, order, and decree that the said Fowle, Snowden & Co. recover against the said Alexandria & Washington Company the sum of \$16,481.35, with interest, costs," etc.

The first day of the term, at which this decree was rendered, was the sixteenth of May, 1859. From this decree appeal was taken by Fowle, Snowden & Co., to the supreme court of Appeals of Virginia, in the petition for which there were assigned, among others, as grounds of error: (1) that the Kinzer deed *was* properly admitted to record; (2) that the Bradley deeds were invalid, because there was no express provision of law authorizing Washington city to guarantee the Alexandria & Washington Company's bonds; (3) and that if the Kinzer deed had been improperly admitted to record yet it "was valid and created a lien, although it might be subordinate to other liens," and yet the court "nowhere affixed to this lien its rank in the order of priorities." It does not appear that execution was ever taken out on this decree in favor of Fowle, Snowden & Co., rendered on the twenty-fifth of May, 1859.

The following are the amounts of the debts reported:

Debt under the Bradley deed to the city of Washington,	-	\$154,340
Debt under the Lennox deed to English creditors,	-	102,092
Debt due on the Hay judgments,	-	79,405
Debt due Fowle, Snowden & Co.,	-	22,785
Claim of the Alexandria & Fredericksburg Railroad Company		
of \$110,451, allowed by the court at -	-	59,610

A creditor's bill was brought in this court to ascertain the debts of the Alexandria & Washington Company, and to settle the order and priorities of liens. The case was heard by Chief Justice WATTS and Judge HUGHES on the fourth and fifth of February, and is now decided as indicated by the following opinion delivered by Judge HUGHES:

Eppa Hunton and Francis Miller, for the city of Washington.

John Selden, C. W. Wattles, and Leonard Marbury, for Lennox creditors.

Francis L. Smith and Wayne McVeigh, for the Alexandria & Fredericksburg Company.

O. A. Cloughton, for Fowle, Snowden & Co.

HUGHES, J. The task of the court is to pass upon the relative priorities of the several deeds and judgments resting as liens upon the property of the Alexandria & Washington Railroad Company, and ascertain the rights with reference to these liens of the Alexandria & Fredericksburg Railroad Company in respect to its claim for betterments. The priority of the lien of the Bradley deed over the Kinzer deed is *res judicata* as between the two; and, as the former deed antedates all other liens by deed or judgment upon the property of the company, it must have precedence over them all, unless there be something in the objection, that the guarantee of the city of Washington to the holders of the bonds of the railroad company was *ultra vires*, as being in conflict with the tenth section of the city charter of 1848. On this subject it may be remarked that there has been a direct adjudication by the court of highest resort in Virginia, where the property embraced in this deed lies, that notwithstanding this objection, the Bradley deed is a lien upon the property of the Alexandria & Washington Company as of the twenty-third of July, 1857. It is true that this decree does not, in a technical sense, conclude those who were not parties to the suit in which it was rendered; but it carries all the authority of a decision of the highest court of the state in which the land affected by it lies, upon a question directly raised before it. Independently of these considerations, it may be added that the mortgage secured the bonds and created a valid lien on the property. When the city took up these bonds this lien was not vacated. The cancellation of the city's signature on the bonds did not cancel the liability of the railroad company for their payment. The city might have contested her liability on the bonds, but the subsequent lienholders are in no condition to contest the title of the city to the bonds. It is a matter of no importance to them, whether the city gets the money, or some one else. The debt is still owing by the company, and the lien for its security is a valid one. So, the conclusion of the court is, that the Bradley deed is a first lien by deed or judgment upon the property of the Alexandria & Washington Company, dating as of the twenty-third of July, 1857, for the debt it secures, as reported by Commissioner Fowler.

The Lennox deed is really not disputed, and having been recorded on the twenty-fourth of July, 1857, antedates and ranks all deeds and judgments, except the Bradley deed. It is true that Lennox, the trustee, had personal notice of the execution; but this notice to him cannot bind the bondholders whom he represents, who took the bonds without notice. For all purposes of notice, the trust deed must, in this case, be treated as executed to the bondholders.

The Hay judgments and the claim of Fowle, Snowden & Co., as this latter is represented by the Kinzer deed, and by the decree of the cir-

cuit court of Alexandria county, rendered on the twenty-fifth of May, 1859, must now be considered. Two of the Hay judgments antedated the decree; two of them were simultaneous with the decree, (the two judgments and the decree having taken effect as of the first day of the same term of the court which rendered all of them, viz: the sixteenth of May, 1859;) and three of the judgments were subsequent to the decree.

It will be necessary to consider the objections urged respectively against the claim of Fowle, Snowden & Co., and the Hay judgments.

First, of Fowle, Snowden & Co.'s claim. The circuit court of Alexandria county, in a case in which that question was directly presented before it, decided that the Kinzer deed was not legally recorded in pursuance of the registration laws of Virginia, and did not constitute a lien upon the property of the Alexandria & Washington Company. Appeal was taken by Fowle, Snowden & Co., to the court of appeals of Virginia; the appellants in their petition for the appeal assigning as a ground of error, that the court below pronounced the registration absolutely illegal, and not merely as it should have done, subordinate to the Bradley deed. The appellate court rendered a general decree of affirmance, thereby establishing the validity and finality of the decree below. It is true that the judge who delivered the opinion discussed only the question whether Fowle, Snowden & Co. had notice of the previous execution of the Bradley deed when they took the Kinzer deed, but the decree itself, which was the act of the whole court, affirmed the decree below generally, and made no such limitation of affirmance in its decree as the individual judge had done of argument in his opinion. In a very recent case, that of *Davis v. Beazley*, 75 Va. 491, the supreme court of appeals has put the matter at rest in this state by holding that the grantee or beneficiary in a deed is not allowed, as an officer, to take an acknowledgment of the deed by the grantor, with a view to its registration; that the certificate of such acknowledgment is invalid, and hence a recordation of it based upon such certificate is without effect. We are therefore relieved of the necessity of considering whether this court, in an original case, would hold that a director of a corporation, which makes a trust deed preferring himself over other creditors, is incompetent to take and certify the acknowledgment of that deed for registration in the additional capacity of notary public; especially a deed which was agreed to be held for a time from registration.

The debt of Fowle, Snowden & Co. therefore having no footing as a lien by virtue of the Kinzer deed, stands exclusively upon the decree of the twenty-seventh of May, 1859, establishing it. It is stated by opposing counsel that no execution was ever taken out on this decree. It does not seem to be pretended by any one that execution was ever issued. The record does not show that it ever was. Not only have ten years elapsed since the decree, but 20 years. As to adverse lien creditors, the right to sue out a writ of *scire facias* upon

the decree is lost, and the right to bring an action upon it is gone. What, then, is the *status* of the lien of the decree? A Virginia text-writer of eminence, Prof. Minor, lays it down that the lien of a judgment is suspended when the right to revive it by *scire facias* or action is lost. 2 Minor, Inst. 272. And Mr. Barton, another text-writer, has this passage, referring to the twelfth section of chapter 182, Code 1873 :

“The right to enforce the lien of a judgment, although the statute (in section 9) declares that it may *always be enforced* in a court of equity, is confined to the time that an action may be brought, or *scire facias* sued out thereon, and after that time the lien ceases to exist.” See 1 Barton, Ch. Pr. 109.

The debt of Fowle, Snowden & Co. is bottomed therefore on no lien, and is to be treated in this suit as an unsecured claim against which a plea of the statute of limitations has not been interposed.

Coming now to a consideration of the Hay judgments. Four of them had been assigned to Hay by the original plaintiffs after they had been recovered. The plaintiffs in two of the four suits were citizens of Massachusetts, and the judgments assigned were rendered respectively on the twenty-fifth of November, 1857, and on the ninth of February, 1858. The other two of these four judgments were recovered by residents of Virginia, and assigned to Hay, bearing date on the twenty-seventh of May, 1859, but taking effect as of the sixteenth of May, 1859. On these four judgments Hay brought an equity suit in this court in 1875, in which he prayed that the *satisfactions* which he had caused to be marked on these judgments in 1860 might be set aside, and the liens which had originally attached to the judgments might be restored. Decree was obtained in this court in 1881. It is objected to the validity of the decree that this court had not jurisdiction as to two of the judgments, to entertain a suit brought by Hay on them, inasmuch as the second clause of section first of the judiciary act of 1865 (Supp. Rev. St. p. 174, c. 137) declares that the circuit courts of the United States shall not have cognizance of suits brought by assignees of causes of action, where their assignors could not sue. Waiving the question whether the decree under consideration can be assailed collaterally, it is to be remarked, that the object of the equity suit brought by Hay in this court was to set aside “satisfactions” which had been marked upon the judgments at a time when they had become the property of Hay. The consideration for which they had been so marked had proved null and void. The satisfactions had been executed on an implied promise of the company, to Hay himself, that if the consideration should fail, the company would make good the judgments. This obligation, arising *ex equo et bono*, from the company to Hay himself, was the cause of action on which the equity suit was founded. It was a cause of action arising directly in favor of Hay, irrespectively of the manner in which he had acquired this property, and the jurisdiction of this court to entertain a suit by Hay, a non-resident, against the Alexandria & Washington Company, a resident of Virginia, upon

this cause of action which had accrued to himself was complete. But even assuming, what is not true, that the original causes of action on which the judgments had been obtained in the state court were still the basis of the equity suit brought in this court, even in that case the jurisdiction of this court was good. Two of the judgments had been recovered by citizens of Massachusetts, the other two by citizens of Virginia. As to the first two, the jurisdiction was undoubted. The owner of these brought the suit; and the only question is, whether he had a right to join in his suit two judgments against the same defendant which had been assigned to him with no purpose or intention of evading the jurisdiction of the state court. This question would seem to be settled by the first clause of the first section of the act of 1875, which provides in substance that the circuit courts of the United States "shall have cognizance of all *suits*, etc., in which there shall be a *controversy* between citizens of different states, etc." The controversy of Hay respecting the judgments as to which the jurisdiction was undoubted, gave under this clause jurisdiction of the suit which embraced two other controversies which were not between citizens of different states. It is true that the clause of the act of 1875, on which this objection is based, would not authorize causes of controversy to be embraced in a suit which had been assigned for the purpose of having them sued upon in a United States court. Section five of the same act forbids assignments for such a purpose; but this very section, by forbidding the joining of causes of action assigned for this purpose, impliedly authorizes causes of action not assigned for such purpose to be so embraced. If a suit is found to embrace causes of action assigned for this purpose, the court will dismiss it as to such causes of action, retaining it as to the others, as was done by the supreme court of the United States in *Inhab. of the Township of Bernards v. Stebbins*, decided at the present term and reported in 109 U. S. 341, and also in 3 Sup. Ct. Rep. 272. This principle has been frequently applied *as to parties* by the supreme court, in suits in which the court has held that though all the plaintiffs and all the defendants marshaled on opposite sides of a cause, were not residents of different states, yet if there be a separable controversy between citizens of different states, that fact may of itself give jurisdiction of the whole suit. If a separable controversy *as to parties* can bring a suit into a federal court, there would seem to be no reason why a separable controversy *as to causes of action* should not do so; except, indeed, in suits where a fraud upon jurisdiction is attempted, as contemplated by section 5 of the act of 1875. These four judgments having therefore been legally relieved of the "satisfactions" that were marked upon them, and the liens which they created having been legally restored, must take rank as of the twenty-fifth of November, 1857, the ninth of February, 1858, and the sixteenth of May, 1859, respectively; and must be given precedence over the debt of Fowle, Snowden & Co.

As to the objection that these four judgments, and the three others that were sued over in this court by Hay, and judgment anew obtained upon them in 1881, were *merged* in the new decree and judgment, it is to be remarked that one of the objects of section 12 of the 182d chapter of the Code of Virginia, in requiring judgments to be kept alive by *scire facias*, or new action, within 10 or 20 years, according as the issuing and return of executions on them might determine, was to provide a means of keeping alive judgments and their liens; and of quieting titles where judgment creditors slept too long on their rights. It is therefore a very strange pretension that the pursuit of the very remedies given by the state to keep alive judgments, and their liens, merges and extinguishes them. Although executions had been taken out on the original judgments owned by Hay, much time had elapsed when his suits were brought upon them in this court in 1875. Doubtless the provisions of section 12 of the 182d chapter of the Code suggested and induced those actions; and this court is unwilling to hold, in view of these statutory requirements, that the plaintiff in those suits, by complying with those requirements, lost the very rights which he was seeking to perpetuate. Whatever may be the general doctrine in other jurisdictions, as to the merger of one judgment into another, it cannot be so applied in Virginia as to convert the statutory provisions that have been alluded to into a delusion and a snare. Besides, it is to be observed, as to the four judgments which were the subject of the equity suit, that suit was brought, not to obtain a new judgment upon the old ones, but to strike from the old ones an inscription which rendered them practically valueless, and to restore to them their original force and attributes. The object was the opposite of merging them, if that were the necessary effect of obtaining a new judgment on an old one. It was to place them *in statu quo* as of the dates on which they were originally recovered, divested of the satisfactions which had been improvidently put upon them. The doctrine of merger, therefore, whatever it may be in ordinary cases, does not apply to these four judgments.

Summing up what has been said, the several debts stand as to each other in the following order: (1) the debt due the city of Washington; (2) the bonds held under the Lennox deed; (3) the Hay judgments, seven in number; and (4) the unsecured claim of Fowle, Snowden & Co.

It remains to be considered how these several claims stand in respect to the claim for betterments put upon the western 18½ feet of the roadway of the Alexandria & Washington Company while in possession of the Alexandria & Fredricksburg Railway Company under the proceedings taken in the county court of Alexandria county. It is clear that this claim can only affect the western strip of roadway that has been mentioned; and the conditions prescribed by statute entitling the Alexandria & Fredricksburg Company to compensa-

tion for betterments seem to exist here. It is true that there is a profuse ascription of fraud against this company in the briefs of adverse counsel; but no proof has been made in the evidence establishing that fraudulent means were used by the company to secure the condemnation of the ground in question, or to obtain control of the Alexandria & Washington Railroad Company and its property. We have only to consider what and how allowance is to be made to this company for its betterments. The control of this road from Alexandria to the Long bridge must have been of much greater importance, and the use of it of much greater value, to the Alexandria & Fredricksburg Company, and its associate companies north and south, than could be measured by the *pro rata* receipts of net earnings in money, which accrued to it from that short section of road, especially if no account is taken of the five years' rent, which the Alexandria & Washington Company might be entitled to as a credit under the statute of Virginia relating to betterments. It will be safe to assume that the Alexandria & Fredricksburg Company's use and control of the road for 10 years have abundantly compensated it for all outlays it may have made for repairs, taxes, and other incidental charges. Its original outlay of \$59,610.07 in constructing the road-bed and track on the western strip is all, therefore, that we think ought to be allowed as a first lien on that strip to the Alexandria & Fredricksburg Company. As to the manner of providing that amount for this claimant, if it cannot be agreed by the parties in interest what proportion the value of this 18½ feet shall bear to that of the whole 50 feet of road, it must be referred to the master to determine that proportion. The road must then be sold as a whole, and the purchase money be separated into two portions to represent respectively the proceeds of the sale of the old part and of the new, and the respective funds applied as has been indicated in this decision.

WAITE, C. J., concurs.

SHIVELY v. WELCH and others.

(Circuit Court, D. Oregon. April 21, 1884.)

1. DECISION OF THE TIDE-LAND COMMISSIONERS.

The commissioners under the acts of 1872 and 1874, to dispose of the state tide lands, were authorized to decide who was entitled, in certain cases, to be preferred as a purchaser thereof, and their determination of the matter cannot be questioned elsewhere, except for an error of law or a fraud extrinsic and collateral to the contest, by which a full and fair hearing of the matter was prevented.

2. SETTLER UNDER THE DONATION ACT.

It does not appear that James Welch was ever a "settler," under the laws of the provisional government or the donation act, upon the donation patented to

John M. Shively and wife; and if he was, upon his abandonment of all such claim thereto in 1860, and before he was entitled to the grant, his wife had no interest in it or the consideration received therefor.

3. CONVEYANCE TO ONE PERSON UPON A CONSIDERATION MOVING FROM ANOTHER.

In 1860 John M. Shively, in consideration that James Welch abandoned his claim to be a "settler" upon the former's donation claim, conveyed a certain portion thereof to said Welch, and a like portion, including blocks 5 and 13, in "Shively's Astoria," to his wife Nancy. *Held*, that Nancy did not hold said blocks under her husband, but the grantor, Shively, and therefore she was entitled under the acts of 1872 and 1874 (Sess. Laws, 129, 76) to purchase the tide land in front of said blocks, although her husband had quitclaimed the same to Shively in 1850.

Suit to Declare the Defendants Trustees, and for a Conveyance.

Frederick K. Strong, for plaintiff.

E. C. Bronaugh, for defendants.

DEADY, J. This suit was brought by the plaintiff, John M. Shively, to have the defendants, Nancy Welch, James W. Welch, Joseph N. Dolph, and W. W. Upton, declared to be the trustees of the plaintiff for certain tide lands conveyed to said Nancy by the commissioners for the sale of school lands, under and by virtue of the act of October 28, 1872, (Sess. Laws, 129,) on August 28, 1876—the same being known as block 111, in front of shore block 13, in the town of Astoria, Oregon, and the west half of each of the blocks 41, 46, and 145, lying in front of the west half of block 5 in said town, and of the alleged value of more than \$5,000. The cause was heard on a demurrer to the amended bill, from which latter it appears that in March, 1844, the plaintiff, John M. Shively, was a "settler," under the laws of the provisional government, on a tract of public land on the south bank, and near the mouth, of the Columbia river, containing 640.56 acres, and laid off a town thereon, containing 121 blocks, divided into lots, and extending from ordinary high water to the southward, and commonly known as "Shively's Astoria;" and on April 18, 1845, he bargained and sold, by an instrument in writing, to James Welch the undivided one-half of said land and blocks, except about 20 lots; that prior to March 13, 1850, the plaintiff, with the consent of Welch, laid off additional blocks, numbered from 122 to 150, both inclusive, the same being situate almost wholly in front of said tract of land, and between ordinary high and low water mark; and on said day said Shively and Welch divided the premises, so far as surveyed into blocks, between them, and by their deeds quitclaimed the same to each other; that upon the passage of the donation act (September 27, 1850, 9 St. 497) the plaintiff became and was a qualified married "settler" on said land under said act, and had been such settler for more than four years prior thereto, to the knowledge of said Welch, who, nevertheless, now disputed the plaintiff's right to hold said land as a donation under said act, by reason of the premises; and for the purpose of settling said dispute, on February 18, 1860, the plaintiff and his wife, Susan L., in pursuance of an arrangement with said Welch to that effect, conveyed by deed, with a general warranty, to

the latter and his wife, Nancy, each, one-fourth of the unplatted portion of said donation, and certain of the blocks aforesaid, in number about one-fourth of the whole number surveyed; that the conveyance to said Nancy included the blocks 5 and 13 aforesaid, and was made to her at the request of her husband, and upon the consideration, and for the purposes aforesaid, and not otherwise; and thereupon said Welch ceased and withdrew his opposition to the plaintiff's claim to the premises as a donee under the donation act, and thereafter, on January 24, 1866, a patent was duly issued thereunder, conveying the east half of the donation to the plaintiff, and the west half to his wife, Susan L.; that blocks 111 and 145 are wholly below ordinary high tide, and were represented on the map of "Shively's Astoria" as being each 300 feet square, bounded on all sides by streets, and were included in the quitclaim of March 13, 1850, made by Welch to the plaintiff, and said block 111 is immediately in front and north of the shore block 13, in the west half of said donation, from which it is separated on said map by Wall street, while block 145 is immediately in front and north of shore block 5, in the east half of said donation, from which it is separated on the map by Hemlock street; that both Wall and Hemlock streets are now below ordinary high water mark, and block 13 is more than one-fourth, and block 5 nearly one-sixth below said line; but in 1856, at the date of the official survey of the Shively donation, a small portion of the west end of Wall street was above the meander line, while such line ran diagonally through the whole length of Hemlock street, in front of block 5, so as to leave about three-fourths of the same above said line, and about one-fifth of block 13 was below said line.

On March 7, 1881, the plaintiff and wife conveyed the latter's half of the donation, with certain exceptions not material to this case, to Milton Elliott, and on the day following he conveyed the same to the plaintiff. On September 3, 1875, Nancy Welch applied to the commissioners of the state for the sale of school lands to purchase the tide lands lying in front of blocks 5 and 13, under the state act of October 28, 1872, "to provide for the sale of tide and overflowed lands on the sea and shore coast," (Sess. Laws, 129,) and the act of October 29, 1874, (Sess. Laws, 76,) amendatory thereof, as the owner of said blocks, and represented that said tide land was not held by any person claiming by, through, or under her, or any one through whom she claimed, which representation the bill alleges to have been false to the knowledge of the party making it, who then knew, as it is alleged, that the plaintiff was the "equitable owner" of the property, and entitled to purchase the same from the state, and that about August 28, 1876, she obtained from said commissioners a conveyance of the tide land in front of block 13 and the west half of block 5, including block 111 and the west half of block 145, while the plaintiff, at the date of both said application and conveyance was an applicant, in due form of law, for the purchase of said tide lands,

and was the only person entitled to purchase the same under said act. On October 19, 1876, the defendants James Welch, Joseph N. Dolph, and W. W. Upton, procured a conveyance from said Nancy Welch of an undivided one-fourth of said tide lands; and it is alleged that the "title" of said Nancy is "fraudulent and void," as against the plaintiff, and that the conveyance to her co-defendants was made without consideration, and received by them with full knowledge of the premises.

The defendants for cause of demurrer to the amended bill, among others, allege: (1) That the question of who was entitled to the conveyance from the state was determined by the commissioners, and their decision, in the absence of fraud, cannot be reviewed by the court; (2) that Nancy took the land and blocks conveyed to her by the plaintiff "free from any contracts of her husband concerning the appurtenances or riparian rights belonging to said land;" and (3) that there is no equity in the bill.

The location of blocks 41 and 46 is not definitely shown by the bill, but it may be gathered therefrom that they are in front of block 5 and beyond block 145, in which case they are in deep water, and below the line of ordinary low tide, and therefore not tide lands. Besides, it appears from the bill that block 41 is in the deed of February 16, 1860, executed by the plaintiff and wife to Nancy Welch, with warranty, which estops the plaintiff from now claiming any right or interest therein as against said Nancy. This being so, counsel for the plaintiff consents that the bill may be considered dismissed as to these two blocks.

The act of 1872, under which Nancy Welch purchased the tide land in question, provides that the owner of any land fronting on or bounded by the shore of any "bay, harbor, or inlet on the sea-coast" of Oregon, shall have the right to purchase from the state all the tide land belonging thereunto in front of such owner. Section 1. The commissioners for the sale of school lands—the governor, treasurer, and secretary of state—are authorized to sell such lands to the owner of the land that abuts or fronts thereon, on proof of such ownership, (sections 2, 3;) and if the application to purchase is not made by the owner within 12 months from the passage of the act, then such tide land may be purchased by any citizen or resident of Oregon. Section 5. By the amendment of 1874, section 1 was extended to tide lands on rivers and their bays in which the tide ebbs and flows," excluding the Wallamet, "the tide and overflowed lands" on which were thereby directly granted to the owners of the adjacent property; and section 5 was amended so as to allow the adjacent owner three years from the passage of the act within which to apply for the purchase of tide lands, and to provide that upon an application to purchase by any one other than the owner of the adjacent land or his grantee, notice thereof shall be given to such owner or grantee, and to any person in the possession of such tide lands or the improver of

the same, who shall have 60 days after service of such notice to make application for the purchase of such lands, which application shall have preference over all others; and all applications to purchase tide lands shall be accompanied by an affidavit of the applicant "setting forth the fact that such land is not held by any other person under a deed from said applicant or any person under whom he holds."

The land in the territory of Oregon, including the beds and shores of the navigable waters below ordinary high tide or water, belonged, prior to the admission of the state into the Union, to the United States, as proprietor, and was subject to its jurisdiction as sovereign. Upon the admission of the state into the Union, such bed and shores, not otherwise disposed of by the United States, became the property of the state in its sovereign capacity, and subject to its jurisdiction and disposal. *Pollard's Lessee v. Hagan*, 3 How. 228; *Barney v. Keokuk*, 94 U. S. 336; *Shively v. Parker*, 9 Or. 504. The United States, so far as appears, never undertook to dispose of any of the shore or tide lands in Oregon during the territorial period, and therefore, upon the admission of the state into the Union, on February 14, 1859, (11 St. 383,) the same became subject to the control and disposition of the latter. In pursuance of this power, the state has provided for the sale and disposition of these lands by the passage of the act of 1872 and the amendment of 1874. Under them, Nancy Welch, as the owner of the adjacent highland, became the purchaser of the parcels of tide land known in this suit as blocks 111 and the west half of 145. But it is alleged that the purchase was fraudulent on her part, because she falsely represented herself to be entitled to purchase the same in preference to the plaintiff. It does not appear from the bill in what this fraud consists or wherein her representation, as to her qualifications, is false, otherwise than that her conclusion from the admitted facts, as to her right in the premises, may have been erroneous. But the question of Nancy Welch's right as a preferred purchaser arose before the commissioners charged with the disposition of the land upon due notice to the plaintiff, who I suppose had the right and did contest the matter before them, and their conclusion or action in the premises cannot be questioned unless for error in the construction or application of the law, or for some fraud extrinsic and collateral to the contest by which the plaintiff was prevented from having a fair and full hearing before the commissioners. At least such is the rule laid down by the national courts in regard to similar proceedings before the officers of the land department. *Aiken v. Ferry*, 6 Sawy. 79; *Vance v. Burbank*, 101 U. S. 519, and cases there cited.

In the course of the business before the commissioners the question arose, and was contested, as to which of the two applicants was entitled to purchase from the state the tide land in question. Their action in determining such a question is in all respects analogous to

that of the officers of the land-office in determining a contest before them, and should receive the same consideration when questioned in the courts. Now, there is no such fraud alleged or pretended as would vitiate the decision of the commissioners in this case. So far as appears, Nancy did nothing to prevent a full and fair hearing of the matter by the commissioners, or to hinder or prevent the plaintiff from presenting his claim to them in the best possible light. Presumably, the facts concerning the alleged rights of the adverse applicants were presented to the commissioners as here stated, and there, as here, there being no dispute about them, they, as a question of law, decided the contest in favor of Nancy. And now, whether the matter of law was correctly decided by them is the only question in this case.

It is admitted that Nancy was the owner of the adjacent highland, but it is claimed that the tide land was "held" by the plaintiff under a deed, not from Nancy, but from James Welch, under whom, it is claimed, she "held" the highland; and therefore her right to purchase was subordinate, under the act, to that of the plaintiff. The argument in support of this proposition is that Welch, having, in March, 1850, quitclaimed the tide blocks 111 and 145 to the plaintiff, and the latter having, in February, 1860, at the instance and request of said Welch, and upon a consideration moving from him, conveyed the blocks 5 and 13 to Nancy, therefore Nancy "held" the same under the said Welch, the same person under whom the plaintiff "held" the tide land included in the quitclaim of 1850. Leaving out of consideration the fact that neither Shively nor Welch ever had any right to or interest in this land, or any right to purchase the same, until and except for the act of 1872, and that their quitclaims of 1850 did not estop either of them from asserting and maintaining, as against the other, any after-acquired estate or interest in them, or right to purchase the same from the state, (*Rawle*, Cov. 409; *Van Rensselaer v. Kearney*, 11 How. 322; *Fields v. Squires*, 1 Deady, 379; *Lownsdale v. Portland*, Id. 15,) it is very clear that Nancy Welch never "held" the blocks 5 and 13 under her husband, James Welch; but I cannot rest this conclusion upon the argument made in its support by the counsel for the defendants. That argument is this: James Welch, at the date of the conveyances to him and his wife, in 1860, was a "settler" on the premises, under the donation act, and in the compromise then made between himself and Shively, in which he abandoned his claim to be such "settler," the one-half of the land and blocks conveyed by Shively, in consideration of such abandonment, was conveyed to Nancy, because, as Welch's wife, she was jointly interested with him in the land upon which he was a "settler" under the donation act, and therefore the consideration for the conveyance from Shively to her moved from her, and not her husband, whereby she "holds" under the former, and not the latter.

But there is no warrant upon the facts stated in the bill, particularly when considered in the light of contemporaneous history, for

concluding that Welch was ever a "settler" upon this land under either the donation act or the laws of the provisional government. True, he lived upon it, but only as the purchaser of certain parcels of the same or an interest thereof under and from such a settler—John M. Shively. After the passage of the donation act, in September 1860, he probably ascertained that his quitclaim from Shively was not sufficient to pass the after-acquired estate which the latter took under the donation act; and therefore, as a means of compelling him to make the same good, Welch may have threatened and probably did set up to be a "settler" on the land under the donation act. The effect of this claim was at least to embarrass and delay Shively in the assertion and maintenance of his right, as such settler, in the land-office. Hence the so-called compromise, by which Welch abandoned his opposition to Shively's claim to the donation, and the latter conveyed to Welch and wife, with warranty, that which he had quitclaimed to the former in 1850. But even if Welch had been the "settler" on the land, his wife had no interest in the premises until he had complied with the law, so as to be entitled to the grant. His abandonment of the claim prior to that time was his own act, and for his own benefit. She had nothing to relinquish or abandon. *Lamb v. Starr*, 1 Deady, 360; *Vance v. Burbank*, 101 U. S. 520. But Nancy Welch having acquired these blocks 5 and 13, by a direct conveyance from Shively, she "holds" them under him. In other words, she derives her title to them from him. And it is altogether immaterial who furnished the consideration for such conveyance. Because a husband for any reason—as love and affection or a sense of justice—furnishes the means to enable his wife to acquire property, or even purchases the same outright, and directs the conveyance to be made to her, she does not "hold" under him. Welch was not the owner of the property, and she is not his grantee. They are not privies in estate; there is no devolution or transmission of any interest in the property from him to her. But she holds under the grantor in the conveyance through which she derives her title and right, and to which her husband is a stranger.

It follows that Nancy Welch's representation or claim that the tide lands in question were not "held" by any person under a deed from her or any person under whom she "held," was true in point of both fact and law, and the commissioners did not err in preferring her as a purchaser to the plaintiff. The plaintiff is not entitled to any relief on this bill, and the same is dismissed.

POPE v. MEADOW SPRING DISTILLING CO.

RYAN v. SAME.

(Circuit Court, E. D. Wisconsin. April 12, 1884.)

1. AGENCY—CONCEALED AGENCY—RESPONSIBILITY OF PRINCIPAL.

A party selling goods to another and taking his individual acceptance therefor, may, upon the discovery that the latter was really acting in the interest of and under authority from a third party, hold that third party responsible for payment.

2. SAME — ACT OF AGENCY ESTABLISHED BY SUBSEQUENT ACCEPTANCE OF THE PROPERTY PURCHASED.

A party who, without the authority of another, purchases goods for him, which the other, knowing the purchase has been so made, accepts, becomes thereby an agent, and the other, as principal, may be required by the seller of the goods to pay the consideration.

At Law.

Jenkins, Winkler & Smith, for plaintiffs.

Goodwin & Miller, for defendant.

DYER, J., (*charging jury*.) These are two actions, one brought by Charles Pope and the other by D. W. Ryan, against the Meadow Spring Distilling Company, to recover in the one case the purchase price of a certain quantity of malt, and in the other case the purchase price of a quantity of barrels, which it is alleged came to the possession of the defendant company through a sale of the same, in the first instance, to one Leopold Wirth, and of which property, it is alleged, the defendant had the use and benefit. The complaint in the case of Pope charges that in August, 1883, Leopold Wirth, who was the president of the defendant company, ordered of the plaintiff, who was a maltster in Chicago, two car-loads of malt suitable for use in a distillery, and the plaintiff Pope, at the request of Wirth, shipped to him such two car-loads of malt on the twenty-eighth and twenty-ninth days of August, 1883; that the same were of the value of \$1,255.78; that Wirth made the order and request for the malt for the use and benefit, and with the knowledge and on behalf, of the defendant, and for the purpose of getting the same into the possession of the defendant; that the defendant company realized the whole benefit and advantage of the purchase, and received the malt in pursuance of the shipment by the plaintiff, and used the same, and became thereby indebted to the plaintiff in the amount of the purchase price, \$1,255.78. In the case of Ryan, the same state of facts and grounds of alleged liability are stated, except that the property described consisted of three car-loads of barrels, the value and purchase price of which are alleged to have been \$775.25, which is the amount sought to be recovered by the plaintiff Ryan.

It is undisputed that the plaintiffs in the several actions, at the time they sold the property in question, made the sales on the indi-

vidual credit of Wirth, and shipped the property to him as the purchaser and personal consignee thereof, and respectively received and accepted his individual acceptances for the purchase price, which acceptances were ultimately not paid. It seems that at the time of these transactions the Meadow Spring Distilling Company was a corporation owning and operating a newly-constructed distillery in this city, of which corporation Leopold Wirth was the president, and of which, in the conduct of its business, William Bergenthal was the general manager. It is claimed by the plaintiffs, in their respective cases, that immediately after the arrival of the malt and barrels in Milwaukee, the same were removed to the distillery of the defendant company, and that the defendant had the full use and benefit of the property in its business. The theory of the plaintiffs is that although Wirth negotiated for and ordered the malt and barrels in question in his own name and on his individual credit, he in fact made the purchase for the use and benefit of the defendant company; that the property was purchased to be used at the distillery of the defendant, and on behalf and with the knowledge of the company, and that the defendant in fact had the use and received the whole benefit of the property, and therefore ought to pay, and in law became liable to pay, for the same. The claim of the defendant in both cases is that the purchases were made by Leopold Wirth on his own account, for his own use, and on his sole credit; that the purchases were not made by him as an agent; that he had no authority so to act for the defendant; that the defendant company at the time had no knowledge of the transactions; that the purchases were not originally made for its use and benefit; that it had no connection therewith, and did not authorize the same, and that subsequently, after Wirth had become the owner of the property in his own right, it purchased the malt and barrels from him as a subsequent and independent transaction, and paid him therefor; that, therefore, it is under no liability to the plaintiffs.

In submitting the cases to you, gentlemen, the court will not enter upon any discussion of the testimony. The facts lie within narrow compass, and they have been fully elucidated by counsel. You have heard the versions, given on both sides, of the negotiations which took place between Wirth and the plaintiffs in Chicago, the evidence of which the court has no doubt is admissible as tending to show the relations of Wirth to the transactions in dispute, and as bearing upon the character in which he acted in making the purchases. All the facts material to the controversy have been laid before you, and you are to say, in the light of those facts and the instructions which the court gives to you upon the law of the case, what the rights of the parties are. It is the law that where goods are sold to a person who is in fact an agent of another, and on the credit of such person, but without knowledge of the agency on the part of the seller, the latter has the right to make the principal his debtor on discovering him;

and the fact that he may have taken the note or acceptance of such buyer for the goods before discovering the principal, will not affect his right to pursue the real principal. So, too, if the party making the purchase in fact purchases the property, not for himself, but for the use and benefit of a third party, and if such third party, knowing of such purchase, takes the property and appropriates it to his own use and benefit, he is liable for the value thereof to the seller, although the seller may not have known, when he made the sale, that such third party was the *real* party in interest, and may have understood at the time that he was making the sale to the party with whom he directly dealt, and may have made the sale on the credit of such party. It is also a principle of law that where the purchaser of goods upon credit is known to the seller to be an agent of a known principal, and the seller with such knowledge gives exclusive credit to the agent by taking his note or acceptance for the goods, the agent alone is responsible to the seller.

Applying these principles to this case, if you should find that Wirth, when he purchased the malt and barrels in question, was in fact the agent of the defendant company in making the purchase; that he purchased the property for the defendant, and for its use and benefit; and that the plaintiffs were at the time ignorant of such agency,—then, on discovery that the defendant was the real principal in the transactions, the plaintiffs had the right to assert their claims against the defendant, and, upon such state of facts being established, they are entitled to recover from the defendant the value of the property so sold, although they took the personal acceptances of Wirth for the property. Or if you should find that, although Wirth had not original authority to make the purchases, he did in fact purchase the malt and barrels for the use and benefit of the defendant, and on its behalf, and that the defendant company, by its president and general manager, knew of such purchase, and with this knowledge received the property, and had the use and benefit of it, then the plaintiffs are entitled to recover, although they may not have known, when they made the sales, that the defendant *was* the real party in interest, and may have understood at the time that they were selling to Wirth, and, in ignorance of the real party in interest, may have taken his acceptances for the property. But if Wirth was the authorized agent of the defendant in the purchase of the property, and if the plaintiffs knew such to be the fact, and knew the Meadow Spring Distilling Company to be his principal, and to be liable on the purchases, and the property was sold on the exclusive credit of Wirth, the plaintiffs electing to trust him and not the defendant company, then the plaintiffs are not entitled to recover. Further, if Wirth was not the authorized agent of the defendant, and did not purchase the malt and barrels for the use and benefit of the defendant, or on its behalf, but purchased them for himself, in his own individual right, and on his own account, then he became the owner of the property, and was

solely liable therefor to the plaintiffs, and in that event he would have the right to sell the same to the defendant, or any other person; and if you should find such to be the state of the case, your verdict should be for the defendant.

These are precisely what the defendant insists were the facts in connection with the transactions between Wirth and the plaintiffs; that is, that he had no authority to act for the defendant, and did not assume to act for it; that he made the purchases in the usual course of business for himself and in his individual right, and not for the use and benefit of the defendant; that he gave his acceptances therefor, expecting to pay them when due; and that he sold the property afterwards in good faith to the defendant, receiving actual payment therefor in the way of credits on certain indebtedness he was owing to the defendant. If this be so, then, obviously, the plaintiffs can only look to Wirth for payment of their debt.

On the other hand, it is contended by the plaintiffs that the real party in interest in these transactions was the Meadow Spring Distilling Company; that Wirth was the president of the company, and really made these purchases for the use and benefit of the company, and that, as originally contemplated, the defendant had the use and benefit of the property; that on its arrival in Milwaukee the malt and barrels passed directly into the possession of the defendant; and that the alleged sale of the property from Wirth to the defendant was but a cover to disguise the transaction, and to enable the company to apply the property upon Wirth's prior indebtedness on account of stock in the corporation, without paying the plaintiffs therefor. Various facts and circumstances are relied on in support of this contention, and have been called to your attention. If the transaction was of the character thus claimed, it will doubtless be your pleasure, as it certainly would be your duty, to unmask it, and place the liability for this property where in such state of the case it would belong.

In examining these transactions you will apply to them, in the light of the evidence, the test of reason and good sense. Which theory of the case is best supported by credible testimony, and by such reasonable probabilities as you would naturally take into consideration in ascertaining the real character of a business transaction? Which theory is most consistent with good faith, and with the way in which business men would ordinarily be expected to do business under similar circumstances? These are points of inquiry pertinent to the issue to be decided by you, and it is your duty to look into all the circumstances of the transactions in dispute, and upon the whole evidence, and under the instructions given you by the court, determine what the rights of the parties are. If you find the plaintiff Pope entitled to recover, the measure of his recovery would be the value of the malt at the time of the sale, and I do not understand it to be disputed that such value was the purchase price, namely, \$1,255.78; and if you find the plaintiff Ryan entitled to recover, the measure of his recovery

would be the value of the barrels at the time of the sale, and I take it to be conceded that such value was the purchase price of the barrels, which was \$775.25.

Verdicts for plaintiffs.

DUNDEE MORTGAGE & TRUST INVESTMENT CO. v. HUGHES.

(Circuit Court, D. Oregon. April 25, 1884.)

LIABILITY OF ATTORNEY ON EXAMINATION OF TITLE TO REAL PROPERTY.

A. applied to a money lender for a loan of \$3,000, and offered his note therefor, secured by a mortgage on certain real property; B., the attorney of the money lender, examined the title to the real property and furnished the latter a certificate to the effect that A.'s title was good and the property unincumbered, and thereupon the loan was made on the terms proposed; subsequently and before the maturity of the note it was assigned to the plaintiff, who foreclosed the mortgage and sold the property, when it was found that it was incumbered by a prior mortgage, so that the plaintiff did not realize the amount of his debt by \$4,794.35. *Held*, that there was no privity of contract between B. and the plaintiff, and that he was not liable to the latter for the loss.

Action for Damages.

William H. Effinger, for plaintiff.

The defendant *in propria personæ*.

DEADY, J. This action is brought to recover, among other things, damages to the amount of \$5,312.35, for losses alleged to have been sustained on two loans on note and mortgage, amounting to \$3,300, upon the certificate of the defendant, as an attorney at law, concerning the title of the borrower to the mortgaged premises and the condition of his estate therein. From what I conceive to be the legal effect of the statement of the first cause of action in the complaint as amended, it appears that "about" April 28, 1877, the Oregon & Washington Trust Investment Company was a corporation formed under the laws of Great Britain, and resident in Dundee, Scotland, and engaged in loaning money in Oregon upon note and mortgage; that the defendant, who was then a practicing attorney in this state, was employed by said corporation to examine the title and condition of the real property offered as security by any one applying to said corporation for a loan; that at this time a loan of \$3,000 was made by said corporation to C. W. Shaw, on his promissory note, payable to its order on June 1, 1882, with interest, at the rate of 10 per centum per annum, and secured by a mortgage on certain real property then owned by said Shaw, upon which the defendant certified there was no prior lien or incumbrance; that on December 19, 1879, said corporation "amalgamated" with the plaintiff and "assigned" thereto "all its mortgages," including "all claim, right, and interest to or in or

growing out of this loan to Shaw," who is now "the owner and holder thereof," of which the defendant had notice; that in 1882 the plaintiff requested the defendant "to foreclose said mortgage," and in the course of the proceeding therefor it was ascertained and determined by the decree of this court that the same was subject to a prior mortgage on the premises, so that the whole amount realized by the plaintiff on said loan was \$938.25; and that said Shaw is insolvent. The second cause of action, as appears from the original complaint, is upon a certificate given by the defendant to the Oregon & Washington Savings Bank, another British corporation engaged in loaning money in Oregon on note and mortgage, "as to the title of property taken by said corporation, as a security for a loan of \$300 made to H. H. Howard on November 27, 1876, on his promissory note payable on December 1, 1877, with interest at the rate of 12 per centum per annum, to the effect that said Howard was the owner in fee of the same, and that it was unincumbered; that in 1883 said corporation "found out" that said property was not owned by said Howard, so that the whole amount of said loan was lost; that Howard is insolvent, and the plaintiff is now "the assignee" and "owner" of all the "assets" of said corporation. The defendant demurs to both these statements, for that they do not contain facts sufficient to constitute a cause of action.

In the first statement it is alleged that the loss arising from the insufficiency of the security for the loan was sustained by the Oregon & Washington Trust Investment Company, and that the defendant now owes to said corporation the full amount thereof, to-wit, \$4,794.35; and it is also alleged that the plaintiff is now "the owner and holder" of the mortgage, notwithstanding it appears that the same has been "foreclosed" and merged in a decree of this court and partly satisfied from the proceeds of the mortgaged premises; and notwithstanding the further allegation that the defendant "now owes" the amount of this loss to the Oregon & Washington Trust Investment Company. But none of these contradictory allegations are admitted by the demurrer, except such as the law adjudges to be true, (*Freeman v. Frank*, 10 Abb. Pr. 370,) and those which are mere conclusions of law and not thereby admitted at all. *Branham v. The Mayor, etc.*, 24 Cal. 602; *Hall v. Bartlett*, 9 Barb. 297. This action is brought upon the hypothesis that the defendant is now liable to the plaintiff for this loss; but the allegation that he "now owes" the amount thereof to the Oregon & Washington Trust Investment Company is utterly at variance therewith. He cannot be liable on this account to both of them at the same time.

Again, it is alleged that the defendant "guarantied" that the Shaw property was clear of incumbrance. But this is a mere conclusion of law, and the facts stated do not support it. Upon these, the transaction is simply an employment of the defendant by the Oregon & Washington Trust Investment Company to examine and report upon

the title and condition of real property offered as security for a loan by the latter. *Prima facie* there is no element of a guaranty involved in such employment. The defendant only undertook to bring to the discharge of his duty reasonable skill and diligence. He did not warrant or guaranty the correctness of his work any more than a physician or a mechanic does.

It is admitted that if the Oregon & Washington Trust Investment Company had sustained a loss by the negligence or want of skill on the part of the defendant in this matter, the right to recover damages for the same might be assigned to the plaintiff, and it could maintain an action thereon. But taking the facts of the case according to their legal import, and construing contradictory allegations according to the law of the case, the plaintiff does not sue as the assignee of a cause of action accruing to the Oregon & Washington Trust Investment Company during its existence and ownership of the Shaw note and mortgage. The only thing assigned by the latter was this note and mortgage, and, nothing appearing to the contrary, presumably the consideration, therefore, was equal to its par value. It does not appear, then, that the assignor ever lost anything by reason of the incorrectness of the defendant's certificate. Nor could the insufficiency of the surety be absolutely, if at all, determined until the maturity of the note in 1882, while the assignment to the plaintiff was made in 1879.

The only question, then, really in this case is whether the defendant is liable, on this certificate, to any one but his employer, the Oregon & Washington Trust Investment Company. The defendant maintains that he is not, while the plaintiff contends he is; not on the ground of privity of contract between them, or that it was aware of the existence of the certificate, or ever acted on it, or was misled by it, but on the ground that the certificate was a necessary preliminary to the contract of loaning, and therefore an integral part of that contract, operating, of course, as an assurance or security to the person about to make the loan, but as much a part of the transaction as the mortgage itself. This question has been decided by the supreme court in *Savings Bank v. Ward*, 100 U. S. 195. The case was this: A., an attorney employed by B. to examine and report on the title of the latter to a certain lot of ground, certified that it was "good," upon which certificate B. procured a loan from C., and gave a mortgage on the property as security. It turned out that B. had parted with the title to the property prior to the date of the certificate—a fact that, in the exercise of reasonable care, might have been learned from the records. The security having proved worthless, and B. being insolvent, C. lost his money, and brought suit against A. for damages. The court held, in the language of the syllabus, "that there being neither fraud, collusion, nor falsehood by A., nor privity of contract between him and C., he is not liable to the latter for any loss sustained by reason of the certificate."

True, Mr. Chief Justice WAITE, with whom concurred Justices SWAYNE and BRADLEY, delivered a dissenting opinion; not upon the general question, however, but on the special ground that it appeared that A. gave his client the certificate in question with knowledge, or reason to know, that he intended to use it in a business transaction with a third person, as evidence of the facts contained therein, and was therefore liable to each person for any loss resulting from a reliance on such certificate, in any particular, which might have been prevented by the exercise of ordinary care and skill on the part of A. But this is not the case. The defendant prepared this certificate at the instance and for the use of his client, the Oregon & Washington Trust Investment Company, and none other. Nor was there anything in the nature of the business that informed him or gave him any reason to believe that any other person would be called upon to act upon it, or part with any right or thing of value on the strength of the representations contained in it. Such a certificate made at the instance of the owner of the property may be used to influence a third person to make a loan thereon; but a certificate made for the information of the lender is presumably made for his use alone, and when the loan is made and the security accepted it is *functus officio*—has performed its office. The defendant is liable to the Oregon & Washington Trust Investment Company for any loss sustained by it on account of any error or mistake in the certificate, arising from a want of ordinary professional skill and care in the preparation of it, and not otherwise. But he is not so liable to the plaintiff, or any third person. There is no privity of contract between them, or any relation whatever.

The ruling is also maintained in *Houseman v. Girard M. B. & L. Ass'n*, 81 Pa. St. 256, in which it was held that while the recorder of deeds is liable in damages for a false certificate of title, but only to the party who employs him to make the search, and not his assignee or alienee. And in *Winterbottom v. Wright*, 10 Mees. & W. (Exch.) 109, it was held that although the maker of a carriage is liable to the person for whom he makes it, for any loss or injury arising directly from negligence in its construction, that he was not so liable to any third person who might use the same, for the reason there was no privity of contract between them.

The statement of the second cause of action is of the same character as the first; and it is also defective in not stating absolutely that the certificate is untrue. The allegation that in 1883 the bank "found out" that Howard did not own the property, is not in form or effect an averment that he did not own the same and had not title thereto at the date of the certificate. It does not appear to have been "found out" in any judicial proceeding that the certificate was untrue in this respect; and while it may, nevertheless, be shown in this action to be a fact, it must first be alleged, so that issue can be taken on it. Because in 1883 the bank was of the opinion that How-

ard had no title to the land, that did make it so, and the statement of that irrelevant matter is not an allegation by the plaintiff that he was not the owner thereof. Neither does it appear that the bank ever made any assignment of this note and mortgage to the plaintiff or of any claim that may have accrued to it against the defendant for a loss sustained by it on account of any error in this certificate. The allegation that the plaintiff is now the "assignee" and "owner" of the "assets" of the bank is far too vague and indefinite to include this note and mortgage, or such claim, if there is one. The owner of what "assets?" For aught that appears, the bank may have parted with this note and demand before the plaintiff became the owner of its assets. Unless it is shown when the assignment was made and that the bank was then the owner of this "asset," the plaintiff does not show itself entitled to maintain this action, even upon its theory of the law and the defendant's liability. The allegation that the plaintiff is "now" the assignee and owner of the assets of the bank, implies, it is true, an assignment at some time, but it cannot be assumed in favor of the plaintiff that it was more than a day before the commencement of this action—January 9, 1884. But there is no direct allegation in the statement of any loss on the mortgage or of the facts necessary to show one. The statement that the loan was lost to the bank, appears to be a mere inference from the fact that the bank was of the opinion that the mortgagee had no title. And if there was such allegation, and it appeared therefrom that the loss was sustained by the plaintiff, the defendant is not liable for it; while if it was sustained by the bank the defendant is not liable to the plaintiff therefor, unless it should further appear that the right of action thereon has been duly assigned to it.

The demurrer is sustained to both statements.

BOUNDY and another v. SPAULDING, Collector.

(Circuit Court, N. D. Illinois. April 23, 1884.)

CUSTOMS DUTIES.

Bullion fringe *held* dutiable under Schedule N, act March 3, 1883, as bullions or canetille, and not as a "manufacture not specially enumerated or provided for, composed wholly or in part of metal."

At Law.

Percy L. Shuman, for plaintiffs.

Chester M. Dawes, Asst. U. S. Atty., for defendant.

BLDGETT, J. The court finds that the article in the declaration mentioned was charged a duty of 45 per cent. *ad valorem* as a "manufacture not specially enumerated or provided for, composed wholly

or in part of metal;" that the article in question is known in trade and commerce as bullion fringe, is composed of bullion canetille and galloons, and assimilates in character, manufacture, and the uses to which it is applied, to epaulets, galloons, laces, knots, stars, tassels, and wings of gold, silver, or other metal, enumerated in Schedule N of the act of congress of March 3, 1883, and should have been classified for duty at 25 per cent. *ad valorem*. The court therefore finds the issue joined for the plaintiffs, and assesses their damages at \$199.40, with interest from the date of payment, and costs of suit.

HERSEY and others, Assignees, v. FOSDICK

(Circuit Court, D. Massachusetts. April 23, 1884.)

BANKRUPTCY—INTEREST ON DIVIDENDS.

Assignees of an estate in bankruptcy are not bound to pay interest upon dividends which may be declared upon debts which have been fairly and reasonably disputed, from the time that like dividends were declared upon undisputed debts.

Semble, they may be ordered to pay such interest as has been earned upon funds set apart to meet the disputed claim.

At Law.

Edward Avery and L. B. Thompson, for appellant.

Myers & Warner, for Fosdick.

LOWELL, J. The petitioner, Fosdick, has been found by the district court, and afterwards by a jury here, a creditor of Charles F. Parker & Co. He now asks that the assignees be ordered to pay interest on the two dividends of 15 and 5 per cent., respectively, which were declared long since upon the acknowledged or undisputed debts. The large amount of the debt due the petitioner, and the time which has been spent in establishing it, make the interest a matter of some importance. The district judge, while sustaining the right to prove the debt, refused the request for interest.

It is admitted, for the purposes of this hearing, that the bankrupt firm were ruined by the fraud of one partner, who borrowed large sums for his own private purposes, and gave firm notes therefor. The debt of the petitioner was of that character; and the question for the court below, and for the jury here, was whether the petitioner had notice of the fraud. It is further admitted that this was a fair subject of doubt, proper to be referred to a jury. In a single case, such a claim was allowed: *Re Kitzinger*, 19 N. B. R. 238, 307. That decision, though by a very able judge, and sustained on appeal, is a new departure in the law of bankruptcy. Of the almost numberless cases in which a proof has been contested, no other has been found in which such an allowance has been made. By the act of 49 Geo. III. c. 121, § 12, the action of *assumpsit* for recovery of a dividend was abolished, and

a remedy by summary petition was substituted, and the lord chancellor was authorized, when justice appeared to him to require it, to order payment of interest for the time the dividend should have been withheld. See 2 Christ. Bankr. Law, 477. This statute refers to dividends ordered upon debts duly proved, and to a mode of managing the estates of bankrupts which is now superseded. The assignees took the funds, and dealt with them as trustees; and it was one of the abuses of the system that they would delay payment of dividends after they had been declared by the commissioners, in order to make interest for themselves. By the old law, they could be sued for the several amounts, and, no doubt, were bound to pay interest for the delay. But it was a delay in paying a debt due from themselves after it had been judicially ascertained. It is to this practice that the statute is addressed, and it is under this statute, I have no doubt, that the case cited by counsel was decided. *Ex parte Loxley*, 1 Glyn & J. 345. See *Ex parte Graham*, 1 Rose, 456; *Ex parte Atkinson*, 3 Ves. & B. 13; *Ex parte Alsopp*, 1 Madd. 608. In this last case, the reason for paying interest is given by the vice-chancellor that a debt proved is like a judgment which the assignees cannot refuse to respect excepting by a direct motion to expunge. If they fail to take the appropriate action to review the proof, they cannot resist payment of the dividend, and may be bound to pay interest. In this case the debt was suspended and never admitted to proof until now, by order of the court, upon the verdict rendered.

I can see no reason why, because a creditor finally prevails in a claim honestly and fairly disputed by the assignees, he should have more than his dividend. Not, surely, as damages for withholding something due him, for there is nothing due him in bankruptcy until his debt, both as to its legality and its amount, has been ascertained. Not as matter of contract, for there is no contractual relation between the parties. I am confident that the practice has always been against it, and that it is both just and expedient that the general creditors should be at liberty to investigate doubtful claims, without the liability to such a penalty as would be imposed upon them by granting this petition. I do not say that if funds have been set aside to meet a large claim of this kind, and have earned interest, the court has not power to order the precise amount of interest so earned on a sum which proves to be the creditor's money, to be paid to him. The case of *Kitzinger*, *ubi supra*, rejects this ground of relief, and gives the creditor a larger rate than his money had actually earned. The record in this case does not inform me whether such interest has been received. If it has, the district judge must pass upon the case if the petitioner sees fit to bring it before him. His former decision related only to the time before the appeal, and in respect, at least, to the considerable time which has since elapsed, I see no impropriety in asking him to hear the case again.

Petition denied.

UNITED STATES v. REILLEY.

(Circuit Court, D. Nevada. April 7, 1884.)

CRIMINAL LAW—EMBEZZLEMENT NOT AN INFAMOUS CRIME.

Embezzlement is not an "infamous crime" within the intention of the fifth amendment of the constitution, and hence a person charged therewith may be tried without the intervention of a grand jury.

Information for Embezzlement.

Trenmor Coffin, U. S. Atty., for the United States.

W. W. Bishop, for defendant.

SAWYER, J. Motion to rescind the order made by United States District Judge HILLYER granting leave to file an information for embezzlement by a postmaster, and to strike the information from the files, the case having been transferred to the circuit court for trial. I have no doubt that the court has jurisdiction to try offenders for misdemeanors and offenses not capital or otherwise infamous, upon informations filed by leave of the court, and that the offenses charged in this case are not infamous. Whether the information presents a proper case for granting leave to the United States attorney to file it, is a question for the exercise of a sound discretion by the court. Generally, in this circuit, unless for some substantial reason the court otherwise determines, it has been required that the party charged shall be examined and held to answer by some committing magistrate, or else that evidence showing probable cause should be made to appear in some proper form before granting leave. In this case the information was verified by the direct, positive affidavit of the United States attorney, and, upon being arrested upon a warrant issued thereon, the prisoner was examined and held to answer for the offense set out in the information. I think the circumstances are sufficient to justify a refusal to vacate the order granting leave, and to strike the motion from the files. For authorities sustaining this action see Spear on the Law of the Federal Judiciary, 406, and the authorities there cited. See, also, *U. S. v. Shepard*, 1 Abb. (U. S.) 437; *U. S. v. Waller*, 1 Sawy. 701; *U. S. v. Block*, 4 Sawy. 211; *In re Wilson*, 18 Fed. Rep. 33; *Thatch*. Pr. 650-652, and cases cited.

Let an order be entered denying the motion.

See *U. S. v. Field*, 16 Fed. Rep. 778, and note, 779, and *U. S. v. Pettit*, 11 Fed. Rep. 58, and note, 60.—[ED.]

KELLER and others v. STOLZENBACH and others

(Circuit Court, W. D. Pennsylvania. March 20, 1884.)

1. FORMER JUDGMENT—WHEN A BAR.

A decree under equity rule 38 dismissing the plaintiff's bill because of his failure to reply to a plea or set it down for argument, is not conclusive, since all the authorities agree that in order to constitute the former judgment or decree a bar it must appear that the point in issue was judicially determined after a hearing and upon consideration of the merits.

2. PATENTS FOR INVENTION—PARTNER INVENTING MACHINE—USE BY FIRM—LICENSE.

During the existence of a partnership between two persons one of them invented a machine upon which a patent was granted to him. The firm paid the fees and costs of procuring the patent and the expenses of an experimental trial of the invention and also the expenses of some litigation which ensued. It appeared, however, that all the outlay of the firm was more than repaid by the benefits arising from the free use of the patented machine in the partnership business. *Held*, that upon these facts no implied license arises to the member of the firm not the inventor to make, use, and vend the patented machine after the dissolution of the partnership.

In Equity.

Bakewell & Kerr and D. F. Patterson, for complainants.

Geo. H. Christy, for defendants.

ACHESON, J. Nicholas J. Keller, one of the plaintiffs, and Philip M. Pfeil, one of the defendants, entered into partnership on April 26, 1870, in the business of dredging and dealing in sand and gravel, the partnership lasting until April 10, 1875, when it was dissolved by mutual consent. During the existence of the partnership Keller invented a sand and gravel separator, for which letters patent were granted to him on May 21, 1872. With his consent, and at the firm expense, the patented apparatus was put on two boats owned by the firm,—one called the Hippopotamus, the other the Rainbow,—and was used thereon without charge during the continuance of the partnership. The firm paid the fees and costs of procuring the patent, and the expenses of an experimental trial of the invention, and also paid the expenses of some litigation which ensued. The evidence, however, tends to show that this outlay was more than made good by the advantage and benefits accruing to the firm from the free use of the invention on said boats. Upon the dissolution of the firm each partner took at an agreed value one of the boats,—Keller, the Hippopotamus, Pfeil the Rainbow,—each then having the patented machine thereon. A contest immediately arose as to the right of Pfeil to use the patented machine on the Rainbow, and Keller filed a bill in this court to restrain such use, alleging that the privilege had not passed with the boat. The decision of the court, however, was against him, and his bill was dismissed. Subsequently Pfeil built another boat called the Wharton McKnight, and placed and used thereon the patented apparatus. Thereupon Keller filed in this court another bill against Pfeil and his associates to restrain the in-

fringement of his patent. To this bill the defendants filed a plea setting up the same matters of defense now relied on. To this plea the plaintiff did not reply, nor did he set down the same for argument. Wherefore a decree dismissing the bill was entered under, and in the terms of the thirty-eighth rule in equity, viz.:

"If the plaintiff shall not reply to any plea, or set down any plea or demurrer for argument, on the rule-day when the same is filed, or on the next succeeding rule-day, he shall be deemed to admit the truth and sufficiency thereof, and his bill shall be dismissed as of course, unless a judge of the court shall allow him further time for the purpose."

The defendants plead the decree entered under this rule in bar of so much of the present bill as relates to the Wharton McKnight, or the use of the patented invention thereon. Whether this position is well taken is the first question in the case. That such decree is not conclusive, is, I think, evident from the authorities, they all agreeing that in order to constitute the former judgment or decree a bar, it must appear that the point in issue was judicially determined after a hearing, and upon consideration of the merits. 1 Greenl. Ev. §§ 529, 530; Story, Eq. Pl. § 793; *Badger v. Badger*, 1 Cliff. 237, 245; *Haws v. Tiernan*, 53 Pa. St. 192; *Hughes v. U. S.* 4 Wall. 232. In *Homer v. Brown*, 16 How. 354, it was held that a judgment of *non-suit*, entered upon an agreed statement of facts submitted to the court for decision, was not a bar to a subsequent suit between the same parties, and for the same cause of action. Says CLIFFORD, J., in *Badger v. Badger*, *supra*, if the order of dismissal was not upon the merits of the bill, it matters not whether it was with or without the consent of the complainant. And Mr. Justice FIELD says in *Hughes v. U. S.* *supra*, "if the first suit * * * was disposed of on any ground which did not go to the merits of the action, the judgment rendered will prove no bar to another suit." 4 Wall. 237. Now, the primary purpose of rules of court being to regulate the practice, and promote the dispatch of business, the intention to create an estoppel ought not to be lightly imputed to the rule now under consideration. Such effect, it seems to me, is foreign to the object to be subserved. True, the rule declares that the plaintiff so in default "shall be deemed to admit the truth and sufficiency" of the plea, but this implied admission is merely for the occasion, and to open the way for a decree of dismissal "*as of course*," without trial, hearing, or adjudication,—a decree which is the equivalent of a judgment of *non-suit* at law for want of a narr or other default of a like nature.

It appears that the defendants are not only using the invention on the Wharton McKnight, but that they have built another boat, the Little Ike, upon which they intend (it is admitted) placing and using a sand and gravel separator constructed pursuant to Keller's patent; and they defend generally, upon the ground that Pfeil is invested with a license to make, use, and sell the patented machine. No express license is shown and none is asserted in view of the proofs. The

defendants stand on an implied license. But if such license exists it must spring from the facts heretofore stated, viz., the invention by Keller during the partnership between him and Pfeil, the free use, with Keller's consent, by the firm, of the patented apparatus upon their boats, and the payment by the firm of the fees, costs, and expenses of procuring the patent, etc. But I cannot see that these facts afford any solid foundation for the defense set up. In *McWilliams Manuf'g Co. v. Blundell*, 11 FED. REP. 419, upon a substantially similar state of facts, it was held that the firm could make no claim to the patent, and, after dissolution, an injunction to restrain infringement issued against the late partner. Here the merit of the invention is Keller's exclusively. He is indebted to Pfeil for no ideas or suggestions. The letters patent were never treated as partnership property. At the dissolution of the firm the partners made a schedule of the firm assets, at agreed valuations, with a view to a division, but the patent was not in that schedule. The claim which Pfeil then asserted was the right to use the patented apparatus with which the *Rainbow* was equipped. To that extent his demand was reasonable and just, and it was sustained. But now he practically insists upon an equitable ownership in the patent, for he claims the unlimited right, individually and in connection with his present partners, to make, use, and vend the patented apparatus. But no express agreement is shown whereby the firm or Pfeil acquired any interest in the patent. If the firm paid the expenses connected with the issue of the patent, etc., they received a full equivalent in the use of the invention upon their two boats, free of royalty, and in the absence of direct proof of any other or greater right in the firm, none is fairly inferable from the facts as they appear.

Our conclusion that Pfeil's right to use the invention is limited to the construction on the *Rainbow*, finds support in adjudged cases. *Brickill v. Mayor, etc., of New York*, 7 FED. REP. 479; *Wade v. Metcalf*, 16 FED. REP. 130. Nor does this view conflict with the decisions cited by the defendants. In the nature of the case (the invention being a process) the presumed license in *McClurg v. Kingsland*, 1 How. 202, was unlimited, and justly so under the circumstances. In *Chabot v. American Button-hole, etc., Co.* 6 Fish. 71, the facts were not only substantially similar to those in *McClurg v. Kingsland*, but there was the additional element of an express contract, the terms of which greatly strengthened the presumption of an unrestricted license. The subject-matter of the patent in *Slemmer's Appeal*, 58 Pa. St. 155, was a process which, if legally the invention of one partner, was in fact the result of partnership labor, experiment, and development, and the dealings of the partners with each other had been of such a character that it would have been grossly inequitable to deny to any of them the right to use the invention. In *Kenny's Patent Button-holing Co. v. Somervell*, 38 Law Times Rep. 878, the partnership was formed for the sole purpose of working the patented in-

v.20,no.1—4

vention, and had been conducted for several years, during which time the partner whom it was attempted arbitrarily to enjoin had aided in perfecting the invention and invested his capital in the business. It was a clear case (as was *Slemmer's Appeal*) of a dedication of the use of the invention to the partnership, without limit as to time. But of any such dedication of Keller's patent there is a lack of evidence, and the equity of Pfeil is fully satisfied by the use of the patented apparatus on the Rainbow.

Let a decree be drawn in favor of the plaintiffs, in accordance with the views expressed in this opinion.

UNITED STATES v. TWO HUNDRED AND FOURTEEN BOXES OF ARMS, AMMUNITION, AND MUNITIONS OF WAR.

UNITED STATES v. ONE HUNDRED AND FORTY KEGS OF GUNPOWDER.

(*District Court, E. D. Virginia. February 4, 1884.*)

NEUTRALITY LAWS—VIOLATION OF—HOSTILE EXPEDITION—SEIZURE—FORFEITURE OF MUNITIONS—EVIDENCE—REV. ST. § 5283.

The steam-tug Morgan was purchased and repaired at New York, to be sent to the waters of Hayti and used there to commit hostilities in aid of the late insurrectionists against the government of Hayti, with which the United States are at peace. Shortly before she was to sail, two cannons, with naval carriages, sundry boxes of Winchester rifles and Springfield muskets, with ammunition, and 100 kegs of gunpowder, were purchased by the purchasers of the Morgan and put on board a schooner at New York, which had cargo for Richmond, with orders, on being hailed by concerted signals, to put these munitions off somewhere near the Virginia capes, on any steamer giving the concerted signals. The proofs showed that the Morgan was to be the steamer to take these munitions off the schooner. The Morgan, when about to set out from New York, was seized by the United States marshal on the charge of attempting to violate the neutrality laws of the United States, and failed to be at the Virginia capes to receive the said munitions. The schooner, accordingly, proceeded on her voyage to Richmond, and on her arrival there the munitions were seized under a libel in admiralty for forfeiture, under section 5283, Rev. St. *Held*, on the proofs, that the munitions were liable to forfeiture.

This case is a sequel to that of the *Mary N. Hogan*, 18 FED. REP. 529

In Admiralty.

Edmund Waddill, U. S. Atty., and *Geo. J. Schermerhorn*, for the United States.

A. M. Keiley and *J. E. Sudden*, for claimant.

HUGHES, J. These are libels of information brought by the United States attorney, for and in behalf of the United States, against two cannons, sundry cases of fire-arms and ammunition, and kegs of gunpowder, found on board the schooner *E. G. Irwin*, lying in the port of Richmond, and seized for forfeiture in August last. The two proceedings are founded upon section 5283 of the Revised Statutes of the United

States, which, so far as applicable to this case, provides that every person who, within the limits of the United States, attempts to fit out and arm, or is knowingly concerned in the furnishing, fitting out, and arming, of any vessel, with intent that such vessel shall be employed in the service of any foreign people to cruise or commit hostilities against the citizens of any foreign state with which the United States are at peace, shall be punished as provided by law; and that all the materials, arms, and ammunition which may have been procured for the equipment of such a vessel shall be forfeited.

The case of the prosecution is claimed to be that the steam-tug Mary N. Hogan, lying in the port of New York in July last, was made ready to be sent out to the waters of Hayti to cruise and commit hostilities in those waters, as a gun-boat, in behalf of the insurrectionists of that island, against the republic of Hayti; and that the two cannons, the cases of fire-arms and ammunition, and the kegs of gunpowder, which were seized on board of the Irwin under process of this court, were intended to be put upon her as her armament and outfit, and to have been taken on board of the Hogan from the Irwin at some point on the Atlantic seaboard near Hog island or Hampton roads; and that they were shipped at New York on the Irwin for that purpose; and that Capt. Dodd, the master of the Irwin, knew of such character and destination of this part of his cargo, and therein willingly and knowingly assisted in the attempt to arm, fit out, and furnish the Hogan, although it is conceded that he was ignorant of the particular steamer which he was thus to aid in furnishing, and of her name. The prosecution have produced evidence tending to prove, among others, the following facts, namely:

On the fifteenth of March, 1883, an expedition left Philadelphia on the steamer Tropic, with arms and ammunition, nominally bound for Kingston, Jamaica. The steamer, instead of going to Kingston, went to the island of Inagua, lying between Hayti and Jamaica. There she took on board Gen. Bazelais, with some 75 armed men, and afterwards took on about the same number of men from an English steamer at sea. She then proceeded to the port of Marigoane, Hayti, with all men, arms, and ammunition, and landed them about daybreak, when, under the command of Gen. Bazelais, they successfully inaugurated the rebellion against the government of Hayti, which continued to maintain itself through the year 1883. This Gen. Bazelais had, before leaving Jamaica, supplied one Simon Soutar, a merchant of Kingston, with money for purchasing arms and ammunition. Those which went out on the Tropic were purchased in New York by one Henry A. Kearney, on Soutar's order, from Joseph W. Frazer, a dealer in such goods, and were shipped by Frazer to Philadelphia, and shipped by Kearney at Philadelphia on the Tropic. The master and mate of the Tropic were afterwards tried in Philadelphia, and convicted and sent to the penitentiary for the violation of section 5286 of the Revised Statutes of the United States, of which they were found guilty. See *U. S. v. Rand*, 17 FED. REP. 142. Early in the summer of 1883 Soutar appeared in New York, and was in conference with Kearney, Frazer, one George W. Brown, and one Wellesley Bourke. Kearney had been vice consul of the United States, during some years before 1883, in Hayti. Afterwards he had been consul of Hayti in New York. Brown had conducted business in Jamaica, and knew Soutar, and had known Kearney for

10 years. Brown's business in New York in July last was that of an insurance agent, but he took part in the affair about to be mentioned as an outside job. Bourke was the agent of the Haytian insurrectionists in New York. A sequel of the intercourse of these men was that a steam-tug called the Mary N. Hogan, capable of carrying some 75 tons or more in weight of freight, not in large bulk, was purchased, with money supplied by Soutar, through the agency of Kearney, at a cost, all told, of \$11,600. There were also purchased by Kearney, with funds supplied by Soutar, the guns, arms, and ammunition which are the subjects of the present libels, at a cost of \$7,000. They were bought of Joseph W. Frazer, the same person who had sold the like articles which had gone to Marigoane on board the Tropic. Kearney, wishing to keep in the background, got Brown to engage a vessel by which these military goods might be sent out of New York billed for some home port; and Brown, through a regular ship-broker in New York, engaged the schooner E. G. Irwin—Silas H. Dodd, master—for that purpose. It was concerted between Kearney, Brown, and Dodd that after these military goods were put on board the Irwin, and after the schooner should have proceeded down the coast for some distance, say to Hog island or Hampton roads, she should be hailed, by means of concerted signals, by a steamer bound from New York for Hayti, and that the munitions of war on board of her should be transferred to the steamer. Dodd, however, was not informed what steamer was to relieve him of his military cargo, or of its name.

The Hogan, before being purchased by Kearney for Soutar, was examined by Edward A. Bushnell, a friend of Kearney, who had sometime before been chief engineer of the Haytian navy. John H. McCarthy, an adventurous and somewhat dissipated character, was employed as master, and the bill of sale of the Hogan, when purchased, was made in the name of McCarthy as owner; but he executed a mortgage for the amount of the purchase money, on the vessel, in favor of a Mr. Abbott, a merchant of Jamaica, and friend of Soutar. Patrick Cox was employed as chief engineer, and Finton Costigan as gunner. Several weeks were consumed in making repairs and preparations, and on the twentieth of July the Hogan, with a crew and a supply of coal, but without other freight, was ready to leave for her destination, when she was seized and libeled by the United States for an attempted violation of the neutrality laws, under section 5283 of the Revised Statutes. Prevented in this way, as the Hogan was, from proceeding on her intended voyage, there was no steamer to overhaul the schooner Irwin in her sail down the coast, and to relieve her of the arms and military munitions which constituted part of her cargo. She had taken on pig-iron and cement at New York for Richmond at the time when she had been engaged to take the military munitions; and these latter had been consigned, as a matter of form, to "order" in Richmond. The Irwin, therefore, looked out in vain for a steamer during her voyage down the coast; and after standing off Hog island for a couple of days, and lying at anchor in Hampton roads for a week, she came, with all her cargo, on to Richmond. Here she discharged her legitimate cargo, but was herself arrested and libeled by the government at the same time that the contraband portion of her cargo was seized.

In opposition to this train of testimony the defense deny that the Hogan was intended for warlike cruising in the waters of Hayti against that republic; insist that she was purchased for the purpose of being sent out and used in the port of Antonio, Jamaica, to raise a steamer, the Calvert, which had been sunk in the harbor there in a collision, and which had been purchased at auction, as she lay, by Soutar; and, not controverting many of the facts brought out in evidence by the prose-

cution, yet insist that the purchase of the arms and munitions seized on the Irwin was for the purpose of their being shipped, as a commercial venture, to Jamaica, on board the Hogan. The case is the same in its principles, and substantially the same in its evidence, with that of *The Mary N. Hogan*, which was tried in the district court of the Southern district of New York in November last, and in which there was a decree of condemnation and sale against the Hogan. The case is reported in 18 FED. REP. 529. The evidence was so fully discussed in the opinion of Judge Brown, delivered in that case, that I am relieved of the necessity of a minute detail of so much of it as goes to show the purpose and destination for which the steam-tug Hogan was intended. I probably have a right to regard that part of the case before me as *res judicata*; but feeling disposed, in the cases at bar, to consider the question of the character and destination of the Hogan as an original one, I have gone anxiously and thoroughly over all the voluminous evidence before me on that subject, and find myself constrained to adopt precisely the conclusions that were reached by Judge Brown, and are set forth in his opinion in that case.

Counsel for defense insist that there is no direct proof of an illegal purpose in fitting out the Hogan. That would be an insufficient objection if the circumstances were such as to leave no other reasonable hypothesis than that of her guilt, and if they pointed conclusively to that fact. But there is very much direct evidence. The chief engineer, Patrick Cox, and the gunner, Finton Costigan, of the Hogan, testify positively and circumstantially that McCarthy, the master of the Hogan, told them that they were to fight the vessel against the Haytian government; that she was going there for that purpose; that a bounty of \$5,000 would be divided, on reaching there, between her four principal officers; and that they hired themselves for that express enterprise. Declarations of McCarthy to the same effect, made to others when off his guard from liquor, were also proved. The pretense that the Hogan was to be used in the port of Antonio to raise the Calvert is insufficient to overcome the circumstantial and positive evidence sustaining the hypothesis of the prosecution, that she was intended to be used as a gun-boat in the waters of Hayti. The Calvert cost, as she lay, \$500 or £500,—the evidence seeming to be confused as to the two sums,—but I suppose the true price was £500. In order to save this £500, it is pretended that Soutar went nearly a thousand miles to New York, and paid \$11,600 for a tug-boat to be used for the purpose of raising the Calvert; putting on that tug-boat when about to sail no sort of apparatus such as salvors employ in lifting ships from the bottom of the sea. If the raising of the Calvert had been Soutar's real object, the services of experienced wreckers, provided with wrecking schooners, and wrecking pumps, anchors, cables, falls, and other expensive material such as are kept on hand only by professional wreckers, would have been sought in Havana,

Savannah, Charleston, Norfolk, or New York, and employed, on a contingent compensation, to effect the raising. It will not do in an admiralty court, accustomed to the trial of wrecking and salvage cases, to insist that a sensible man would content himself with purchasing a single steam-tug (an instrument of most subordinate utility in such an enterprise) in the expectation of raising with it an ocean steam-ship from the bottom of a harbor. Sunken vessels are not raised by steam-tugs. All the apparatus of professional wreckers is required for the purpose. A court will generally make charitable presumptions in favor of accused persons, where there is a question of forfeiture, but I find myself unable to accept the presumption that a steam-tug was bought in New York at a cost of \$12,000 for the purpose of raising a steam-ship from the bottom of the harbor of Antonio, Jamaica, which cost only £500, and was to be sent out for that purpose without a particle of wrecking apparatus on board, except some sort of windlass, but loaded down with military guns and ammunition. The Hogan bore less than two feet of free-board. A cargo of 20 or 30 tons, which was the weight of these munitions, would have put down her deck to within 12 inches of the water. Even on a smooth July sea, a voyage to the West Indies would have been a desperate commercial venture, and yet we hear nothing of insurance either upon vessel or cargo. Commercially, the enterprise would have been reckless. As a military venture, it was no more desperate than military raids usually are, especially upon the high seas. In short, it is impossible to read the evidence in these cases, in a judicial spirit, without being impressed with the irresistible conviction that the Hogan was bought and prepared in New York for the purpose of being sent directly to Hayti, with cannons, gun-carriages, small-arms, ammunition, and powder, which were to be taken on board at some point on the coast from some other vessel, and with this armament was intended to be used as a gun-boat in the waters of Hayti, in aid of the insurrectionists of that island, against that republic. Technically, this question comes to me as *res adjudicata* under the decree of the district court of the Southern district of New York, rendered on the twenty-third of November, 1883. Actually, it is proved to me by evidence which leaves room for no other conclusion.

I come, therefore, to the additional questions on which the cases at bar depend, namely: *First*, whether or not the military material which is the subject of these libels was intended to be sent out as merchandise, in a commercial venture, and destined to some point in the West Indies for sale as merchandise. If not, whether this military material was intended to be sent directly to Hayti, as the military outfit of the gun-boat Hogan, for use in the hostile and insurrectionary enterprise for which that vessel was destined. No principle of the law is more clear or well settled than that merchandise, including munitions of war, may be sold to belligerents without violating the laws of neutrality. If those munitions had been sent on a vessel of commerce, which

itself was not to engage in hostile operations, for the purpose of being landed and sold in a neutral port, even to a belligerent, they could not be confiscated. The general test of contraband as to neutrals is whether the contraband goods are intended for sale in a neutral market, or whether the direct and intended object is to supply the enemy with them. If the latter is the immediate object, and the property is destined to go directly to the belligerent for his immediate use, the case is within the inhibitions of the neutrality Code, and the other belligerent may confiscate. In the cases at bar the question is in different form, while the principle is identical. It concerns the furnishing, fitting out, and arming, in a neutral jurisdiction, of a vessel about to proceed directly to the theater of hostilities, and to engage in military operations. The Hogan, as already concluded, was intended for such a purpose, and on receiving these arms was intended to be directly bound to the waters of Hayti. These military goods were not to be taken to a neutral port to be sold in open market; they were not for sale at all. They were intended to be used on that steam-tug in flagrant hostilities. When they left Frazer's warehouse they ceased to be articles of commerce. They were no longer for sale. They were to be put in a covert and deceptive manner upon a vessel at sea, and to constitute her outfit for engaging in hostilities against a state with which the United States are at peace. It is useless to cite legal authorities on this subject. The law is in the form of an express statute. Its principles are plain and elementary, and need only to be stated to be comprehended and approved. It is not denied by the defense that these munitions were intended to be put upon the Hogan when she should have got fairly out at sea. Admitting that fact, they deny that the Hogan was destined to Mari-goane, and insist that she was going on a wrecking-expedition to raise a steam-ship from the bottom of the harbor of Antonio. That pretense was rejected by the court in New York, and is as emphatically rejected by this court. The Hogan was to go directly to engage in hostilities in the waters of Hayti; and these munitions were to be put upon her as her military furniture and outfit.

The only remaining question, therefore, is, did those who purchased the goods and shipped them on the Irwin, and did the Irwin's master, Capt. Dodd, know of this destination of the goods? Did they attempt to fit out the Hogan with these goods? Were they "knowingly concerned in furnishing, fitting out, and arming" the Hogan, or attempting to do so, with these goods? "Attempt to fit out and arm," "knowingly concerned in the furnishing, fitting out, and arming of any vessel with intent that such vessel shall be employed to cruise or commit hostilities against a state," etc., are the searching and comprehensive terms of the law applying to these libels. It were a waste of words, in view of the cumulative evidence in these cases, to state the proofs of the complicity of Soutar and Kearney in the purchase and preparation of the Hogan for her expedition; and of Soutar,

Kearney, and Brown in the purchase, shipment on the Irwin, and intended shipment on the Hogan at sea, of the munitions mentioned in these libels. I shall perform no such act of supererogation. They made the "attempt;" they were "knowingly concerned" in it. The only question is as to Capt. Dodd's complicity; though that is not an essential part of the case. These munitions were sent from Frazer's warehouse in New York to the Irwin, which had come up to an East-river wharf for the purpose of receiving them. Most of them were put on at that wharf; but the schooner fearing to lie long at that point, because of the powder on board of her, went off without receiving the remainder of the goods, and set sail down the coast. On going into the Delaware breakwater to Lewes, where the captain took on his family, the munitions which had been left were found to have been forwarded there by express, and were there taken on. There were two cannons. Some of the cases contained cannon-balls; others, ball cartridges; and others, fire-arms. Their weight became the subject of instant remark by the crew, who at once divined that, though shipped as "hardware," they were really arms, ammunition, and missiles of war. Capt. Dodd could not have been ignorant of their nature. The Irwin sailed on the 18th, and on that afternoon Capt. Dodd informed his able seaman, Thomas Smith, that these munitions were to go to Hayti, to be used there by the rebels against their government. He also gave the same information to his mate, Moses Monks, and directed him and Smith to be on the lookout for a steamer which was to come along bound to Hayti, and to take these munitions off the schooner. These men testified as to the red and white flag with which Brown had provided Dodd, and that it was kept flying at the flag-staff. Dodd told them that the expected steamer would recognize them by this flag, and was to hail them by dipping her own flag three times. These men testify to their own knowledge of the hostile destination of these munitions for the Haytian rebels, and that they derived it from Capt. Dodd, and that the steamer which was to hail them was to take these munitions directly to the waters of Hayti. This evidence is direct, positive, emphatic. It is not a matter of mere inference that Capt. Dodd was knowingly concerned in an attempt to furnish, arm, and fit out a steamer, which was expected to come along-side of him and take these munitions on board as her armament for committing hostilities against the government of Hayti. That Capt. Dodd did not know what particular steamer this was to be is immaterial. If a black steamer, sailing under a black flag, without name or home port, had come-along side of him at night, and, on complying with concerted signals, had taken these munitions on board and sailed off, without his being able to learn her name or identity, and she was proved to be destined, with Capt. Dodd's knowledge, on such an expedition as that for which the Hogan was intended, Capt. Dodd's guilty participation in this enterprise would have been no greater than it was in respect to the steamer Hogan, which was

equally unknown to him. If the claimant, Soutar, and his agent, Kearney, were engaged in the attempt, by shipping them down the coast on the Irwin, to put these munitions on the Hogan to be used on her in committing hostilities in Hayti, I do not know that it is necessary to establish a guilty knowledge of their scheme in Capt. Dodd. He might be innocent, though the goods were guilty; but, whether necessary to the condemnation of the goods or not, I hold that the guilty knowledge and participation in the plot is clearly established against Capt. Dodd by the evidence. It is useless for me to reiterate what has so often been ruled in principle, that the placing of these goods directly on the Hogan, by those knowingly concerned in fitting out that vessel, was not necessary to justify the condemnation of the goods. If they had passed through the hands of many draymen, and other intermediaries, and over many decks, before reaching the vessel whose outfit and armament they were intended to be, that ultimate destination made them guilty goods, and subjected them to condemnation.

I will sign a decree of condemnation and sale in both of these cases.

THE CITY OF NEW BEDFORD.

(District Court, S. D. New York. April 2, 1884.)

1. SEAMEN'S WAGES NOT ATTACHABLE—JURISDICTION—COMITY OF COURTS—LOCAL LAW—FOREIGN JUDGMENTS—U. S. CONST. ART. 4, § 1.

Whether seamen's wages are subject to garnishee process in suits at common law in state courts has not been settled by the supreme court, and in this district they have been held not liable to attachment. The contrary view seems to be held in the First circuit. *Held, therefore*, that the latter should be regarded as fixing the maritime law for the time being within that circuit, and that the state court in attaching such wages should be held by comity to be acting within its jurisdiction under the local maritime law as there recognized. *Held, therefore*, that a compulsory payment under a judgment on garnishee process in the state court of Massachusetts made by the defendant prior to his answer in this cause, should be deemed valid by comity, as well as under the United States constitution, and allowed the defendant in this suit as a credit against the libellant's claim.

2. SAME—OFFSET.

A court of admiralty acts upon equitable principles, and upon that ground also should allow as an offset the compulsory payment of a just debt of which the libellant has had the benefit, where no special hardship to the libellant would result.

In Admiralty. Action for Seaman's Wages.

The libellant was a seaman on the propeller, the City of New Bedford, running between Fall River, Massachusetts, and New York. The parties agree that the sum of \$32.67 was due to the libellant for wages for

his services up to the evening of November 5, 1883, when he was discharged. The propeller was owned by the Old Colony Fall River Steamboat Company, a Massachusetts corporation. Payments were ordinarily made on the eighth or ninth of each month, on the arrival of the "pay-car." On November 9th, the pay-car having arrived, the libellant called on Mr. Ackley, the agent of the claimants, and asked for his pay, and was told to call again shortly, when the agent would be ready to pay him. An hour or two afterwards he called again for his pay, and was informed that his wages had been attached by a trustee or garnishee process, served upon Mr. Ackley, at the suit of one Blake. This process had been issued in accordance with the usual course of procedure in the courts of Massachusetts, and was returnable on November 25th. The process did not state the amount of the debt claimed by Blake against the libellant, but attached as security for the payment of whatever might be recovered, not exceeding \$300, any moneys, effects, and credits of the libellant in the hands of the company. The libellant thereupon went to Blake for the purpose of procuring a settlement with him, but did not effect any settlement. The libellant and Blake are both residents of Fall River. The libellant was not served personally with the process. He subsequently came to this city and filed his libel in this cause for the recovery of his full wages; and caused the propeller to be seized by the marshal on November 12th. By diligent efforts the propeller was released, under bonds, in time to leave this city upon her usual trip the same day. On the twenty-fifth of November the claimants here, by the answer interposed in the suit against the libellant in Massachusetts, duly set up the facts in regard to the wages due to the libellant; that they were for his services, as a seaman upon the propeller, in running from Fall River to New York; that the wages had been demanded, and that they were exempt from attachment. The court, however, overruled the claim of exemption set up in the answer, and gave judgment for \$8.25, the amount of Blake's claim, which the claimants here subsequently paid to the sheriff on November 30, 1883, upon execution issued upon that judgment, together with 70 cents additional costs.

The claimants in their answer in this cause set up the above facts, and paid into court the balance of the wages due to the libellant at the time of filing their answer. Upon the trial, the above facts were admitted. The only questions submitted to this court are—*First*, whether the sum of \$8.95 shall be allowed as a credit to the claimants in this action; *second*, the question of costs.

Hyland & Zabriskie, for libellant.

Shipman, Barlow, Larocque & Choate, for claimants.

BROWN, J. In the case of *McCarty v. The City of New Bedford*, 4 FED. REP. 818, it was held in this court, (BENEDICT, J.,) that an attachment suit pending in Massachusetts on appeal after judgment, wherein the seaman's wages had been attached, was not a valid plea

to the libel in this court for the same wages, but that the libelant should have judgment for the whole wages due him. That decision is sustained by such weighty and varied considerations as seem to me to justify the conclusion of the court in that case, that seamen's wages under the maritime law ought to be held exempt from attachment on trustee process in suits at common law. That case differs from this in the fact only that in the present case the defendant has been compelled to pay, and has paid, the amount adjudicated in the attachment suit; while in the other case the amount, though adjudicated, had not been paid, the cause being then pending on appeal. In the decision on the appeal in that case, (*Eddy v. O'Hara*, 132 Mass. 56,) the supreme court of Massachusetts in an elaborate opinion, delivered by GRAY, C. J., who examined the subject with his usual ability and research, arrived at the opposite conclusion, and held the attachment proceedings valid. In rendering judgment, however, that court relieved the steam-ship company from the effect of the judgment; it appearing that, in the mean time, under the judgment of this court as a court of competent jurisdiction over the subject-matter, the trustee had been compelled to pay the whole amount of the seaman's wages. This was done upon the ground that an innocent stakeholder should not be compelled to pay twice under the diverse adjudications of different courts of competent jurisdiction. The validity of such attachment proceedings against the wages of seamen engaged in the coast-wise trade was again directly affirmed in the case of *White v. Dunn*, 134 Mass. 271.

In the case of *Ross v. Bourne*, 14 FED. REP. 858, the United States district court of Massachusetts, (NELSON J.,) held, as was held by BENEDICT J., in the case of *McCarty v. The City of New Bedford*, *supra*, that the pendency of a suit at law against a seaman, wherein his wages had been attached by trustee process, but not yet paid, should not bar the seaman's recovery of his whole wages in his suit in admiralty. This was based partly on the grounds stated by BENEDICT, J., and partly on the ground that under the decision in *Eddy v. O'Hara*, the respondent could suffer no detriment in the trustee suit from any decree first rendered against him in admiralty for the full amount. The last ground could apply only to those cases in which payment had not been previously made by the garnishee. In his opinion in that case, NELSON, J., says:

"That such a debt (for seaman's wages) is not exempt from attachment at common law seems to be the law of Massachusetts, though the point has never been directly adjudged. At least, it would seem to be clear that a judgment of a court of competent jurisdiction charging the trustee, and a payment by him under the judgment, would be a defense, *pro tanto*, in a court of admiralty, as in any other court, to a suit by a seaman for his wages, whether against the ship and freight, or the owner and master *in personam*."

Since this decision the case of *White v. Dunn*, *supra*, has been decided in the supreme court of Massachusetts, in which the liability

for such wages in an action at common law has been directly adjudicated. On appeal to the circuit court the case of *Ross v. Bourne* was affirmed by LOWELL, J. 17 FED. REP. 703. In his brief opinion, LOWELL, J., states that he "does not dissent" from the learned opinion of Mr. Justice GRAY in the case of *Eddy v. O'Hara*, *supra*, but he held that attachment proceedings in another jurisdiction, though valid, should be respected out of comity only, (see *Lynch v. Hartford Ins. Co.* 17 FED. REP. 627;) and that comity does not require summary actions in favor of seamen in admiralty to be hung up to await the dilatory proceedings in an attachment suit at common law.

On the part of the libelant, it is urged that this court, in adhering to the view previously expressed in the case of *McCarty v. The City of New Bedford*, must hold that the attachment proceeding in Massachusetts was utterly void; that as there was no service of process upon the libelant, the proceeding was, essentially, a proceeding *in rem* against the fund attached; and as, according to the view of this court, the fund was not subject to attachment, the whole proceeding, from the time the trustee's answer was admitted, showing the facts, was *coram non judice* and void. This would doubtless be the legal result of the view of the proceeding entertained in this court, if the attachment proceedings, or the fund attached, had been within the territorial jurisdiction of this court, and no question of comity were involved. If, for instance, property which was by law exempt, such as the last cow of the defendant, or wages due, being less than \$10, which by the Massachusetts statute are expressly exempt, were attached, and the facts showing such exemption were made to appear in the trustee's answer, and admitted, any judgment which the court might thereafter give in the absence of personal service of process on the principal defendant, and any sale or payment under such a judgment, would be held utterly void, in a court of law, for want of jurisdiction of the subject-matter. Whart. Conf. Laws, §§ 664, 717; *Thompson v. Whitman*, 18 Wall. 457; *Pennoyer v. Neff*, 95 U. S. 714; *St. Clair v. Cox*, 106 U. S. 350; S. C. 1 Sup. Ct. Rep. 354; *Daily v. Doe*, 3 FED. REP. 903; *The B. F. Woolsey*, Id. 457; 4 FED. REP. 552. But, even in that case, it does not follow that a court of admiralty, though sitting within the same territorial jurisdiction with the court rendering such a judgment, would necessarily disregard what had been done under it, and compel a defendant to pay a second time, without reference to any of the other circumstances of the case. A court of admiralty acts upon equitable principles. A libelant cannot demand of the court an application of even its own general rules beyond what, in the particular case, he is entitled to *ex æquo et bono*. Here there is no fault or laches in the respondents. They stated all the facts properly and promptly in their answer in the attachment suit. The libelant had full actual notice of the suit on the day when it was instituted, though not legally served with process. The debt was for necessities supplied to the libelant at his

home in Massachusetts, and its justice is not disputed. Instead of assuming the defense of that suit, if he had any defense, he left the trustee to defend as he could, came within this jurisdiction, and attached the defendants' vessel; and after they have been compelled to pay, under the execution in the attachment suit, about one-quarter of the wages due, he asks this court to require the defendants to pay that part over again.

This court ought not to disregard accomplished facts or the equities which grow out of them. It may disregard assignments of wages by seamen, or even judgments, so long as they are executory merely. But here the payment by the defendants has been already made, and made compulsorily under a power which they could not resist. The libelant's debt to Blake has been thereby extinguished. The debt was a just one. No circumstances appear or are suggested showing that it was not one which the libelant was bound in conscience to pay, and one which he would presumably have paid out of these wages, if received by him. He has had the full benefit of the defendants' payment of it. These are all accomplished facts; and in the absence of any proved circumstances of hardship to the libelant, there is manifestly no equity in his claim to be paid, in substance, a second time; and such a decree would inflict a manifest wrong upon the defendants. From this point of view the court might determine quite otherwise if there were any fraud, injustice, or oppression, either in the inception or in the payment of the debt to Blake; or, if it absorbed the whole of the libelant's wages, or so much of it as would distress him to do without. But there is no suggestion of any such circumstances. Without reference, therefore, to the result, in a strictly legal point of view, of the assumed want of jurisdiction in the Massachusetts court to attach these wages, I think a court of admiralty, acting on equitable principles, could not award the libelant, under such circumstances, *ex æquo et bono*, the wages already paid compulsorily for his use. The defendant has manifestly the better equity. Per KENT, C. J., in *Embree v. Hanna*, 5 Johns. 101-103.

Another consideration leads to the same result; namely, the law of the place of the attachment proceedings, including both the residence of the parties and the *situs* of the debt attached. In both the United States district and circuit courts of Massachusetts, the tribunals there specially charged with the determination of questions of maritime law, it must be considered, since the expression of opinion by LOWELL, J., in the case of *Ross v. Bourne*, *supra*, that, under the maritime law as received and applied in Massachusetts, the wages of seamen may be there attached; in other words, that the state court had jurisdiction of the subject-matter, and was therefore a competent court to compel the payment made by the respondents in the attachment suit. The question before us, it is true, was not presented for express adjudication, but it was involved collaterally; and the expression of opinion, in regard to it, in both the United States courts in Massachu-

setts, is sufficient to entitle the respondents here to the benefit of the views of the United States courts there, as a recognition of the right to attach the wages of seamen in the coastwise trade in that district, according to the maritime law as there recognized. The maritime law of the United States ought, indeed, to be uniform throughout the country; but, until the supreme court decide between different views in the United States courts in the different districts, this court ought, upon the principles of comity, to respect the views of maritime law held and applied in other districts, though opposite to its own, so far, at least, as regards acts done and payments compulsorily made within those districts in conformity with the maritime law as there recognized by the United States courts. Story, *Conf. Laws*, § 331. Even in cases of a difference of view with the state courts, the supreme court, in the recent case of *Burgess v. Seligman*, 107 U. S. 20, 34; S. C. 2 Sup. Ct. Rep. 10, observes:

"But even in such cases, for the sake of harmony and to avoid confusion, the federal courts will lean towards an agreement of views with the state courts, if the question seems to them balanced with doubt. Acting on these principles, founded as they are on comity and good sense, the courts of the United States, without sacrificing their own dignity as independent tribunals, endeavor to avoid, and in most cases do avoid, any unseemly conflict with the well-considered decisions of the state courts."

These observations are certainly quite as applicable to differences between the United States courts themselves in different districts as to the local maritime law, and as to the legality of acts done in conformity with such local law. See *Roderigas v. East River Sav. Inst.* 63 N. Y. 460; *Lavin v. Emigrant Industrial, etc.*, 1 Fed. Rep. 641.

The constitution of the United States, moreover, requires that "full faith and credit be given in each state to the judicial proceedings of every other state." Article 4, § 1. In the case of *Mills v. Duryee*, 7 Cranch, 481, 484, STORY, J., in delivering the opinion of the court, says: "It remains only, then, to inquire in every case what is the effect of a judgment in the state where it is rendered?" and this test is reaffirmed in the case of *Green v. Van Buskirk*, 7 Wall. 139, 148. See *Pennoyer v. Neff*, *supra*; *Pritchard v. Norton*, 106 U. S. 124; S. C. 1 Sup. Ct. Rep. 102. Since the decision of *Ross v. Bourne*, *supra*, which was prior to the attachment proceedings and the payment by the respondents in this case, there can be no question, I think, that under the maritime law, as recognized and enforced in United States courts in the state of Massachusetts, the judgment record in the attachment suit put in evidence in this case, showing the attachment and the payment under it, would be held valid and binding upon the libellant in Massachusetts, because in conformity with the maritime law as there recognized; and being valid and effectual there, they must be held to be valid and effectual in any other jurisdiction where they may be brought in question, until the supreme court shall otherwise adjudge, as respects the validity of such attachments.

It follows, therefore, that the payment made must be allowed, and that the tender made at the time the answer was filed was sufficient. The libellant is entitled to the sum deposited in court, with costs to that time only, and the defendants should have costs thereafter.

THE ERIE BELLE.

(District Court, E. D. Michigan. February 19, 1883.)

ADMIRALTY PRACTICE—JURY TRIAL—REV. ST. § 566.

In admiralty causes of contract or tort, arising upon the lakes, if *either* vessel concerned in such action be of 20 tons burden and upwards, enrolled and licensed for the coasting trade, and employed in navigation between different states, either party to such action may demand a trial by jury, under Rev. St. § 566. But if *both* vessels be foreign, or engaged in trade between places in the same state, or the action be other than one of contract or tort, it seems that neither party is entitled to a jury trial.

In Admiralty: On motion to strike from claimants' answer their demand for trial by jury:

This was a libel for damages received by the schooner *Lizzie Law*, through the negligence of the tug *Erie Belle*, in towing her from Chicago to Buffalo. The answer alleged that the schooner was a vessel of 20 tons burden and upwards, enrolled and licensed for the coasting trade, and at the time employed in the business of commerce and navigation between places in different states and territories upon the lakes and navigable waters connecting said lakes. It further appeared that the *Erie Belle* was a foreign vessel, and of course not within the above description.

F. H. Canfield, for libellant.

H. C. Wisner, for claimants.

BROWN, J. The Revised Statutes (section 566) enact that in causes of admiralty and maritime jurisdiction relating to any matter of contract or tort arising upon or concerning any vessel of 20 tons burden or upwards, enrolled and licensed for the coasting trade, and at the time employed in the business of commerce and navigation between places in different states and territories upon the lakes and navigable waters connecting the lakes, the trial of issues of fact shall be by jury when either party requires it. The history of this anomaly in our admiralty jurisprudence is found in the case of *Gillet v. Pierce*, 1 Brown, Adm. 553. In the case under consideration the vessel receiving the injury is within the description of the statute, but the offending vessel is not. The question is, upon which vessel can the cause or action be said to "arise or concern,"—the vessel receiving or the one doing the injury? So far as I know, no attempt has been made to answer this question, except by Judge CONKLING, in a note in his

work upon Admiralty Jurisdiction, vol. 2, p. 534, in which he says "that this definition is supposed, unquestionably, to embrace, in cases of collision, the injured vessel, and in cases of salvage, the salvaged vessel; but it seems to be not an unreasonable interpretation to consider it as embracing also the colliding, and the salving vessel." I am unable myself to see why, if two vessels are interested in a contract, or involved in a tort, the cause or action does not *concern* one of them as much as the other. It is no more important to the injured vessel that she should recover her damages than to the other vessel that she should not be compelled to pay them. In such cases *either* party is entitled, by the express terms of the statute, to demand a trial by jury. I doubt, however, whether the statute would apply at all to cases of pure salvage, as they are neither matters of contract nor tort, or to cases wherein both vessels are foreign, or engaged in foreign trade, or in trade between ports in the same state.

The motion to strike the demand for a jury from the answer must be denied.

FIRST NAT. BANK OF JEFFERSONVILLE, INDIANA, v. OHIO FALLS CAR & LOCOMOTIVE WORKS.

*(Circuit Court, D. Indiana. January 9, 1884.)***ASSIGNEE OF PLEDGED SECURITIES—FORECLOSURE—ACCOUNTABLE TO ASSIGNOR.**

Where the pledgee of mortgage bonds assigns them as collateral security for a debt of his own, and the assignee, foreclosing against the original pledgee without joining the assignor as a party, buys in the bonds himself, he is bound to account to the assignor for the bonds or their value, and not merely for the amount paid by him for them at the foreclosure sale.

The Ohio Falls Car & Locomotive Company is a corporation duly organized under the laws of the state of Indiana. It stopped payment in the month of October, 1873. At that time it owned certain real estate, buildings, machinery, etc., in Jeffersonville, Indiana, which were subject to a mortgage of \$121,000.¹ There had been executed to it by the Chesapeake & Ohio Railroad Company divers notes, aggregating the sum of \$262,767.11, secured by the pledge of 329 bonds, of \$1,000 each, issued by the said Chesapeake & Ohio Railroad Company, and secured by a mortgage upon its property. Of these notes the Ohio Falls Car & Locomotive Company had discounted with the First National Bank of Jeffersonville, Indiana, \$62,043.80, all of which it had indorsed. The said Ohio Falls Car & Locomotive Company had also borrowed from the Western Financial Corporation, the Bank of Kentucky, and J. W. Sprague, trustee, divers sums of money, aggregating the sum of \$81,713.48, which it had secured by the pledge of the notes of the Chesapeake & Ohio Railroad Company to the amount of \$89,636.42. The balance of the notes of the said Chesapeake & Ohio Railroad Company, amounting to \$110,086.89, remained in the possession of the Ohio Falls Car & Locomotive Company. Of the bonds of the Chesapeake & Ohio Railroad Company, which had been pledged to secure their notes, a due proportion stood pledged for the notes so discounted by the First National Bank of Jeffersonville, and pledged to the Western Financial Corporation, the Bank of Kentucky, and J. W. Sprague, trustee. So that the First National Bank of Jeffersonville held as a pledge to secure the notes discounted by it 96 of said bonds, the Western Financial Corporation held 56, the Bank of Kentucky 14, Sprague, trustee, 27, and the company the remaining 139.

On the thirty-first day of October, 1873, the Ohio Falls Car & Locomotive Company made an arrangement with its creditors. This settlement provided, in its first and second sections, for certain debts which have since been fully paid, and need not be further noticed. By the third section it was provided as follows:

"That all parties who have discounted paper of the Chesapeake & Ohio Railroad Company, amounting in the aggregate to \$62,043.80, and indorsed by the Ohio Falls Car & Locomotive Company, shall retain possession of said notes

of the Chesapeake & Ohio Railroad Company till the same are paid in full by the maker, or the obligations of the Ohio Falls Car & Locomotive Company as indorser, as provided for in section sixth, are complied with."

By section 4 it was provided as follows:

"That parties holding notes of the Ohio Falls Car & Locomotive Company to the amount of \$81,713.48, secured by the notes of the Chesapeake & Ohio Railroad Company to the amount of \$89,636.42, as collateral, shall retain their present collaterals till the notes of the Ohio Falls Car & Locomotive Company are paid in full as provided for in section six."

Section 5 relates to certain debts due for labor and personal service, which it was provided should be paid in full, and which have since been satisfied.

By section 6 it was provided:

"That all other creditors, including those embraced in the third and fourth sections, whether on book account or by note, or otherwise, amounting to \$440,689.22, shall receive, in settlement of their claims now matured, or yet to mature, seven (7) equal notes of the Ohio Falls Car & Locomotive Company, payable respectively in one year, one year and a half, two years, two years and a half, three years, three years and a half, and four years from the fifteenth day of November, 1873, and bearing interest at the rate of 10 per cent. per annum, and notes made for the same falling due each six months, and to be for the interest on the full amount of indebtedness at these specified times. On all notes past due, interest shall be allowed to November 15th, and all notes not matured shall be discounted as of November 15th; and all such notes shall be surrendered on the delivery of the new notes as provided for in this section."

By section 7 it was provided:

"Messrs. Washington C. De Pauw, of New Albany, Ind., John B. Smith, of Louisville, Ky., and J. H. McCampbell, of Jeffersonville, Ind., shall be appointed trustees under this agreement of extension, with power to fill any vacancies."

By section 8 it was provided:

"The Ohio Falls Car & Locomotive Company shall make to said trustees a good and valid mortgage of all the real estate, buildings, and machinery now owned by them, being recently erected and purchased at a cost of \$483,369.37, (subject to an existing mortgage on a portion of the same securing bonds now outstanding to the amount of \$121,000,) to secure to all the present creditors of the Ohio Falls Car & Locomotive Company payment of their claims according to the various provisions of this agreement, and when all said claims are paid in full then said trustees shall release said mortgage."

By section 9 it was provided as follows:

"The Ohio Falls Car & Locomotive Company shall deliver and assign to said trustees all the notes of the Chesapeake & Ohio Railroad Company now in their possession, amounting in the aggregate to \$110,086.89, and said trustees shall have full authority to renew or dispose of the same, or make such compromise in settlement of the same with the Chesapeake & Ohio Railroad Company as may in their judgment be for the best interests of the creditors of the Ohio Falls Car & Locomotive Company; and whenever any payment or payments of interest or principal made on said notes to said trustees will in their opinion justify a distribution of the same, then they are authorized to make a *pro rata* distribution of the same on the unpaid notes of the Ohio Falls Car & Locomotive Company, given under the provisions of this agree-

ment and first maturing, each series of notes to be paid, principal and interest, in the order of its maturity."

By section 12 it was provided as follows:

"The seven (7) per cent. bonds of the Chesapeake & Ohio Railroad Company to the amount of \$329,000, held in trust by Mr. T. L. Barrett, of Louisville, Ky., are pledged *pro rata* for the notes given by the Chesapeake & Ohio Railway Company to the Ohio Falls Car & Locomotive Company, to the amount of \$262,767.11, (being at the rate of eighty cents on the dollar,) and none of said bonds shall be surrendered to said Chesapeake & Ohio Railroad Company, or otherwise disposed of, except with the joint consent of the party or parties holding the notes secured by such bonds and the trustees appointed under this agreement, provided the Ohio Falls Car & Locomotive Company complies with the obligations contained in this agreement; but in case the Ohio Falls Car & Locomotive Company fails in any of these obligations, then parties holding said notes of the Chesapeake & Ohio Railroad Company as collateral, or having discounted any of the same, are at liberty to take such action with reference to their *pro rata* of said bonds as they can legally do."

When the extension notes came to be executed under section 6, some of the creditors took interest notes separate from the principal notes, and others took them together. The six months interest note therein provided for was paid at maturity, and also the first and second principal notes, and the second and third interest notes. Default was made in the payment of the third principal and fourth interest notes. These matured November 15, 1875. In 1877 the trustees to whom the mortgage provided for by section 8 was executed, foreclosed it in Clark county, Indiana. By the order of the court entered in that cause all of the outstanding extension notes were adjusted as of January 15, 1877, interest being calculated on those which had matured up to that day, and rebate upon those which were to mature thereafter. The total amount of the extension notes upon this basis was fixed at \$357,988.52. This included extension notes held by the First National Bank of Jeffersonville to the amount of \$64,760.12, similar notes held by the Bank of Kentucky to the amount of \$8,116.35, similar notes held by the Western Financial Corporation to the amount of \$33,396.62, and similar notes held by Sprague, trustee, to the amount of \$14,812.63. On these extension notes the trustees paid two dividends,—one on the fifteenth day of January, 1877, of 8 per cent., and one on September 1, 1877, of 6½ per cent.

On February 14, 1877, the First National Bank of Jeffersonville, the Bank of Kentucky, the Western Financial Corporation, J. W. Sprague, trustee, and De Pauw, Smith, and McCampbell, as trustees, under section 9 of the agreement hereinbefore recited, brought suits in the Louisville chancery court against the Chesapeake & Ohio Railroad Company, upon the notes severally held by the plaintiffs therein, and praying that the bonds pledged to secure such notes should be sold, and each obtained judgment in accordance with the prayer of the petition directing a sale of the bonds. At a sale made in its case, the First National Bank of Jeffersonville bought the bonds pledged to

secure the notes held by it, and realized on them as a credit upon the debt, after the payment of the costs, the sum of \$429.55. The Western Financial Corporation bought the bonds pledged to secure the notes held by it, and realized on them as a credit upon the debt, after the payment of the costs, the sum of \$207.15. The Bank of Kentucky likewise bought the bonds pledged to secure the payment of the notes held by it, and realized on them as a credit upon the debt, after the payment of the costs, the sum of \$20. The trustees, De Pauw, Smith, and McCampbell, bought in the bonds held by them, pledged to secure the notes held by them, as set forth in section 9 of the agreement above. About two years thereafter the Chesapeake & Ohio Railway Company was organized upon the wreck of the former Chesapeake & Ohio Railroad Company. Persons holding securities of the railroad company were admitted into the railway company upon certain terms, not necessary to be stated. The Western Financial Corporation took the bonds so purchased by it at judicial sale, as above recited, and having received therefor the prescribed securities in the new railway company, sold such securities, realizing upon them, about November 1, 1879, the sum of \$19,429.84. The Bank of Kentucky pursued a similar course with the bonds purchased by it at judicial sale, and sold the securities it received in the new railway company about November 11, 1879, for \$5,148.28. The First National Bank of Jeffersonville, J. W. Sprague, trustee, and De Pauw, Smith, and McCampbell, trustees, delivered their bonds to the Union Trust Company of New York, the designated depository in the reorganization of the railway company, and received the proper certificates therefor. When, however, they came to present these certificates, the railway company refused to issue the securities which they called for. After a litigation, the details of which it is not essential to state, the First National Bank of Jeffersonville compromised its claim, upon receipt from the defendants of 80 first mortgage \$1,000 bonds of the Elizabethtown, Lexington & Big Sandy Railway Company. Sprague, trustee, likewise compromised the litigation upon his part by the receipt of 22 similar bonds. The trustees likewise compromised the litigation upon their part by the receipt of 116 similar bonds. These bonds were received by the parties in the spring of 1882, and were at the time worth from 90 to 92 cents on the dollar. The trustees have, under an arrangement assented to between them and the holders of the extension notes, and under the advice and direction of the Clark circuit court, paid to the stockholders of the old company 21 of these bonds. This leaves in their hands 95 of the said bonds. This litigation is had with the view of instructing the trustees as to how they will distribute these bonds. They will, when sold, after the payment of the expenses incident to the trust, yield about 22 per cent. on the amount of the extension notes, as fixed on the fifteenth of January, 1877. This computation excludes interest which has accrued since that date, and also the two dividends which

have been paid; but, as the interest will more than exceed the amount of the dividends, the estimate as to what each holder of the extension notes will receive is too large, rather than too small.

It is claimed on the part of the complainants that the only credit to which the Ohio Falls Car & Locomotive Company is entitled in respect to the Chesapeake & Ohio Railroad bonds purchased by them at judicial sale is the amount which said bonds brought at such sale; *second*, that each of them is entitled to the dividend on the full amount of the debt due, without regard to such credit; *third*, that each one of these creditors had two securities for their debts, viz., bonds specially pledged to each one of them, and the lien given to them in common with the other creditors upon the property mentioned in clause 8 of the agreement, and that mentioned in clause 9 of said agreement, and that where a creditor has such double security he is entitled to a dividend on his full debt out of each.

Alex. P. Humphreys, for complainants.

Alex. Dowling, for defendants.

Woods, J. Objections are made by counsel for the defendant, on account of alleged defects of the record of the procedure, to the jurisdiction of the Louisville chancery court, in the case of the First National Bank of Jeffersonville; but the questions thus presented need not be decided. Treating as valid and effective, between the parties to the respective records, all the judgments of that court with which the parties to this case are concerned, the important fact remains that neither the Ohio Falls Car & Locomotive Company, nor the trustees to whom that company made the assignment of October, 1873, were made party to any of the cases, except that the trustees themselves brought one of the suits, and under the decree which they obtained bought the bonds thereby ordered to be sold.

It has been held in a number of instances, and seems to be well established, that where a mortgage of real estate has been assigned as collateral security for a debt other than the mortgage debt, and the holder of the collateral forecloses the mortgage, without making the assignor party to the purchase, and becomes the purchaser under the decree, the sale extinguishes the mortgagor's right of redemption only, and does not otherwise affect the relations of the assignor and assignee of the collateral. The property, as well after foreclosure as before, is held for the benefit of both pledgeor and pledgee, and must be disposed of for the benefit of both. The price bid at such sale does not operate as payment upon the debt for which the mortgage was pledged. *Brown v. Tyler*, 8 Gray, 135; *Montague v. Boston & A. R. Co.* 124 Mass. 242; *Stevens v. Dedham Inst., etc.*, 129 Mass. 547; *Slee v. Manhattan Co.* 1 Paige, 48; *Hoyt v. Martense*, 16 N. Y. 231; *Dalton v. Smith*, 86 N. Y. 176; *Smith v. Bunting*, 86 Pa. St. 116; *Jones*, Pledges, §§ 659, 683. The evident principle upon which these cases were decided is that the assignor or pledgeor of the collateral in each instance had an interest in the mortgage which could not be

extinguished by a procedure to which he was not a party, and it seems clear that in this respect there can be no distinction between the position of an assignor of notes, secured by a mortgage upon real estate, and that of an assignor of notes secured by the pledge of bonds or other like securities. It follows that the decrees of the Louisville chancery court, however effective to divest the Chesapeake & Ohio Railroad Company of any interest in the pledged bonds, had no such effect on the rights of the Ohio Falls Car & Locomotive Company, or of those claiming under that company. Each purchaser of the bonds under those decrees still held the same as a pledge or security for the payment of that portion of the notes of the car company executed to or held by such purchaser.

It is perhaps worth while to note that prior to the adjustment of October, 1873, the Jeffersonville National Bank was, as it seems, the owner of the notes of the Chesapeake & Ohio Railroad Company, indorsed to it by the car company, and the car company was liable to the bank only as indorser of those notes; but after and by force of that adjustment the car company became and was the principal debtor, liable to the bank upon its notes then made, and accepted by the bank, to which the notes of the railroad company, themselves secured by the bonds in pledge, became only a collateral. In this way the relation of the bank to the car company, in respect to the notes and bonds of the railroad company, became the same as that of the other holders, and the effect of their several decrees for the sale of their respective bonds the same. They are, therefore, all alike bound, not to give credit for the amount of their respective bids, but to account for the bonds purchased, or for the proceeds or value thereof, in case they have been disposed of.

In respect to the *third* proposition of the complainants, it is the opinion of the court that it is true, and that distribution should be made accordingly: provided that no one shall receive from the trustees more than enough, after application of the proceeds or value of his collaterals, to pay the remainder of his claim, with interest, as evidenced by the extension notes.

HOLYOKE WATER-POWER Co. v. CONNECTICUT RIVER Co.

(Circuit Court, D. Connecticut. April 23, 1884.)

IMPROVEMENT OF NAVIGABLE STREAMS—CONSEQUENTIAL DAMAGE—LAND OUTSIDE THE STATE—LEGISLATIVE POWER.

Remote and consequential damage, such as the diminution of water-power, accruing to land from improvements to the navigation of the water-ways of a state authorized by the legislature thereof, do not amount to a "taking" within the meaning of the constitution, and the legislature is empowered to authorize such improvements without reference to such consequential damage to land within the state; but the legislature has no power to cause such damage to the owners of land in other states.

In Equity.

N. A. Leonard and Alvan P. Hyde, for plaintiff.

Henry C. Robinson, Charles E. Perkins, Charles H. Briscoe, and Arthur F. Eggleston, for defendant.

SHIPMAN, J. The Connecticut River Company was incorporated in the year 1824, by the general assembly of the state of Connecticut, "for the purpose of improving the boat navigation of Connecticut river," a navigable stream, and was empowered, among other things, to remove obstructions from the channels and bars of said river from and above the bridge at Hartford to Springfield; to lock the falls at Enfield on said river; to make channels to aid them; to construct a canal on either bank of said river near said falls, and to construct a dam or dams for the purpose of entering and leaving the locks, "provided the extension and form thereof shall be such as shall not prevent the convenient passage of boats and lumber down the river, nor obstruct the passage of fish;" to demand and receive specified tolls from every boat passing up said river or through the locks; and to purchase, hold, lease, or alien mill seats or manufactories upon or near Enfield falls. The locks and canals were to be, and were, constructed under the direction of a board of commissioners, who were named in the charter, and who were authorized to direct further improvements to be made, if, after the completion of the works, such improvements should become necessary. Under this charter the defendant, before 1829, built a dam from the west bank into the river at Enfield falls, and also built a canal upon the west side of the river, about five and one-half miles long, with the necessary locks and other works. In 1829 the water of the river was turned into the canal, and since then boats engaged in the navigation of the river have continuously passed through the canal, and so have avoided the difficulties incident to the passage of Enfield falls. The defendant has also continuously leased the use of the water and water-power in said canal to the occupants of mills upon its banks. Upon the defendant's application to the board of commissioners to examine, approve, and allow certain proposed dams in the river, the commissioners, on September 3, 1849, found and authorized as follows:

"That the depth of the water at and above the northern termination of said canal is not sufficient for the safe and easy passage of boats into and out of said canal at low stages of water, and that it is expedient and necessary that the depth of water should be increased. We do also find that the dam and works proposed or in the process of erection in said river, and extending westwardly from the east bank of the same, are well adapted to effect that object of increasing the depth of the water, and that the same will not impede the passage of fish up said river, or the passage or floating of boats, timber, or other property down the same. We do therefore authorize, approve of, and allow the erection and completion of the dam and other works in said river, whether proposed or now in progress, as the same are herein-after specified and described, viz.: The dam extending westerly from the east bank of said river four hundred and sixty-one (461) feet, and at such height as shall at the lowest stage of water, when the water is at the height of the top of said dam, raise the water in said canal to the height of five (5) feet and (9) inches on the miter sill of the upper guard gate. Also to sink a crib at the western end of said last-mentioned dam, and continue and keep the same there of twenty-eight feet in breadth westerly from said west end, and at such height from the bottom of said river as will leave the water two feet in depth at its lowest stage, leaving the opening in the river from the western end of said dam to the eastern end of the old or former dam not less than one hundred (100) feet, and from the western side of said crib not less than seventy (70) feet to the eastern end of said old dam. Also to make a sunken dam across the said opening of seventy (70) feet from the westerly side of said crib to the eastern end of said old dam, by the sinking of cribs or other materials on the bottom of said river, and to make and construct said sunken dam such height that the water shall not, at its lowest stages, ever be less than four (4) feet in depth upon and above the top or highest part of said sunken dam."

In the year 1855 the defendant made another application to the board of commissioners "to approve, authorize, and allow certain alterations on and additions to" its works and dams, which had been constructed or were in process. The commissioners decided as follows:

"* * * We do therefore decide that it is inexpedient to modify or vary said order of 1849, but we adopt and confirm the same so far as it specifies and fixes the depth of water at five feet nine inches on the miter sill of the guard lock at low water. We believe it is better for all parties that, so far as the action of the commissioners is concerned, it should be held as a settled point that the water at low stages should be and continue to be at this specified depth, and that all the erections and obstructions of the company should have reference to that depth. We do therefore approve the erection of the eastern dam, the making of the cribs and sunken dam in the opening between the dams, but decide that certain of those cribs which are above the general level be taken down and reduced to such level as soon as the weather and the stage of water will allow, and in the mean time they are to remain as they now are. As it respects the navigation down Enfield falls, it is very inconsiderable and dangerous at the best, and at extreme low water is scarcely attempted or practicable, and we think the weight of evidence produced before us shows that the recent erections have not increased the danger or the difficulty. The eastern dam we think somewhat higher than necessary to secure the specified depth of water at low stages, and incline to the opinion it might properly be lowered a few inches; but as some persons, who were understood to have been remonstrants, suggested it might be injurious to them, as they were interested in property above the falls, we make no order on that subject."

The dams remained in the condition in which they were authorized to be by these two orders of the commissioners until 1881. The defendant fully availed itself of the permission to sink cribs in the opening between the dams, and when they were repaired, as hereinafter mentioned, in the summer of 1881, there was in the gap "a pile of stone which had been built right round on a circle from one wing to another," about two feet below the surface of the water at the opening. At this time about 4,000 cubic feet of water per second were flowing at Holyoke.

In 1881 the defendant's charter was amended by the general assembly of Connecticut as follows:

"Whereas, the dams of the Connecticut River Company, at Enfield falls, have become inadequate by reason of natural changes in the channel of the Connecticut river, and by reason of the uneven and greatly diminished flow of water therein, making said river for a distance of several miles below said dams unnavigable; and,

"Whereas, to improve the navigation upon said river, both above and below said dams, and to preserve and maintain the water-power of said company, it is necessary that the water in the canal of said company, and in said river above said canal, shall be of greater depth than the dams of said company, at their present heights, will allow; therefore,

"Resolved, by this assembly: Section 1. That the Connecticut River Company are hereby empowered and authorized to unite their said dams at Enfield falls, aforesaid, so as to continue and extend the same across the Connecticut river, and to raise said dam and dams to such a height that the crest or crests thereof shall not exceed the height of seven feet above the miter sill of the upper guard gate or lock, at the upper entrance to said canal, as said miter sill now is; but the dam at the extreme west end may be fifteen inches higher than its present height, sloping on a regular incline for three hundred feet: provided, that said company shall construct and maintain at the said dam or dams, and as a part thereof, subject to the approval of the fish commissioners of this state, suitable and proper fish-ways to admit the free passage of fish up and down said river, over and above said dams, and to be kept open at such seasons as shall be necessary for the passage of fish; said fish-ways at all times to be under the direction and approval of said commissioners, or of such other authority as this state shall appoint with reference thereto."

The second section related to the assessment and payment of damages which should accrue to the property of any person by reason of the exercise of the powers conferred by the amendment.

In July, 1881, the defendant began to fill the gap between the dams, and after the building of a coffer-dam 404 feet long, above and in front of the opening, built, below the dams and across the gap between the wings, and connecting with the old dams, a piece of new dam, 285 feet long, and, after it had settled 2 inches, 10.80 inches above the average crest of the old dam. The gap between the wings was 100 feet. The respective surveyors differ about two inches in the height of the new dam before it had settled. I adopt the measurement of the defendant's surveyor. In the new piece of dam there is an opening 14 inches deep, and from 40 feet to 42 feet in width, for the passage of fish and lumber over the dam. The elevation of

the old dam above the miter sill was five feet nine and one quarter inches. On August 19, 1882, the surface of the water in the river was six feet and four inches above the miter sill. The average elevation of the new work, not including the fish-way, is 40.31 feet above the datum plane, or imaginary horizontal plane which was established by the engineers on both sides, and which is explained in the record. The remainder of the dam, or the old dam still remaining, is about 1,288 feet long, and on an average height of 39.41 feet above the datum plane. Three hundred and thirty-two feet in length of the coffer-dam were about six feet in height above the water, and the remainder of the dam was about two feet in height above the water. It was taken away late in the fall of 1881.

The Holyoke Water-power Company was incorporated in January, 1859, by the legislature of Massachusetts, for the purpose of upholding and maintaining the dam across the Connecticut river, theretofore constructed by the Hadley Falls Company, and one or more locks and canals in connection with the said dam, and of creating and maintaining a water-power to be used for like purposes. The Hadley Falls Company was incorporated for similar purposes, by the legislature of Massachusetts, in 1848, and in 1859 the plaintiff purchased its dam, canals, water privileges, and land. The plaintiff thus became, and is, the owner of an extensive and valuable water-power upon the Connecticut river, at Holyoke, in Massachusetts, 16 miles above the defendant's dam, and has expended large sums of money in the development and improvement of its property. It leases the water-power to mill-owners, and from such leases derives a large portion of its income. Its fall is about 60 feet.

The bill was brought in September, 1881, and after the gap had been filled by the new piece of dam which has been described, but before the work was entirely completed, alleging that the solid dam, and the raising the dam across the width of the river as authorized by the legislature of Connecticut, will set back the water upon the plaintiff's works, will overflow its land, impede the operation of the mills there situate, diminish the effective head of its fall, and commit irreparable injury to its property, and praying that the defendant may be ordered to remove the obstruction between the wing dams, and be enjoined against raising the dam. The answer of the defendant admits that the gap was filled by the new dam substantially as has been stated, but denies that any damage has been done to the rights or property of the plaintiff, and alleges that it has no present intention of raising the rest of the dam, but claims that under said amendment of 1881 it has the right to raise the whole of the dam to the height authorized thereby, and asserts that it proposes to make such erection if it should become necessary.

The water of the river is diverted by the plaintiff at Holyoke into three canals, which are substantially parallel to the river, and are called the first, second, and third level canals. "They are so arranged

that the water flows from the gates at the dam into the first level; from the first level, a small portion into the river and the balance into the second-level canal; from the second level, part into the third level and a part into the river; and from the third level into the river. The third-level canal is furthest from the dam, and nearest to and parallel with the bank of the river, where the river bends to the westward, below the city of Holyoke." The plaintiff owns about 440 acres of land, "390 acres being building lots and about 50 acres being mill-sites. Twenty acres of these mill-sites are on the third-level canal. The Holyoke Water-power Company now owns the river front, from the dam to the foot of the fall, about 9,600 feet in length, and thence about 5,500 feet further, on the west bank of the river. This last-described bank of the river is the one across which the tail-races of the mills on the third-level canal are constructed."

The plaintiff furnished elaborate and careful computations of its hydraulic engineer, which were based upon the comparison of an extensive system of observations taken by his employes after the construction of the coffer-dam, with observations and *data* before such construction, for the purpose of showing that the effect of the present obstruction at Enfield falls was to raise the water of the river at the point next adjacent to the tail-races of the mills upon the third-level canal, but not to show that any water has been set back upon the plaintiff's land, or into the tail-races, or upon the works of any of the mills as now constructed. The plaintiff's engineer, Mr. Herschel, was corroborated, to a certain extent, by the opinions of Gen. Ellis, the engineer in charge of the surveys which had been taken since 1870, and of the works which had been constructed by the United States government for the purpose of improving the navigation of the Connecticut. Two other hydraulic engineers, Messrs. Worthen and Greene, criticised the accuracy of the *data* upon which the computations were based, and Mr. Greene denied that the property of the plaintiff is or will be injured by the present or proposed dam of the defendant whenever the river is at the stage which he estimates to be its ordinary stage.

Two facts are conceded by all the witnesses to be true. The first is that at low water, which is generally stated to be a flow of 4,000 cubic feet per second at Holyoke, the Connecticut river between Holyoke and the defendant's dam, as it existed before the gap was filled, was nearly a still pond. Mr. Herschel says that "a slope of only four inches sufficed to convey 4,000 cubic feet per second from Holyoke to the Enfield dam." Therefore any material additional obstruction placed upon the Enfield dam of 1849 or 1855 would be perceptible in the river at Holyoke at the time of very low or low water. The second conceded fact is that the defendant's dam as it was, or as it is now constructed, is so low that as the volume of water increases in the river and flows over the dam, there is a point where the present dam would cause no injury at Holyoke. The

amount of the rise of the water which is ordinarily caused by the present dam, the fact of injury, the length of time during which any injury would be perceptible, and the point at which any injury would cease, are controverted questions.

The most reliable testimony upon the amount of the rise in the river resulting from the increased obstruction at Enfield falls is derived from the records of the river heights at the Springfield toll-bridge, which were kept by the keeper of the bridge from March, 1881, to December, 1881. From these records it is shown that when 4,000 cubic feet of water per second were passing Holyoke, the water at Springfield was, after the construction of the coffer-dam, 96-100 of a foot higher than it was before July, 1881. It is to be observed that these figures state the effect between July and December, and that during the greater portion of this time the coffer-dam was a part of the obstruction. The other results are given in the following table:

Cubic feet per second at Holyoke.										Increase.
7,000,	-	-	-	-	-	-	-	-	-	0.28
10,000,	-	-	-	-	-	-	-	-	-	0.25
13,000,	-	-	-	-	-	-	-	-	-	0.24
16,000,	-	-	-	-	-	-	-	-	-	0.22
19,000,	-	-	-	-	-	-	-	-	-	0.19
22,000,	-	-	-	-	-	-	-	-	-	0.13

At 4,000 feet the effect at Holyoke would be the same as at Springfield. From and after the flow of 7,000 cubic feet, the effect at Holyoke would be about half that felt at Springfield. The observations which were taken at Holyoke and near Enfield Falls, under the direction of the plaintiff, show a greater effect than that which is here stated, but the Springfield observations I regard as more reliable. In order to determine whether any damage will be caused by the present dam, the length of time during which a rise at Holyoke will continue is important. Mr. Herschel, collecting the scattered days of the year, in the order of their dryness, into months, and arranging the months in like order, estimates that during the driest month the flow of the river at Holyoke is 4,072 cubic feet per second, and is during the second month 4,886 cubic feet, and is during the third month 6,515 cubic feet, and is during the fourth month 8,225 cubic feet, and is about 47,000 cubic feet per second during the wettest month. Gen. Ellis, who had been very familiar with the river between Enfield dam and Holyoke, from having superintended the government surveys, was of the opinion that if the gap was filled up, so that the crest of the solid dam should average 39.1 feet above the datum plane, which would be 3.72 inches below the average crest of the old part of the present structure, the river would be raised a foot during about one month; and in his report recommended that the opening should be thus closed by the government. Assuming that the gap was filled up by a structure 18 inches above the main level

of the old dam, and 280 feet long, he testified that this obstruction "would certainly raise the water at Holyoke in the lower stages of the river. The reasons are that the obstruction contracts the water-way at Enfield, and thereby raises the water flowing over the rest of the dam. This sets the water back at Holyoke, at the lower stages of the river, almost exactly the amount of the rise at Enfield. * * * Exactly what part of the year this effect would take place, I am not able to state of my own knowledge. As the river rose from the state of low water, the effect would diminish." In his affidavit, made September 13, 1881, to be used upon the motion for a preliminary injunction, he said: "There would probably be, from the best data in my possession, and my general knowledge of the river, an average of about thirty days in each year when the water would be one foot lower with the gap as it existed eight years ago, than with the gap filled up as at present." It is evident that Gen. Ellis was intentionally vague as to the increase of flow which would overcome the effect of the obstruction. From the testimony in the case no certain and indisputable conclusion can be reached, either as to the length of time in each year in which the influence of the present dam will be known at Holyoke, or as to the amount of the flow of water at which the influence of the dam will cease to be felt; but my opinion is that, with a flow of 7,000 cubic feet per second, the effect will be unknown, and that such effect will be perceived at Holyoke between 30 and 90 days during the driest part of the year.

Putting aside the testimony for the defendant, certain facts tend strongly to satisfy me that the effect of the present structure will not be protracted and will not be injurious. They are as follows:

(1) When the observations in regard to the rise of the water were taken, the coffer-dam, the dimensions of which have been given, was the effective obstruction in the river, in addition to that caused by the pre-existing dam.

(2) Gen. Ellis' indisposition to commit himself in regard to the point at which the effect will be unknown, when he was testifying for the plaintiff, and his admission that when he was testifying before the legislative committee which had the amendment of 1881 under consideration he might have said, in substance, that if the dam was raised 15 inches, the backwater would be overcome by a slight rise.

(3) His recommendation to the government to close the gap, when it was apparent that such a course would raise the water about one foot during 30 days in the year. He was undoubtedly making recommendations which he knew it would be perfectly safe for the government to act upon, and which were probably inside the limit which he thought that careful prudence would suggest.

The next point is as to the amount of damage which is caused by the present structure. The rise is simply a rise within the banks of the river. It overflows nothing; it occupies no land. As the works of the existing mills are arranged, it is impossible for this obstruction to set back any water upon their wheel-pits or canals. The fall on the third-level canal, as computed by Mr. Herschel in the order of his arrangement of months, follows: Driest, or first, 25.10 feet;

second, 24.80 feet; third, 24.20 feet; fourth, 23.65 feet; fifth, 23.10 feet; sixth, 22.35 feet; seventh, 21.65 feet; eighth, 20.85 feet; ninth, 20 feet; tenth, 18.85 feet.

The usual lease heretofore in use has been for a fall of 24 feet. It is, of course, practicable for the lessors and lessees of power at Holyoke to alter their indentures, and for the lessees to alter their structures so as to utilize every inch of fall that is attainable during the driest portion of the summer, and it may be possible for the plaintiff so to arrange its contracts with the present lessees, or with the purchasers of unsold mill-powers, as to derive a pecuniary benefit from the slight additional amount of fall during this dry period; but the damage which will accrue to the plaintiff from the present Enfield dam seems to me to be theoretical and fanciful rather than actual. In the months of August and September it might have a nominal advantage if the gap had not been filled, but I cannot deem it reasonable that no change should be permitted in the structures for the benefit of navigation 16 miles distant from Holyoke, in order to furnish the Holyoke company with an advantage which consists far more in theory than in fact. During nine or ten months in the year this obstruction will not be known at Holyoke; during two or three months it can be perceived; but it practically does no damage to the owners of the water-power.

In regard to the raising of the dam above its present height to the point authorized by the amendment of 1881, I am of opinion that it would produce to the plaintiff a pecuniary injury for a period of six or seven months in the year by the diminution of its fall, but not by an overflow of its land or a taking of its property,—an injury which is called a consequential injury. *McKeen v. Delaware Division Canal Co.* 49 Pa. St. 424. The defendant admits in its answer that it claims the right to raise its dam to the point authorized by the amendment, and that it proposes to do so whenever necessary.

The defendant insists that inasmuch as the state of Connecticut authorized the addition to the dam for the purpose of improving the navigation of Connecticut river within the limits of the state, any consequential injury not amounting to the taking of land, which is occasioned, in the exercise of ordinary care, by reason of such improvement to the land of a riparian proprietor, is *damnum absque injuria*; and it may be considered as settled that where a state, by itself or by its agents, in the construction of works authorized or directed by the legislature of such state for the benefit of the navigation of a navigable river within its borders, causes, without malice, and in the exercise of ordinary care, a necessary consequential injury to land within its borders, no relief will be granted against such injury. The state and federal courts concur in the assertion of this principle. The supreme court of errors of Connecticut says, in regard to works erected for the improvement of the navigation of Connecticut river: "The public, being the owners of this river, have an unquestionable

right to improve the navigation of it, without any liability for remote and consequential damage to individuals." *Hollister v. Union Co.* 9 Conn. 436.

"Acts done in the proper exercise of governmental powers, and not directly encroaching upon private property, though their consequences may impair its use, are universally held not to be a taking within the meaning of the constitutional provision. They do not entitle the owner of such property to compensation from the state or its agents, or give him any right of action. This is supported by an immense weight of authority. * * * We have examined the decisions of the courts of Illinois, and others to which we have been referred by the plaintiffs in error, but in none of them was it decided that a riparian owner on a navigable stream, or that an adjoiner on a public highway, can maintain a suit at common law against public agents to recover consequential damages resulting from obstructing a stream or highway in pursuance of legislative authority, unless that authority has been transcended, or unless there was a wanton injury inflicted, or carelessness, negligence, or want of skill in causing the obstruction." *Transp. Co. v. Chicago*, 99 U. S. 635.

In this case the injury will be caused to property beyond the limits of Connecticut, and the question arises whether the doctrine which has been asserted is applicable to this state of facts. This question has never, so far as I can ascertain, been decided by the courts of this country. The question has arisen whether, by virtue of the right of eminent domain, one state can take or subject to public use land in another state, and the decisions have naturally been against such a power. *Furnum v. Canal Corp.* 1 Sumn. 46; *Salisbury Mills v. Forsaith*, 57 N. H. 124; *Wooster v. Great Falls, etc., Co.* 39 Me. 246; *U. S. v. Ames*, 1 Wood. & M. 76. In two cases which have recently arisen in federal courts, and which involved the right of a state to regulate or to improve the navigation of a river wholly within its limits, the judges have carefully limited their decisions to the facts in the cases. *Escanaba Co. v. Chicago*, 107 U. S. 678; S. C. 2 Sup. Ct. Rep. 185; *Huse v. Glover*, 15 Fed. Rep. 296. Important suggestions which bear upon the question in this case are made by Judge TREAT in *Rutz v. St. Louis*, 7 Fed. Rep. 438, and by Mr. Justice McLEAN in *Palmer v. Com'rs Cuyahoga Co.* 3 McLean, 226.

The rule which has been referred to is based upon the principle that the improvement of the navigation of navigable rivers within a state is part of the state's governmental duties, and that the work which is done towards such improvement is done in the discharge of the governmental powers of the state, and that the land of the riparian proprietor within the state is subject to the just exercise of this power; and that when the state undertakes to exercise its governmental power the public good is paramount to the consequential injury of land which is incidentally and necessarily affected by the improvement. The land is under the jurisdiction of the state, and the state derives the

power to inflict remote and consequential injuries upon it by virtue of such jurisdiction. The owner of land abutting upon a navigable river owns it subject to the right of the state to improve the navigation of the river, because the land is within the governmental control of the state; but it seems to me that the state obtains by virtue of its governmental powers no control over or right to injure land without its jurisdiction. Jurisdiction confers the power and the right to inflict consequential injury, but when no jurisdiction exists the right ceases to exist. It is a recognized principle that the statutes of one state in regard to real estate cannot act extraterritorially. As Connecticut has no direct jurisdiction or control over real estate situate in another state; it cannot indirectly, by virtue of its attempted improvement of its own navigable waters, control or subject to injury foreign real estate. If this resolution is a bar to an action for any consequential injury to land or to rights connected with land in Massachusetts, Connecticut is acting extraterritorially.

Let there be a decree enjoining the defendant against any further raising of its present dam, and against constructing a new dam or dams to a greater height than the height occupied by the respective portions of the present structure.

UNION TRUST CO. OF NEW YORK *v.* NEVADA & O. R. CO.

MASON and others *v.* McMURRAY and others.

(Circuit Court, D. Nevada. March 23, 1884.)

RAILROAD BONDS — RIGHTS OF HOLDER UNAFFECTED BY SUBSEQUENT FRAUDULENT ISSUE.

One who purchases from a railroad company their bonds, under the assurance that no further indebtedness shall be placed on the portion of road then constructed, enjoys all his rights against the company; unaffected by those of a purchaser of bonds issued subsequently in violation of the assurance.

In Equity.

SABIN, J. The above-entitled suits are submitted upon the same testimony. The first-entitled suit was brought in this court by the Union Trust Company of New York, to foreclose a certain trust deed executed by the Nevada & Oregon Railroad Company to secure the payment of certain first mortgage bonds (310 in number, of the denomination of \$1,000 each) and coupons, executed by said railroad company, in the payment of which default had been made. In that suit an interlocutory decree was entered August 7, 1883, final decree being reserved until the testimony should be taken and submitted in the two cases. The second suit was brought by complainants, who are the owners of said 310 bonds, secured by said trust deed, fore-

closed in the first-named suit. The object of this second suit is to have declared fraudulent and void, as against complainants, an issue of 147 bonds of said railroad company, (of the value of \$1,000 each,) and claimed by respondents to be equally secured by said trust deed with the 310 bonds held by complainants.

The pleadings are somewhat voluminous. The bill alleges that on the twenty-fifth of April, 1881, said railroad company duly executed 3,000 bonds, of the value of \$1,000 each, bearing 8 per cent. interest, payable A. D. 1930, interest payable semi-annually, and, in default of payment of interest when due, the principal should become due at the option of the holder of the bonds. On the same date said railroad company, to secure the payment of said bonds, duly executed to the Union Trust Company of New York, in trust for the bondholders, a mortgage upon its franchise and property in the state of Nevada. These bonds were to be of no validity until certified to by said trust company. The trust company certified to only 600 of these bonds. Of these bonds so certified, complainants purchased 310, for value, paying therefor, as shown by the testimony, \$248,000. The bill further alleges that these bonds were so purchased by complainants on the distinct and positive agreement by said railroad company that no more than \$10,000 of said bonds should be issued for each completed mile of said road, as the same should be built; that only 31 miles of said road were ever completed; that said railroad company wrongfully procured from said trust company the 290 bonds remaining from said 600 bonds so certified, and has in fraud of the rights of complainants wrongfully disposed of 147 of the same. The respondents deny that said railroad company ever made or entered into any agreement by which it was limited to an issue of bonds at the rate of \$10,000 per mile of completed road, or at any limited rate whatever. And it alleges that respondents are *bona fide* purchasers of said 147 bonds, without notice, for value, and are entitled to all of the benefits arising to them as such.

In examining the testimony it will be well, to avoid confusion, to note these facts in reference to the date of the organization of the "Nevada & Oregon Railroad Company," the defendant in this action, and the organization of "The Nevada & Oregon Railroad Company," the predecessor in interest of said company, defendant. The names of the companies are the same, excepting that the definite article "the" is not prefixed to the railroad company defendant in this suit. "The Nevada & Oregon Railroad Company" was organized in Nevada on the first of June, 1880. Its object was to construct a railway 300 miles in length, more or less, with various branches. The proposed line of railway was divided into "divisions," with appropriate names for each division. The portion of the line extending from Reno to Beckwith pass, and northerly, was called the "Reno division," and is so named and called by witnesses in the testimony. On the twenty-sixth of August, 1880, this company entered into a contract with one

Thomas Moore for the construction of the road. By that contract said company agreed "that fifty-year eight per cent. first mortgage bonds, to the extent only of \$10,000 per mile, and capital stock to the extent of only \$20,000 per mile, for the first 185 miles, will be issued." In providing for making payments to Moore for the work, when completed, said contract further provided for the payment to him of "\$100,000 in lawful money, and \$310,000 in the first mortgage bonds, and \$450,000 in the capital stock of said railroad stock, for the Reno division, as far as Beckwith pass, being thirty miles, more or less."

On the fourth of December, 1880, said railroad company and said Moore entered into another contract in reference to building the road. This contract provided that the Reno division should be first constructed from Reno to Beckwith pass, the company to pay at a certain prescribed rate should the distance exceed 31 miles.

Section 6 of this contract is as follows:

"The company shall deposit with a trustee in New York, on or before January 10, A. D. 1881, \$10,000 in cash and the \$450,000 stock, and on or before January 25, 1881, the \$310,000 in first mortgage bonds."

Sec. 7. "Nothing in this contract is to be construed as abating or impairing any portion of the contract of August 26, A. D. 1880, which is hereby extended in all matters not conflicting with the provisions of this instrument," etc.

Sec. 8. "The entire stock to be issued upon the line from Reno to the temporary terminus, as herein stated, ('at a point near Beckwith pass;' see section 1,) shall be limited to \$600,000, without reference to any excess in distance over 30 miles, and the first mortgage bonds upon the same to \$310,000."

On the same day, December 4, 1880, said company and said Moore entered into another contract, by which Moore was to construct 170 miles of said road from Beckwith pass to the Oregon line, "on the same basis as agreed upon for the first thirty miles of said division," and the company agreed to pay therefor "a total of \$500,000 in cash and \$1,700,000 in first mortgage bonds, the same being total issue upon said line, and \$2,850,000 in the capital stock;" the issue of first mortgage bonds being at the rate of \$10,000 per mile. On the first day of February, 1881, said Moore and said company entered into another contract, the company having failed to make payments, as stipulated in the former contract, for work done by Moore on this line from Reno to Beckwith pass—these 31 miles.

Section 3 of this contract provided:

"The party of the second part is to deliver to the party of the first part the \$450,000 of stock as soon as engrossed and certificates can be signed, and the \$310,000 first mortgage bonds as soon as engrossed and can be properly signed, and all on or before March 31st, proximo."

This contract was not to impair any former contracts made between the parties.

On the twenty-fifth day of April, 1881, the "Nevada & Oregon Railroad Company" was organized, the company defendant in this action.

Its object was the same as that of "The Nevada & Oregon Railroad Company." It was the successor of the last-named corporation, and by transfer and assignment it succeeded to all its rights, property, franchises, and contracts, and debts also. By contract entered into with Moore on the twenty-sixth of April, 1881, the defendant corporation adopted, ratified, and confirmed all of the contracts hereinbefore mentioned, and renewed them in all respects with Moore. On the twenty-fourth of May, 1881, Moore and the defendant corporation extended for one year the contract entered into by Moore and "Nevada & Oregon Railroad Company" for the building of the 170 miles of road from Beckwith pass to the Oregon line. Moore went on under these various contracts, and graded 32 miles on the first section north from Reno, and commenced grading on the 170 miles running north from Beckwith pass. He also laid about 17 miles of track from Reno northerly, and provided certain rolling stock and other materials. Moore became embarrassed, and on about November 16, 1881, abandoned his contracts and left the state. From that time forward the company assumed the management of the road and conducted its future operations as best it could. The company was in a very embarrassed condition. It was largely in debt, and without money or resources of any kind to meet its liabilities. It had attempted to build and equip a railroad without first having provided any adequate means for so doing.

On the twenty-fifth of March, 1882, Moore, as party of the first part, the railroad company, defendant, of the second part, D. W. Balch, H. J. McMurray, A. H. Manning, W. F. Berry, and C. A. Bragg, of the third part, and Alvin Burt, as trustee, of the fourth part, entered into an agreement, the object of which was to adjust, as therein provided, the then unsettled business matters between Moore and the railroad company. This contract recognizes the fact that the railroad company had issued to Moore these 310 first mortgage bonds; that he had negotiated them with Moran Bros., complainants in the second above entitled suit; that he had been paid for 210 of said bonds by Moran Bros., and that they held the remaining of said bonds subject to contract with Moore, to be paid for as the road was completed. By this contract Moore surrendered his rights in these bonds for the benefit of the railroad company, which subsequently drew the money due upon them. Section 11 of this contract is as follows:

"The parties of the second and third part hereby covenant and agree, for themselves and the other stockholders, and for the creditors of the party of the first part, as follows, viz.: * * * (b) That no second mortgage shall be made, issued, or recorded upon said railroad or any portion thereof.

"That the issue of first-mortgage bonds thereon shall be limited to \$10,000 per mile of completed road, or such an amount that the annual interest charge thereon shall not exceed \$800 per mile of completed road, and also that the issue of capital stock of said company shall be limited to \$20,000 per mile of said railroad."

Pursuant to this contract, on the twenty-sixth of April following, Moore and Moran Bros. join in a communication to Balch, as president of said railroad company, informing him of the terms upon which he can, as the road is completed, draw upon complainants for \$75,000, the balance due upon these 100 bonds. These funds were so drawn, and with them the road was completed the 31 miles. It should be noted that this contract of March 25, 1882, was entered into by Balch, as president of and on behalf of said railroad company, pursuant to a resolution of the board of directors of said company, adopted January 13, 1882, prior to his departure from Reno to New York for the purpose of endeavoring to effect a settlement of the business of the company. And this contract, if not formally ratified by the directors of the company by resolution adopted to that effect, was actually ratified by the company, by its acting upon it,—carrying out, to some extent, at least, its provisions, and accepting the benefits arising therefrom, and especially in drawing and using the balance due upon the 100 bonds paid by Moran Bros. after its execution. Now, all of these various contracts conclusively show this, that this railroad company, defendant, and its predecessor, had repeatedly contracted with Moore, and promised and held out to the public that upon no part of the line of its road should there be issued more than \$10,000, in first-mortgage bonds, for each mile of completed road. It was upon this condition and agreement that Moran Bros. purchased these bonds. Charles Moran, one of the complainants, testifies that the railroad company issued its circulars to that effect; that he saw them; that this limitation was the condition in the purchase of the bonds; that they would not have advanced \$11,000 per mile upon the road. He is supported in this by the testimony of Moore, Fowler, and Balch, and by every contract in evidence executed either by the railroad company, defendant, or by its predecessor, and subsequently ratified by the Nevada & Oregon Railroad Company. And this testimony is wholly uncontradicted.

Can we believe that these complainants did, or that any business man or firm would, make advances to this or any railroad company upon its first mortgage bonds, and no limit be fixed upon the amount of issue of such bonds? These various contracts in evidence were affirmed and reaffirmed by this railroad company, defendant, in every subsequent transaction wherever the issue of first mortgage bonds is mentioned. The limitation upon the issue of first mortgage bonds is the sole condition which gave the bonds value, and made it possible to negotiate them; and whoever purchased any of these first mortgage bonds upon the faith of this railroad company, as pledged in these contracts with Moore, limiting the amount of issue, is as much entitled to the benefit of those contracts in this respect as though they had been made with the purchaser himself. These contracts, though private as to Moore, inure to the benefit of all in privity with him in the purchase of any of those bonds upon the faith of the company

therein plighted. If this corporation, defendant, can now set those contracts aside, can absolve itself from its obligations, repeatedly affirmed, and especially so by its contract of March 25, 1882, and after it has drawn from complainants, Moran Bros., \$75,000 by virtue of that contract,—if this can be done, is it not time that men cease to enter into contracts? The directors of this railroad company knew of these contracts; they were officially bound to know of them; and had affirmed all of them which were made prior to the organization of the corporation, defendant. It is manifest, from the evidence, that they knew and realized that the issue of these first mortgage bonds was limited to \$10,000 per mile of completed road, and it cannot be seriously contested.

Moore abandoned his contracts and left the state in November, 1881. The company then undertook the management and completion of the 31 miles of road. The position of the directors was far from being a pleasant one. Many of them had advanced their entire means to aid the company with, then, but little prospect or hope of recovering their advances. The directors were importuned and harassed by creditors of the company on every side. Upon this point, Balch, president of the company, testifies: "One time, I remember, we were in session, and a lot of fellows came in there and wanted to hang us. That is the kind of talk we had." These 147 bonds had not then been issued; they were issued afterwards. Was it "that kind of talk" which finally caused them to be issued, and against the better judgment of the board of directors? From March 25, 1882, to November 20th following, the board had been acting under the contract of date March 25, 1882, made between Moore, the company, Balch and others, and Burt, recognizing its obligations and accepting its benefits. But the affairs of the company grew no better during this time, and, on the twentieth of November, a resolution was adopted by the board directing the president of the company to draw these 290 bonds from the trust company and to negotiate them. It is not a matter of surprise that he found no sale for them for cash,—no one who wished to part with his money for them. It cannot be contended, under the evidence, that any of these holders of these 147 bonds, respondents in this second suit, are, in any legal sense, innocent purchasers thereof for value. Not one of them was sold to any of said respondents for cash. Not a dollar changed hands upon their transfer. They were each and all of them issued to persons who held pre-existing claims or demands against the company, or against the directors, or against Moore, which had been assumed by the company, or for services rendered, or to be rendered, to the company. There is no conflict of testimony on this point. Some of the respondents merely hold them as security for debts due them from the persons to whom they were originally issued. The creditors of the company evidently took the bonds, as they were all the company had to give, and the company issued them with a liberal hand. I cannot but hold

that this issue of these 147 bonds was and is wholly fraudulent and void as against Moran Bros., complainants in this second suit. And such is the judgment of the court thereon. To hold otherwise would be doing great wrong, not only to complainants, but to all persons who repose faith in the solemn contracts and obligations of men or corporations.

The legality of the issue of these 290 bonds, and the disposal of these 147 of the same, is the real matter to be determined in this suit. It is immaterial to complainants what might be the judgment of the court upon the action of the board of directors in auditing and allowing against the railroad company the various claims and demands, aggregating this large sum of \$147,000. This subject is not properly before the court in this suit. The single issue here is, and in which both parties are alike interested, are the holders of any of these 147 bonds entitled to come in and share with Moran Bros., complainants, in the proceeds arising from the sale under the trust deed, foreclosed in the first-entitled suit. The court has adjudged that they are not,—at least not until complainants shall be first paid the amounts due them, with interest and costs, from the proceeds arising from such sale. A large amount of testimony has been taken upon this outside issue, but the court does not feel called upon to decide or consider this branch of the case.

The railroad company, defendant, or the stockholders therein, might seek to avoid and set aside the action of the board of directors, in assuming any or all of the claims and demands which were by the board of directors audited and allowed against the company. But the voice of the company is not heard in its own behalf in this case. The personal interest of the directors in this suit has risen superior to that of the company which they represent. A very large majority, in amount, of the claims audited and allowed by the board of directors, and for which these bonds were issued, were the personal claims and demands of the directors themselves, and embraced almost every conceivable demand. Should any one care to examine, in the light of the law, the action of this board of directors in the management of the affairs of the company, the following authorities will be found applicable and instructive: *Pierce*, R. R. 36, 40; *Field, Corp.* §§ 162-167, 172-175, and notes; *Perry, Trusts*, 207, 814; *City of San Diego v. S. D. & L. A. R. Co.* 44 Cal. 106; *Wilbur v. Lynde*, 49 Cal. 290; *Forbes v. McDonald*, Id. 98; *Chamberlain v. P. W. G. Co.* 54 Cal. 103; 1 *Lead. Cas. Eq. (H. & W.)* 208-222; *Cumberland Coal Co. v. Sherman*, 30 Barb. 553; *Wardell v. Railroad Co.* 103 U. S. 651.

Tested by these authorities, the action of this board of directors would, in many respects, be subject to criticism at least.

Let final decrees be entered in each of the above-entitled cases, in accordance with the opinion herein expressed.

CREW v. ST. LOUIS, K. & N. W. RY. CO.¹

(Circuit Court, E. D. Missouri. April 26, 1884.)

1. EVIDENCE—BURDEN OF PROOF.

In an action for damages for an injury caused by the defendant's negligence, the burden of proving the negligence alleged is on the plaintiff; the burden of proving contributory negligence is on the defendant.

2. SAME—PRESUMPTION OF FACT.

Other things being equal, positive testimony is more to be relied upon than negative.

3. NEGLIGENCE—SELECTION OF EMPLOYEES.

It is the duty of railroad companies, in employing servants, to use care and diligence, to select only those persons who are fit and proper for the positions they are intended to fill. The degree of care required is measured by the nature of the duties to be performed by the servants. The more important the duties the greater the care.

4. SAME—NEGLIGENCE OF CO-EMPLOYEE.

Where an employe of a railroad company is injured through the negligence of a co-employe the company is not liable unless the employe at fault was incompetent, and was known, or might, by the use of diligence, have been known, to be so when employed, or was retained in his position by the company after it knew, or should have known, of his incompetency.

5. SAME.

But where the negligence of the co-employe, in combination with the company's negligence, causes the injury, the company is liable.

6. SAME—INTEMPERATE CONDUCTOR.

It is an act of negligence on the part of a railroad company to employ or keep in its employment a freight conductor known to be intemperate, or who is intemperate, and whose intemperance it might have discovered by the use of proper diligence.

7. SAME—NEGLIGENCE OF CO-EMPLOYEE.

Where an employe of a railroad company is injured without negligence on his part, by an accident contributed to by the negligence of a co-employe, whom it was negligent on the part of their employer to employ, the company is liable.

8. SAME—WHO ARE NOT CO-EMPLOYEES.

Train dispatchers and train masters are not co-employees of locomotive firemen, within the meaning of the rule as to negligence of co-employees.

9. SAME—RULES AND REGULATIONS.

It is negligence on the part of railroad companies to fail to adopt such rules and regulations as are proper and necessary for the protection of the safety of its employes.

10. SAME.

It is equally negligent to adopt rules tending to impair the safety of employes.

11. SAME—USAGES AND CUSTOMS—DUTY OF EMPLOYEES.

It is the duty of the employes of railroad companies to comply with all reasonable rules and regulations of the company, and all reasonable usages and customs of the road, which are brought to their knowledge.

12. SAME—EXEMPTION FROM RESPONSIBILITY FOR NEGLIGENCE.

A railroad company cannot exempt itself from responsibility for negligence by its rules and regulations.

13. SAME—CONTRIBUTORY NEGLIGENCE.

Where the plaintiff's own negligence has directly tended to cause the injury complained of he cannot recover.

14. SAME.

Employees of railroad companies are bound to use that degree of care to escape injuries which the nature of their employment calls for.

¹Reported by Benj. F. Rex, Esq., of the St. Louis bar.

15. SAME—INJURIES SUSTAINED IN THE PERFORMANCE OF DUTIES OUTSIDE OF THE SCOPE OF EMPLOYMENT.

Where a man voluntarily assumes duties that do not belong to him, and is injured in consequence of his own ignorance, negligence, or lack of skill, combined with the negligence of defendant, he cannot recover; but if a subordinate is commanded by his superior to do anything outside of his employment and which he is not competent to perform, and his lack of skill or ignorance, combined with the negligence of his employer, causes him to suffer an injury, the question of whether or not he has been guilty of negligence is a question of fact for the jury.

16. MEASURE OF DAMAGES.

In computing damages for a physical injury, impairment of capacity to earn money, loss of time, and the pain and anguish suffered, should be taken into consideration.

Motion for a New Trial.

This was an action brought by a locomotive fireman to recover damages for a physical injury alleged to have been caused by the negligence of a freight conductor in the defendant's employment.

MCCRARY, J., (*charging jury orally.*) You are, I suppose, aware that the controlling question in this case is the question of negligence. The plaintiff's allegation is, that he was injured by the negligence of the defendant, the St. Louis, Keokuk & Northwestern Railway Company. That he was injured while in the service of that company is not disputed; and the case must turn, under the facts given to you in evidence and the law as the court will state it, upon your decision of the question whether the railway company was guilty of negligence causing or contributing to the plaintiff's injury; and if that is found in the affirmative, then the other question, whether the plaintiff himself was guilty of contributory negligence; that is, negligence on his part which contributed to his injury. These questions you are to determine upon the proof that is before you, in the light of the law, as I shall state it.

The particular negligence which the plaintiff alleges or charges against the railway company is—*First*, in employing one Shields to act in the capacity of a conductor upon one of its freight trains, the said Shields being an unfit and improper person to perform the duties of that office, by reason, as is alleged, of being addicted to habits of intemperance. That is the allegation of the plaintiff. It is for you to say from the proof whether that allegation is sustained. In considering it you will bear in mind the well-known rule of evidence, that positive testimony is always more to be relied upon than negative testimony. If certain witnesses testify to having seen particular things, and others testify that they did not see them, the testimony of those who affirm is more to be relied upon than the testimony of those who deny. And so in regard to a fact of this character. The positive testimony of witnesses that a man was intoxicated at a particular time is better than the testimony of those who say that he was not intoxicated.

The law upon this subject is that it is the duty of a railroad company in employing its servants to use ordinary care and diligence to

select only those who are fit and proper persons to be engaged in that duty. I use the term "ordinary care and diligence," but in this connection these words have a different meaning from what they would have in some other connections. The care and diligence which is required is measured by the nature of the duties to be performed by the servant who is employed. If he is employed to perform very difficult and dangerous duties, and if by the neglect of these duties human life may be imperiled, then, of course, the care which the railroad company must exercise in this selection is much greater than it would be if he were employed to perform other and less important duties. It has been said by the supreme court of the United States that it is not improper, in connection with this subject, to say that a railroad company must exercise proper care and caution, because the care and caution to be exercised in this selection of agents to discharge duties so important as these is great, and more than would be required with respect to other matters; and I may say that the very same rule applies also to the other branch of the subject. The diligence which was required of the plaintiff himself in the performance of his duties as an employe was such as the circumstances and surroundings required him to exercise. If he was performing a very dangerous duty, he was called upon to exercise corresponding care and diligence, and so with regard to the employment of this man Shields as a conductor. If you find from the evidence that he was a person of intemperate habits, the court charges you as a matter of law that he was an unfit person to be employed in such service, and if the railroad company knew the fact, or if by proper diligence it could have ascertained the fact, it was negligence on its part to employ him. Furthermore, if, after his employment the railroad company was advised, through its managing agents, of course, of the fact that he was an intemperate and improper person and failed to discharge him, or if by the exercise of proper caution and care it could have ascertained the fact of his being an improper person and did not do so, then his employment or detention, as the case may be, was negligence on the part of the railway company. It does not, however, necessarily follow from the fact that the defendant employed an incompetent and unfit person as conductor that the plaintiff's injury resulted therefrom. It is the duty of the plaintiff to show, by a preponderance of testimony, that the accident which resulted in his injury was caused in whole or in part by the negligence of this incompetent and unfit conductor, if you find that he was such.

It is also charged as a matter of negligence against the railway company that this conductor was guilty of certain acts of negligence, and it is necessary that I should say to you here that if you find that the conductor was an unfit and improper person to be employed in this capacity, and the company had notice, within the rule that I have laid down to you, then his negligence becomes the negligence of the company, and for which the company is responsible. In view

of that rule, the plaintiff has charged that this conductor, being thus unfit and incompetent, was guilty of certain acts of negligence which contributed to the injury complained of. Those acts of negligence are as follows: It is stated in the petition that the conductor negligently delayed his train at the station mentioned; that while the train was delayed at the station he negligently failed to give any warning to an approaching train; that he failed to carry three red lights on the rear of his car for the purpose of giving notice to an approaching train; and that the defendant was guilty of negligence, independently of any act of this conductor, by failing to adopt such rules as were necessary and proper for the protection of the safety of their employes in this particular case,—a rule by which this approaching train would be warned of the fact that the train with which it collided was at the station. It is for you to consider, upon all the proofs in the case, whether any of these allegations of negligence against the railway company have been sustained.

A good deal of discussion has been had before you about the rules of the railway company, and I have been requested by counsel to give my views with respect to the construction, force, and effect of a number of them. I do not propose, however, to go over all of them, but shall only refer specifically to one. I say generally that the railway company has a right, and it is its duty, to make rules for the protection of the safety of its employes, and such rules its employes are bound to regard and obey. But under the form of making rules, of course, a railroad company cannot exempt itself from negligence. Its rules must be such as tend to the protection of the lives of its employes. With this general statement in regard to the rules, you may take and consider them. They are before you in evidence. I will say to you, however, that the terms which are employed in these rules may be explained and understood, in the light of the testimony, as to what is understood by the words employed in railroad parlance among railroad men. Rule 4, under the head of "signals," is important to be considered in this connection, and I will read it:

"Two red signal-lights must be carried on the rear of each passenger-train, three red lights on the rear of each freight or other train, and one on the rear of the tender of the engine, if the engine is alone, when running at night."

By the terms of this rule three red lights are required to be kept on the rear of a freight train, and one of the allegations of the plaintiff's petition is that by reason of a failure to comply with this rule the collision occurred. You will determine from the evidence how many red lights were upon that car and where they were placed, and when you have so determined you will decide, upon the evidence, whether this rule was complied with, and if it was not complied with, then whether the absence of one or two of the red lights, as the case may be, was the cause of the collision. If you believe from the evidence that the fact that there was but one light there in sight from the rear as this train approaches, and that that light was dim, so

that the engineer in charge of the approaching train was led to believe that it was a light at the bridge, and not a light upon a freight train, and that if the three lights had been there in their proper places the collision would have been avoided; and if you also believe from the evidence that the plaintiff was not guilty of any contributory negligence,—then the plaintiff is entitled to recover; but if the absence of this light did not contribute to this accident, if it would have occurred if all the lights had been there, or if the plaintiff, by his negligence, contributed to the injury,—then he cannot recover.

It is, perhaps, necessary that I should explain to you a little more fully what is meant by the negligence of the railroad company. I say, in general terms, that the plaintiff must show that the railroad company was guilty of negligence which caused the injury; but I do not mean by that that the negligence of the railroad company must have been the sole and only cause of this injury. It may be that you will find upon the testimony that the railroad company and the co-employees of the plaintiff were guilty of negligence, and that the negligence of the two contributed or combined to cause the injury. If that be so, and the plaintiff himself was free from negligence, he is entitled to recover. It is enough, in that case, to show that the negligence of the railroad company contributed to, that is, had a share in causing, the injury. But if, after having shown that the railroad company was guilty of negligence within the meaning of the rule, as I have stated it, it is still necessary for the plaintiff to show, or, at least, it must appear from the evidence, that the plaintiff was not guilty of contributory negligence. The burden, however, of showing contributory negligence on the part of the plaintiff is upon the defendant, while the burden of showing the negligence of the defendant is upon the plaintiff.

A good deal has been said about the custom and usage which existed at the time of the accident upon this railroad. The employees of a railroad company are bound to take notice of all reasonable rules which the company may establish for their protection. They are also bound to take notice of the customs and usages of the company, if they have been in the service of the company long enough to ascertain what they are. What I have said about rules I must repeat in regard to customs. Those customs must be reasonable, they must be proper, they must be such as tend to the safety of the employees. In other words, the railroad company cannot, either by rule or custom, exempt itself from liability for what in law is negligence. So that it comes back, after all, to the question of negligence; and it might be that there would be negligence by the mere fact of making a rule if it was one which in its nature did not tend to protect, but rather tended to endanger, the lives of the employees. I do not say that any of the rules of this company are of this character, but I speak in regard to rules and customs generally, and say that they must be reasonable and proper, and being such, the employees must take notice of them,

and they are bound by them. The negligence of the persons who are employed by the railroad company to direct the movements of trains, by telegraph or otherwise,—as, for example, the train dispatcher, train-master, or whoever the persons are,—is not chargeable to a person occupying, as this plaintiff did, the position of a mere fireman. The negligence of such persons is the negligence of the company, if there be such negligence shown by the testimony in this case. And so it is a proper question for you to consider whether the rules of this company were such as reasonable care and prudence on the part of the company required them to make for the safety of the persons operating the trains. There is a rule here which requires the sending out of signals where a train is detained upon a track, but it is said that that applies only to trains detained elsewhere than at the stations, and the testimony seems to show that such is the understanding of the rule. If you find that is the meaning of the rule, as it is understood by the employes of the company, and that it is a reasonable and proper rule, then you must also find that the plaintiff was bound to take notice of it, and to act in view of it.

There is one view of the case in which you may be called upon to consider the question whether this accident was caused by the contributory negligence of a co-employe of the plaintiff. If you find that the company was guilty of negligence, and that the plaintiff was not guilty of negligence, then you will inquire whether the accident occurred by reason of the negligence of the plaintiff's co-employe. I think I must correct that statement, because it is not exactly as I intended to make it. If the railroad company is shown to have been negligent itself in employing an improper person to act as conductor, and the plaintiff was not guilty of contributory negligence, then the question of the negligence of the plaintiff's co-employees is entirely immaterial, and you need not consider it at all; because, as I have said, the negligence of the railroad company, combined with the negligence of a co-employe, makes the railroad company liable; but if the railroad company was not guilty of negligence in the employment of this man as a conductor, or if the negligence of the company did not contribute to the injury, then it might be claimed, perhaps, that the injury resulted from the negligence either of the plaintiff himself or of his co-employees. If it resulted from either, he cannot recover. That is what I desire to state. Unless the company was guilty of negligence, the plaintiff cannot recover, whether his own negligence or that of his co-employees was the occasion of the injury. So that the case must turn upon the question whether the company, in the employment of this conductor, or in the failure to make the rules that might have been made,—if you find it to be so,—for the protection of trains running on the same track, or any of those matters alleged in the petition, was guilty of negligence.

When you come to the question of the alleged contributory negligence of the plaintiff, you will have then to consider the question that

I was about to mention a moment ago. It is said that the plaintiff was negligent from the fact that this train was running at a dangerous rate of speed, and that proper care was not taken to stop it before it came to the station. If he was, and by that negligence he contributed to his injury, he cannot recover; but if he was acting outside of his duties as fireman, then the question arises whether he was guilty of negligence. He was called upon, it appears from the evidence, temporarily to occupy the place of the engineer. Now, the law upon this subject is that if a man voluntarily assumes duties that do not belong to him while in the service of the railroad company, if he takes the risk of the performance of those duties, or of his incompetency to perform them, he is guilty of negligence, and if that negligence contributes to the injury, he cannot recover. But if one man is placed by the company under the orders of another, and in obedience to those orders he undertakes a duty which is not within the line of his employment, it is for the jury then to determine whether in obeying such orders he is guilty of negligence. And so here. If you find that Mr. Crew, the plaintiff, voluntarily undertook to act in the capacity of engineer for the time being, and while so acting was guilty of negligence, and that negligence contributes to his injury, then he cannot recover; but if you find that he was directed by his superior officer, the engineer, to take his place for the time being, and that what he did while so acting was in pursuance of the order of his superior, then you are at liberty to consider, upon the facts as they are developed, whether his action was negligence on his part or not. If the train was running at a high and dangerous rate of speed, and proper efforts were not made to check it before reaching the station, in accordance with the rules of the company, and in accordance with the duties which devolved upon the men in charge of it, then, of course, somebody was guilty of negligence in that respect; and if you find that that is so, then your only inquiry in regard to that will be whether it was the negligence of the plaintiff, or the negligence of his co-employee; in other words, whether he was voluntarily acting in the capacity of engineer, and therefore for the time being responsible for the movement of the train, or whether he was for the time being acting under the orders of his superior, and in so doing whether he was guilty of negligence or not.

Mr. Trimble. Will your honor allow me to make a suggestion. If the co-employee was guilty of negligence, and the company was not guilty of negligence, then the plaintiff cannot recover.

Judge McCrary. I am speaking now, of course,—and it is necessary for you to bear that in mind, gentlemen,—upon the hypothesis that the conductor was an unfit and improper person for his post, and that his negligence contributed to the injury of the plaintiff. That being established, then you come to the question of his contributory negli-

gence, and in considering that you may consider whether he was acting voluntarily in the position he was in, or whether he was acting under orders of a superior. That is all I need to say, gentlemen, upon the main question in the case,—the question of negligence. If you find for the plaintiff, you will allow such damages as he has sustained, not exceeding the sum of \$10,000. In passing upon the question of damages, you may consider the loss of time to the plaintiff, if you find any, his impaired capacity to earn money, his physical pain and suffering, and the anguish to which he may have been subjected. It is for the jury, upon all the facts and circumstances, to allow the plaintiff such a reasonable sum as they may think him entitled to.

I may add, in regard to the custom which may have existed on this railroad with respect to its employes, that if the custom was a reasonable one, and the plaintiff knew of it, of course he was bound to obey it. I think I said that to you before, but the counsel for the defendant (Mr. Trimble) thinks that perhaps I did not.

Mr. Trimble. I ask your honor to instruct the jury that if the plaintiff knew of the custom, whether it was reasonable or not, he was bound to follow it.

Judge McCrary. I decline to give that instruction.

The jury returned a verdict for the plaintiff in the sum of \$5,000.

The following opinion was rendered upon a motion by the defendant for a new trial.

George F. Hatch and Hagerman, McCrary & Hagerman, for plaintiff. James Can and H. H. Trimble, for defendant.

BREWER, J., (*orally*.) The motion for a new trial in this case was argued before us the other day. In the examination and decision of this matter we are, naturally, under considerable embarrassment from the fact that the case was tried before another judge. While this is nominally a motion for a new trial, pending in the same court in which the trial took place, still, being unfamiliar with the testimony and having seen none of the witnesses, it really comes before us in the same way that it would come before an appellate court. The question in all such cases is not whether some technical error may not have crept into the instructions, but whether, taking the case as a whole, and looking at the instructions as a whole, it is apparent that the law was presented fairly and correctly to the jury. We are not in a position to review the testimony and say that it did prove this or that fact in the case.

A single objection was presented in the argument on the admission of testimony, but I do not think that that is of any significance. The common law prevails in this state, and in order to charge the railroad company for an injury to one employe by another it must

appear, not merely that the co-employee was guilty of negligence, but that the company was responsible for that negligence by reason of having employed, knowingly, or continued knowingly in its employ, an incompetent servant. The judge who tried the case presented the law to the jury very clearly in regard to that; that is, that before the company could be charged with this injury it must have retained in its employment an incompetent servant, knowing him to be incompetent. It was not seriously contended in the argument that the testimony was not ample to show that the conductor of the way-freight train was not a habitual drunkard, and known to be such by the company. There were two or three charges of negligence against him,—one of which was in failing to send out signals to the rear while stopping at the way station of Old Monroe; and another, in failing, as the rules of the company required, to have three red lights on the rear end of the caboose. Consequently, in presenting the questions to the jury, on the testimony, Judge McCrARY placed it before them principally upon this man's alleged dereliction in failing to have proper signals,—that is, such red lights as were necessary on the rear of the caboose,—in consequence of which failure the following train was deceived as to the location of the way-freight train, and ran into it, causing the accident. It seems to us that Judge McCrARY stated the question fairly and fully for the instruction of the jury, and their verdict, which was substantially that the conductor, Childs, was guilty of negligence in failing to take the proper precautions by putting the requisite signals on the rear end of his train, must be sustained.

There was also a question in this case, as there is in almost every case of this kind, as to the alleged negligence of the plaintiff; and the instructions of the court were that if he was guilty of contributory negligence which directly tended to cause the injury, he could not recover. In looking at these instructions, it seems to both of us that the court stated the law fully and clearly to the jury, and, notwithstanding one or two technical criticisms that have been made upon some of the expressions in the instructions, it seems to us that the law was presented to the jury correctly, and that their verdict upon the facts must be sustained.

The motion for a new trial will therefore be overruled.

ALFORD v. WILSON.

*(Circuit Court, D. Connecticut. April 29, 1884.)***CONTRACT—FACTS OF CASE REVIEWED.**

Where a letter was written to the defendant proposing that as a part of a contract he should agree to furnish \$15,000 in stock, and requesting him to signify his acceptance of the terms by telegraphing back "proposition as to fifteen thousand stock accepted," and the defendant telegraphed "I will provide for the fifteen thousand stock," intending the dispatch to be regarded as an acceptance, *held*, on the facts found by the court, that a refusal to furnish the stock rendered him liable.

SHIPMAN, J. This is an action at law which was tried by the court, the parties having, by a duly signed written stipulation, waived a trial by jury. Upon said trial so had to the court, both parties appeared, and having been fully heard by their counsel and with their witnesses, I find the following facts to have been proved and to be true:

In June, 1882, the Wilson Sewing-machine Company of Chicago was a corporation for the manufacture and sale of Wilson sewing-machines, located in Chicago, and theretofore incorporated under the laws of the state of Illinois, with a capital stock of \$500,000. The defendant, a citizen of Illinois, was the president of the company, and owned all its stock except 40 shares. The plaintiff was at the same time living and doing business in the city of New York, under a contract with said company, dated January 4, 1882, by which he had the exclusive power of selling the said machines in the states of New York, Connecticut, New Jersey, Delaware, Maryland, and Virginia, and the District of Columbia, and specified portions of Pennsylvania and North Carolina, and by which the company agreed to sell to him its machines at specified prices. In June, 1882, the defendant came to New York city for the purpose of collecting or settling the plaintiff's debt to said company of about \$20,000. After negotiations with the plaintiff and his bondsmen, said contract was terminated by mutual consent on June 23, 1882, and 16 notes for said indebtedness were given by the plaintiff to said company, each for the sum of \$1,250, each four of said notes being also signed by one of the four persons who had been his sureties for the fulfillment of said contract. Thereupon, on said day or the next, conversation and negotiations were had between the defendant on the one part and the plaintiff, and George A. Delaree, a broker, on the other part, in regard to the formation of a joint-stock company in the city of New York, with a capital of \$50,000 for the sale of said sewing-machines in the territory formerly occupied by the defendant. It was understood that the plaintiff and said Delaree should proceed and endeavor to form such a company, but as the parties differ in regard to the terms upon which the services were to be rendered, and as those terms are not necessary to the determination of this case, I make no finding upon that point. The plaintiff and said Delaree say that the defendant was to give or furnish each of them \$5,000 paid-up stock in this company. The defendant says that he simply agreed to pay for the legal expenses of organizing such a company, provided they did not exceed \$50.

About June 24th the defendant returned to Chicago, and the other two persons made some attempt to start this proposed corporation. The defendant, in a few days, conferred with James H. Sheldon, the general manager of the company, as to the expediency of forming a company at the east for the purchase of the machinery, tools, fixtures, and good-will of the business of said Chicago corporation. This necessarily involved the abandonment of the en-

terprise in which the plaintiff and Delaree were engaged. The result of this conference was that it was arranged between the defendant and said Sheldon that the latter, he being still in the employment of the Chicago company and upon a salary, should go to New York city for the purpose of organizing this new company, and should see the plaintiff and said Delaree, and see if they would co-operate and assist in this enterprise and abandon the other. No definite plan for the new company was agreed upon between the defendant and said Sheldon. The general plan suggested by the defendant was to have a company with a nominal capital of \$1,000,000, and with a paid-up capital of \$250,000 or \$300,000, and power in the company to issue and sell the residue of the unpaid capital from time to time. The defendant said that he would take a reasonable amount of the stock, and, if necessary, the amount of \$50,000. He told said Sheldon that if the project was carried out he would recommend that stock to the amount of \$10,000 or \$15,000 from this residue of stock should be given by the new company to Sheldon, which stock, when so given, would be paid up and non-assessable. The business of negotiating with the plaintiff and Delaree was left to the judgment of said Sheldon, without definite and exact instructions. Said Sheldon reached New York city on July 4, 1882, and had two interviews with the plaintiff and Delaree on July 6th, in which he proposed to them to join him in the new plan and discontinue their efforts for the organization of a company for the sale of the machines. He stated the outline of the plan as hereinbefore given, and suggested that in the new company the plaintiff might be secretary and treasurer, and Delaree might have a position for the establishment of agencies, and that he hoped to get the position of general manager, and that the attainment of these positions would justify the expenditure of labor to get up the company. On July 7th Sheldon met the plaintiff and Delaree again. They said that they did not feel that they had a tangible enough future in the proposed company; that while the positions which had been named were well enough, there was a lack of certainty about the thing, and they wanted something more definite in the way of compensation. They virtually declined to engage in efforts for the new company upon the mere hope or promise of position in the company, and they required a promise of paid-up stock. The suggestion was made by Delaree that the defendant could ask \$15,000 more for "the plant," as it was termed, and take more stock than had been proposed, and that from this additional stock a compensation in stock could be furnished to the three for their services. The result of the conversation was that a letter should be written by Sheldon to the defendant on the subject, with a request to reply by telegraph, and if the reply which it was expected would be received by the following Monday was favorable, Delaree would immediately accompany Sheldon to Connecticut upon the business of the company, and Alford would also furnish his aid, influence, and services in furtherance of the enterprise. The following letter was thereupon written by Sheldon, and was sent to and received by the defendant:

"NEW YORK, July 7, 1882.

"*To W. G. Wilson, Esq.*—DEAR SIR: There now seems to be a complete understanding between Delaree, Alford, and myself, and to carry out the idea they have for compensation for Alford's built-up influence, Delaree's services, etc., it is proposed that you add \$15,000 to the amount you will take in stock,—the amount has not been indicated yet what that is,—which \$15,000 in stock is to be issued to Alford, Delaree, and myself, each \$5,000. If you will telegraph me on Monday morning saying, proposition as to fifteen thousand stock accepted, it will satisfy all parties, and the effort will be made with a will. We will have all the information by that time which will enable the effort to go forward without interruption, and I think with success.

"Yours truly,

J. H. SHELTON.

"P. S. The amount of stock proposed for myself is in keeping with the others, and it is better to have it so as it keeps the idea complete about the origin of the movement. Please have a draft for June salary sent me, and oblige,
J. H. S."

On Monday, July 10, 1882, the following telegraphic reply was sent by the defendant to Sheldon, and was shown to the plaintiff and to Delaree, who thereupon declared themselves satisfied and went to work to carry out the new enterprise:

"To J. H. Sheldon, 37 West 14th St.: I will provide for the fifteen thousand stock.
W. G. WILSON."

In the foregoing statement I have found only such facts as are admitted to be true by Mr. Sheldon, who is a witness for the defendant, and have made no finding in regard to details, upon which the witnesses differ. I further find that when the defendant received said letter of July 7th, he knew that it was a proposition for him to furnish \$5,000 paid-up stock to each one of the three, Alford, Delaree, and Sheldon, in case of the success of the new enterprise; and that, while he was not willing to commit himself to the terms of the proposition, as made, viz., as to the manner in which the stock was to be procured by him, he was willing to promise, and did promise by his telegram, to furnish the \$15,000 stock, as requested in the letter, viz., \$5,000 paid-up stock to each, and that he intended that the said Delaree and Alford should understand, and knew that they would understand, that the telegram was, in substance, a favorable reply to and acceptance of the proposition contained in said letter of July 7th. The telegram was not a refusal of the proposition, nor was it a promise to do what had not been asked, viz., to furnish unpaid stock, nor was it written to deceive the New York gentlemen, and induce them to believe that it meant something which the writer did not mean, but was an intentional promise to provide or furnish to each of them \$5,000 of stock, in case of success, but, intentionally, did not tell how the stock was to be provided, whether by gift from the company or in some other way, but it was to be provided by or through him in some way.

In consideration of this promise, and relying upon it, the plaintiff entered upon the attempt to organize a new company for the purpose proposed by Mr. Sheldon, and the defendant knew or believed that upon such promise he would so enter. Vigorous efforts were made to establish the company at Norwalk and at New Britain, in each of which the plaintiff participated, and in the New Britain effort he was especially active from the fact that he had lived in that city for some years, and knew its inhabitants. Through the newspaper notices of the Norwalk and New Britain efforts the attention of a Wallingford gentleman was called to the proposed enterprise, who took hold of the idea with promptness, and through his intervention the chances of success at Wallingford were brought to the defendant's notice, who sent Mr. Sheldon there, and soon after the company was organized in that town. The plaintiff did not visit Wallingford for the purpose

of helping along the scheme, and did not solicit Wallingford people to take stock, and did not procure any stock to be subscribed in the new company, but he indirectly helped the enterprise by means of his New Britain operations.

The Wilson Sewing-machine Company of Wallingford was formed, with a capital of \$300,000. The defendant subscribed for 4,000 shares of \$25 each, and paid for the same nominally by his check or draft for \$100,000, but really by the tools, machinery, and fixtures of the old company, which were estimated at \$100,000. The new company also purchased the merchandise, furniture, and fixtures belonging to the old company, and at its Chicago office. Wallingford people subscribed for \$106,600 of the stock of the new company. Sheldon nominally subscribed for \$93,400 of said stock for himself, but really subscribed for the defendant, who paid the first installment, and afterwards sold all the stock at par. A certificate for 200 shares of the 4,000 shares which were subscribed and paid for by the defendant was, by his direction, issued to Mr. Sheldon, who paid nothing for it. The changes from the original plan or idea of the defendant in regard to the company were voluntarily made by him, without suggestion to the plaintiff, or to Delaree, or to Sheldon, that his relations to them or his contract with them were changed thereby, or that the company as organized or to be organized was not the company which they undertook to promote, or that the modification of his plan modified his contract with them.

The influence of the plaintiff was valuable to the defendant. Had the plaintiff opposed the scheme, it would have failed. Had he not been actively at work in its behalf, it might have failed, because his position as the New York salesman of the sewing-machines, and his knowledge of the business, gave him facilities for directing the opinions of the people, which were valuable to the success of the plan. The defendant desired to sell the old company's property to a new company at the east. To do this, he knew that it was important to enlist the services of the plaintiff, and the letter of Mr. Sheldon gave the information that in order to obtain that assistance it was necessary to promise to furnish \$5,000 in paid-up stock. The defendant made the promise, and obtained thereby the services of the plaintiff,—pecuniary benefit and success. Demand was made by the plaintiff on October 9, 1882, and on October 18, 1882, upon the defendant for said stock. The defendant refused on October 13, 1882. No reply was made to the demand of October 18th. He was able at the time of the demand to comply with it and to furnish to the plaintiff said stock.

The first meeting of the new company was held September 2, 1882. The articles of association were duly published September 9, 1882, and the certificate of organization was filed in the office of the town clerk of Wallingford on September 30, 1882. Said company was duly organized before the date of said demand. The stock of said com-

pany sold at par, and that was its market value at and for three or four months after its organization. There are divers disputed facts between said parties, which I have not referred to, but the testimony of Mr. Sheldon, his letter, and the telegram contain both the undisputed and the vital facts in the case.

In actions for damages upon breach of contract, interest is often a matter of discretion. *Redfield v. Ystalyfera Iron Co.* 3 Sup. Ct. Rep. 570. In this case, while the market price of the stock was at par for some months after the organization of the new company, and while the defendant was able to sell his stock at par, I think that was the full price of the stock, and that the seller was pecuniarily fortunate, and that the quantity of the plaintiff's damages from not having received the stock do not call for interest.

Let judgment be entered for the plaintiff for \$5,000.

HEENRICH v. PULLMAN PALACE CAR CO.

(*District Court, D. Oregon.* 1884.)

1. LIABILITY OF THE MASTER FOR THE ACT OF HIS SERVANT.

A master is liable for the act of his servant when done within the scope or general course of his employment, although done contrary to the master's orders.

2. SAME—COMPLAINT—DEMURRER.

An answer to a complaint by a passenger against a common carrier for injuries caused by the negligent discharge of a pistol by the car porter, which alleges merely that the porter received the pistol from another passenger, in violation of the company's rules and directions to receive no package, baggage, or article of luggage from passengers, is demurrable.

Action for Injury to the Person.

Julius Moreland, for plaintiff.

Charles B. Bellinger, for defendant.

DEADY, J. This action is brought by the plaintiff, a citizen of Minnesota, against the defendant, a corporation formed under the laws of Illinois, to recover \$25,000 damages for an injury to her person, received while traveling as a passenger on a Pullman palace car attached to a train on the Northern Pacific Railway, running from St. Paul to Portland, and caused, as alleged, by the negligent handling of a pistol by the porter in charge of said car while "in the discharge of his duty as such porter," and "while attending to the defendant's business," whereby the same fell on the car floor and was discharged, the ball entering the thigh of the plaintiff, and inflicting a dangerous wound therein. The answer of the defendant controverts the allegation of the plaintiff that the porter "was in the discharge of his duty" when he let the pistol fall; and also contains a plea in bar of the action—that the pistol mentioned in the com-

plaint was the property of a passenger on said train; that said porter received it from the owner, and was carrying it through the car at the request of said owner, and not otherwise, at the time of the discharge and wounding in the complaint mentioned; and that it is one of the defendant's rules and directions to all its car porters that they are not permitted to receive any package, baggage, or article of luggage from passengers, or to become custodians thereof; which rule and order was, at the time of the taking and carrying of said pistol by said porter, well known to him; and that said porter, in so receiving and carrying said pistol, was acting in violation of the defendant's orders. To this new matter the plaintiff demurs, for that it does not constitute a defense to the action.

A corporation is liable to the same extent as a natural person for an injury caused by its servant in the course of his employment. *Moore v. Fitchburg Ry. Corp.* 4 Gray, 465; *Thayer v. Boston*, 19 Pick. 511.

In Story, Ag. § 452, it is laid down that a principal is liable to third persons in a civil suit for the frauds, deceits, concealments, misrepresentations, torts, negligences and other malfeasances or misfeasances and omissions, although the principal did not authorize or justify, or participate in, or, indeed, know of such misconduct, or even if he forbade the acts or disapproved of them. In all such cases the rule applies *respondet superior*; and it is founded on public policy and convenience; for in no other way could there be any safety to third persons in their dealings, either directly with the principal, or indirectly with him through the instrumentality of agents. In every such case the principal holds out his agent as competent and fit to be trusted, and thereby, in effect, he warrants his fidelity and good conduct in all matters within the scope of his agency.

In *Ramsden v. Boston & A. R. Co.* 104 Mass. 117, it was held that the corporation was liable to an action for an assault and battery, for the act of its conductor in wrongfully and unlawfully attempting to seize the parasol of a passenger for her fare. In delivering the opinion of the court, Mr. Justice GRAY said:

"If the act of the servant is within the general scope of his employment, the master is equally liable, whether the act is willful or merely negligent, or even if it is contrary to an express order of the master."

In *Philadelphia & R. Ry. Co. v. Derby*, 14 How. 468, a servant of the corporation ran an engine on its track contrary to its express order, and thereby caused a collision, in which the defendant was injured, and it was held that the corporation was liable for the injury. In delivering the opinion of the court, Mr. Justice GRIER said:

"The rule of *respondet superior*, or that the master shall be civilly liable for the tortious acts of his servant, is of universal application, whether the act be one of omission or commission, whether negligent, fraudulent, or deceitful. If it be done in the course of his employment, the master is liable; and it makes no difference that the master did not authorize, or even know

of, the servant's act or neglect; or even if he disapproved or forbade it, he is equally liable, if the act be done in the course of his servant's employment."

The authorities to this point might be multiplied indefinitely, but these are sufficient. Tried by them, this defense is clearly bad. It is not alleged that the corporation commanded the porter to do the act which caused the injury to the plaintiff, and therefore if it was not done in the course of his employment it is not liable therefor. But if the act was done in the course of his employment, the corporation is liable to the plaintiff for the injury caused thereby, notwithstanding the order to the porter. The case, so far as appears, must turn on the issue made by the denial of the allegation that the porter was in the discharge of his duty, or the course of his employment, at the time he let the pistol fall. And whether he was acting contrary to his employers' orders or not is altogether immaterial.

In Whart. Neg. § 157, in discussing this subject, the learned author says:

"That he who puts in operation an agency which he controls, while he receives its emoluments, is responsible for the injuries it incidentally inflicts. Servants are, in this sense, machinery, and for the defects of his servants, *within the scope of their employment*, the master is as much liable as for the defects of his machines."

And Cooley, Torts, 539, says:

"It is immaterial to the master's responsibility that the servant, at the time, was neglecting some rule of caution which the master had prescribed, or was exceeding his master's instructions, or was disregarding them in some particular, and that the injury which actually resulted is attributable to the servant's failure to observe the directions given him. In other words, it is not sufficient for the master to give proper directions; he must also see that they are obeyed."

On page 540 the learned author gives an apt illustration of the rule. A farm servant burned over the fallow when the wind was from the west, and thereby destroyed the adjoining premises on the east, although he had been directed, on that very account, not to set out the fire unless the wind was in the west, and the master was responsible.

The cases cited by counsel are not in conflict with this conclusion. They are Whart. Neg. § 168; *Tuller v. Voght*, 13 Ill. 285; *Oxford v. Peter*, 28 Ill. 435; *Foster v. Essex Bank*, 17 Mass. 508; and *Mali v. Lord*, 39 N. Y. 381. They are only to the effect, as is said in *Oxford v. Peter*, that the master is not liable "for the willful or malicious acts of his servant, unless it is in furtherance of the business of the master. The contention in these cases was not as to the rule of law, but the application of it,—whether the act complained of was done in the furtherance of the business of the master, or, rather, in the course of the servant's employment. Sometimes this is a very nice question, and difficult to determine, but the rule of law is, I think, undisputed that where the servant is acting in the course of or within the scope of his employment, the master is liable for his acts

of commission or omission, as if they were his own; and this, notwithstanding the servant may have acted contrary to his master's orders. Whether the act complained of in this case was within the scope of the porter's employment, on that occasion, will be ascertained from the evidence on the trial of the issue elsewhere made in the case.

The demurrer is sustained.

SCOPE OF EMPLOYMENT. The principal case affords merely another illustration of the well-settled rule that a master is liable for the act of his servant if within the scope of his employment, although the act in question was willful,¹ or even malicious,² or contrary to the employer's express instructions.³ The difficulty arises in the application of this principle to particular states of fact; and to discover the underlying principle which divides the cases requires careful discrimination.

A driver went out with the team on an errand of his own, and, returning, called for some of his master's goods on the way, and, while carrying them, had a collision: it was held that he was not acting within the scope of his employment.⁴ On the other hand, where the pilot of a ferry-boat departed from his usual course, between the *termini* of his route, to place a stranger upon a passing tow, without compensation to himself or his employers, the latter were held liable for a collision resulting therefrom upon proof that the same departure had been made before, and that it might indirectly benefit the employers.⁵ And the owner of a horse and cab let by the day, for use at the discretion of the driver, was held liable for the latter's negligence in running over the plaintiff, although the injury occurred when returning to the stable by an indirect route on a private errand of his own.⁶

Where plaintiff's horse was frightened by a pile of bags left temporarily at the foot of a hill, by an employe, to lighten his load while delivering goods, the employer was held liable for the damages occasioned thereby.⁷ Where a driver took a load of coal to the wrong house, and delivered it to one who had not ordered it, but subsequently paid for it, and the driver negligently left the coal-hole open, the master was held liable.⁸ A stevedore's foreman, dissatisfied with a cartman's unloading, zealously took the cartman's place, and, in throwing a package, injured the plaintiff. This was held to be evidence to go to the jury that he was acting for the stevedore. The question was, did he act, perhaps overzealously, in his employment, or did he act for a purpose of his own?⁹

¹ Mott v. Consumers' Ice Co. 73 N. Y. 543; Rounds v. Delaware, L. & W. R. Co. 64 N. Y. 129; Shea v. Sixth Ave. R. Co. 62 N. Y. 180; Howe v. Newmarch, 12 Allen, 49; Eckert v. St. Louis Transfer Co. 2 Mo. App. 36. See note by Seymour D. Thompson, Esq., 15 Fed. Rep. 66.

² Schultz v. Third Ave. R. Co. 89 N. Y. 242; Jackson v. Second Ave. R. Co. 47 N. Y. 275; S. C. 7 Amer. Rep. 448; Day v. Brooklyn City R. Co. 12 Hun, 435; Hoffman v. N. Y. Cent., etc., R. Co. 87 N. Y. 25; Cohen v. Dry-dock, etc., R. Co. 69 N. Y. 170.

³ Quinn v. Power, 87 N. Y. 535; S. C. 41 Amer. Rep. 392; Cosgrove v. Ogden, 49 N. Y. 255, S. C. 10 Amer. Rep. 361.

⁴ Rayner v. Mitchell, 25 Weekly Rep.

633. Compare Sheridan v. Charlick, 4 Daly, 338.

⁵ Quinn v. Power, 87 N. Y. 535; S. C. 41 Amer. Rep. 392.

⁶ Venables v. Smith, L. R. 2 Q. B. 279; S. C. 20 Moak, Eng. Rep. 345; Flint v. Norwich, etc., Trans. Co. 34 Conn. 554; S. C. 6 Blatchf. 158; approved in Putnam v. Broadway, etc., R. Co. 55 N. Y. 108; S. C. 14 Amer. Rep. 190; 15 Abb. Pr. (N. S.) 383, reversing 36 Super. Ct. (Jones & S.) 196. See, also, a similar case lately decided by the Minnesota supreme court, Mulvehill v. Bates, 17 N. W. Rep. 959.

⁷ Phelon v. Stilcs, 43 Conn. 426.

⁸ Whitely v. Pepper, 36 Law T. Rep. (N. S.) 588.

⁹ Burns v. Poulson, L. R. 5 C. P. 563; S. C. 6 Moak, Eng. Rep. 261.

In a recent case¹ it was sought to hold a railroad company liable for the destruction of the plaintiff's hay by fire, communicated by burning grass ignited from a fire negligently left burning by the company's section men employed to repair the track, which fire they had kindled at noon on the company's right of way for the purpose of warming their coffee. But the court held the company not liable. The court say: "The act of these section men in building a fire to warm their own dinner was in no sense an act done in the course of and within the scope of their employment, or in the execution of defendant's business. For the time being they had stepped aside from that business, and in building this fire they were engaged exclusively in their own business as much as they were when eating their dinner, and were for the time being their own masters as much as when they ate their breakfast that morning or went to bed the night before. The fact that they did it on defendant's right of way is wholly immaterial in the absence of any evidence that defendant knew of or authorized the act. Had they gone upon the plaintiff's farm and built the fire the case would have been precisely the same. It can no more be said that this act was done in the defendant's business, and within the scope of their employment, than would the act of one of these men in lighting his pipe after eating his dinner, and carelessly throwing the burning match into the grass. See *Williams v. Jones*, 3 Hurl. & C. 256." The same rule was applied in a recent English case, where the plaintiff sought to hold a solicitor, who had his office above plaintiff's warerooms, liable for damages caused by the overflow of water left running by the solicitor's clerk after washing his hands in the private room of his employer, where he had been forbidden to go.²

It is immaterial that an agent exceeds the powers conferred upon him by the principal, and that he does an act which the principal is not authorized to do, so long as he acts in the line of his duty, or being engaged in the service of his principal, attempts to perform a duty pertaining, or which he believes to pertain, to that service. This rule was applied where the gate-keeper of a railroad company detained a passenger attempting to leave the station without producing his ticket or paying his fare, as required by a rule of the company.³ A servant whose duty it is to see that goods are delivered to the proper persons, and to obtain vouchers, cannot be said to transcend his powers in endeavoring to prevent their being carried off by thieves, although there is a watchman who is charged with that duty.⁴ But, on the other hand, the contrary was held as to the malicious act of a servant in shooting a trespasser on his master's premises.⁵ And a merchant was held not liable for his employee's act in directing the arrest of a customer suspected of stealing goods from the store.⁶

CARRIER CASES. A common carrier of passengers may be liable for the act of his servant, either because it was within the scope of his employment, and, therefore, whether the injured party be a trespasser or mere licensee or a passenger, within the general rule of liability; or because the act was a breach of the carrier's contract of carriage where the injured party was a passenger.

Under the first class falls a great variety of cases. Thus, where the plaintiff jumped upon the platform of a baggage car in motion, and was ordered off by the baggage-master, the rules of the company prohibiting all except employes from riding on the platform, and requiring baggage-masters to enforce

¹ *Marrier v. St. Paul, M. & M. Ry. Co.* (Minn.) 17 N. W. Rep. 952.

² *Stevens v. Woodward*, L. R. 6 Q. B. Div. 318; S. C. 50 L. J. C. P. 231; and 29 Moak, Eng. Rep. 645.

³ *Lynch v. Met. Elev. Ry. Co.* 90 N. Y. 77, affirming 24 Hun, 506.

⁴ *Courtney v. Baker*, 60 N. Y. 1.

⁵ *Fraser v. Freeman*, 43 N. Y. 566, reversing 56 Barb. 234.

⁶ *Mali v. Lord*, 39 N. Y. 381.

them, and the plaintiff refusing, on the plea of an obstruction they were passing, was kicked off by the baggage-master, it was held that the fact that the plaintiff was a trespasser did not preclude his recovery against the company, and that its liability, based on the authority of the baggage-master and the scope of his employment, was for the jury to determine.¹ In this case, where the jury were charged that if the baggage-master acted "willfully and maliciously towards the plaintiff, outside of and in excess of his duty," defendant was not liable, it was held not error to refuse to charge that it was sufficient to exempt the defendant from liability that the act of the baggage-master was willful.

In *Shea v. Sixth Ave. R. Co.*² the complaint alleged that the plaintiff stepped upon the platform of a street car obstructing a crossing, in order to cross the street, when she was "forcibly, willfully, and violently thrown off by the driver," acting as "the servant and agent and in the employment of the defendant." It was held that the averment of willfulness, not necessarily implying malice on the part of the driver, but as well a too-zealous discharge of his duty to the defendant, did not make the complaint demurrable.

Where the injured person came upon the conveyance at the unauthorized invitation or request of the carrier's servant, the carrier may be liable for his servant's negligence. For example, the driver of a horse car offered some little girls a free ride on the platform, while his car was moving slowly, and suddenly increased his speed, so that one fell off, and was run over, the company was held liable for his negligence.³ On the other hand, where a fireman was intrusted with an engine and tender, in place of the engineer, to take it to a station for water, detached from the rest of the train, and asked a boy to turn on the water, who, while he was climbing on the tender for that purpose, was injured by the jar of the backing down of the rest of the train, at its usual speed and force, it was held that the railroad company was not liable, because the act of the fireman was not within the scope of his employment.⁴

A horse car company has been held liable for the act of a conductor in ejecting plaintiff from the car upon a charge not sustained by the jury, of disorderly conduct, although the conductor acted merely upon a mistaken impression as to the facts.⁵ A conductor has no authority to bind a railroad company by a promise to arouse a sleeping passenger at his station, so as to make the company liable for his neglect so to do. The passenger sleeps at his peril.⁶

BREACH OF CARRIER'S CONTRACT. As said in *Pendleton v. Kinsley*,⁷ "Passengers do not contract merely for ship-room and transportation from one place to another, but they also contract for good treatment, and against personal rudeness and every wanton interference with their persons either by the carrier or his agents employed in the management of the ship or other conveyance." This duty belongs to the carrier, and is not discharged by its delegation to competent employees. If the employee fails to perform that duty it is immaterial whether the failure be accidental or willful, in the neglect or in the malice of the employee; the contract of the carrier is equally broken in the negligent disregard or in the malicious violation of the duty by the employee.⁸ In the case last cited, a railroad company was held liable for the act of a conductor in kissing the plaintiff, a lady passenger, by force, the court saying: "It would be cheap and superficial morality to allow one owing a

¹ *Rounds v. Delaware, L. & W. R. Co.*
64 N. Y. 129.

² 62 N. Y. 180.

³ *Wilton v. Middlesex R. Co.* 107 Mass.
108.

⁴ *Flower v. Pennsylvania R. Co.* 69 Pa.
St. 210. Compare *Snyder v. Hannibal &*
St. Joe R. Co. 60 Mo. 413.

⁵ *Higgins v. Watervliet Turnpike Co.*
46 N. Y. 23. Compare *Bayley v. Manchester,*
etc., Ry. Co. 7 C. P. 415. S. C. 3 Moak,
Eng. Rep. 313.

⁶ *Munn v. Georgia, etc., R. Co.* (Sup. Ct.
Ga. Feb. 2, 1884) 18 Cent. Law J. 176.

⁷ 3 Cliff. 416.

⁸ *Craker v. Chicago, etc., R. Co.* 36 Wis.
657.

duty to another to commit the performance of his duty to a third, without responsibility for the malicious conduct of the substitute in the performance of the duty."

The carrier's liability in such case resting upon the ground of a breach of contract, it is immaterial whether the servant was acting within the scope of his authority or not. The case of *Isaacs v. Third Ave. R. Co.*,¹ in which a street railroad company was held not liable for the act of a conductor in pushing the plaintiff from the platform upon her refusal to alight until the car should come to a full stop, was recently said to have been erroneously decided upon the assumption that the rule of the master's liability for the assault of a servant committed upon a person to whom the master owed no duty was applicable to the case;² and the case may be regarded as overruled by the case cited, where the driver of a horse car assaulted a passenger who had endeavored to prevent the driver from beating a newsboy who jumped upon the car, and the railroad company was held liable for the assault, and upon its contract to carry the passenger safely; not as insuring him against every possible danger, but as undertaking to protect him from the negligence or willful misconduct of its servants.

In *Goddard v. Grand Trunk Ry. Co.*,³ which contains a clear and full statement of the carrier's duty to a passenger, with a review of many cases, a railroad company was held liable for the malicious act of a brakeman who, shortly after receiving the plaintiff's ticket, declared that he had not done so, and that plaintiff was endeavoring to evade payment of fare, and otherwise insulted him, and threatened him with personal violence. The court say: "The law seems to be now well settled that the carrier is obliged to protect his passenger from violence and insult, from whatever source arising. He is not regarded as an insurer of his passenger's safety against every possible source of danger, but he is bound to use all such reasonable precautions as human judgment and foresight are capable of, to make his passenger's journey safe and comfortable. He must not only protect his passenger against the violence and insults of strangers and co-passengers, but, *a fortiori*, against the violence and insults of his own servants. If this duty to the passenger is not performed, if this protection is not furnished, but, on the contrary, the passenger is assaulted and insulted through the negligence or willful misconduct of the carrier's servant, the carrier is necessarily responsible." Upon the same ground the owners of a steam-boat were held liable for an employe's assault upon a passenger who had remonstrated against his treatment of another passenger.⁴ So, also, for the clerk's assault upon a boy passenger, whom he accused of attempting to evade payment of his fare.⁵

It is worth while to notice that, though the distinction is clearly established, comparatively few of the cases in point expressly indicate the carrier's breach of contract as the basis of the decision, without reference to whether or not the act may be deemed to be within the scope of the servant's employment. Thus, where a brakeman assaulted a passenger who insisted upon entering a car which the brakeman told him was reserved for ladies, the company was held liable for the assault, upon the ground that a master is liable for even the willful or criminal act of his servant if done in the course of his employment, though the court refer briefly to the duty of a railroad company to its passengers as distinguishing the case at bar from others cited.⁶ And upon this ground a railroad company was held liable for an assault by a

¹ 47 N. Y. 122. See Moak, Und. Torts, 31.

² *Stewart v. Brooklyn & C. R. Co.* 90 N. Y. 583.

³ 57 Me. 202.

⁴ *Bryant v. Rich*, 106 Mass. 180.

⁵ *Sherley v. Billings*, 8 Bush, 147. See, also, a similar case, *Pendleton v. Kinsley*, 3 Cliff. 416.

⁶ *McKinley v. Chicago, etc., R. Co.* 44 Iowa, 314.

conductor, who attempted to seize plaintiff's property as security for her fare, which she claimed to have paid.¹

In *Goddard v. Grand Trunk Ry. Co.*² it was held, after an extended examination of the authorities, that exemplary damages might be recovered against the carrier for the willful assault of his servant; but in *Craker v. Chicago, etc., R. Co.*³ it was held that only compensatory damages were allowable.

PLEADING. A general averment that the acts of the servant were in the range of his employment is a conclusion of law, and not sufficient.⁴ An averment that defendant, by the culpable carelessness and mismanagement of itself and its employes, ran a train of cars against the plaintiff's team, lawfully traveling along the public highway, though not stating the specific acts constituting the negligence, is sufficient on demurrer.⁵ While a passenger suing a railway company need only allege, in pleading, that he was injured by the derailment of the train on which he was traveling, and that the injury resulted from negligence on the part of the defendant, without stating in what the negligence consisted, it seems that, to sustain an action of like nature by an employe, it might be necessary to state in the complaint the facts constituting the injury.⁶

WAYLAND E. BENJAMIN.

New York City.

¹ *Ramsden v. Boston, etc., R. Co.* 104 Mass. 117.

² 57 Me. 202.

³ 38 Wis. 657.

⁴ *Snyder v. Hannibal, etc., R. Co.* 60 Mo. 413.

⁵ *Clark v. Chicago, M. & St. P. Ry. Co.* (Minn.) 9 N. W. Rep. 75.

⁶ *Clark v. Chicago, B. & Q. Ry. Co.* (Cir. Ct. S. D. Iowa, Jan. 1883.) 15 Fed. Rep. 588.

McMURRY v. SUPREME LODGE, KNIGHTS OF HONOR.¹

(Circuit Court, M. D. Tennessee. April 24, 1884.)

1. KNIGHTS OF HONOR—"GOOD STANDING" OF MEMBER.

"Good standing," within the meaning of the laws of the order of the Knights of Honor, implies a full and fair compliance with those laws, in the payment of assessments and dues.

2. SAME—ARREARS OF ASSESSMENT—BENEFITS.

A member who is largely in arrears for assessments and dues is not "in good standing," within the meaning of his benefit certificate, and if he dies when so in arrears his beneficiary is not entitled to the payment of the benefit.

The case was heard before the circuit judge, without a jury, upon an agreed statement of facts.

The plaintiff brought suit against the defendant, as "a beneficiary organization upon the mutual assessment plan," upon a benefit certificate issued July 5, 1878, to Charles S. McMurry, providing for the payment of \$2,000, "as a benefit, upon due notice of his death and the surrender of this certificate, to such person or persons as he may, by will or entry on the record-book of this lodge, or on the face of this certificate, direct the same to be paid, provided he is in good standing

¹ From the Central Law Journal.

when he dies." The plaintiff was named as the beneficiary on the face of the certificate.

McMurry paid regularly his assessments, of one dollar each, until February 23, 1881, when he ceased paying. After this, Guthrie Lodge, No. 1,054, of which he was a member, paid four assessments for him, voluntarily, to the supreme lodge of the order. He did not reimburse Guthrie Lodge for these payments, and its officers thereupon dropped his name from their rolls, and reported him as "suspended;" but the lodge did not suspend him by any vote which was recorded on its minutes. Prior to September 15, 1881, four other assessments had been called, and were forwarded by Guthrie Lodge to the supreme lodge, on none of which had any payments been made by McMurry. The 30 days' time allowed to members by the law of the order for the payment of these assessments had fully expired before McMurry died, which was on October 11, 1881. He had not paid dues to his lodge since January 1, 1881.

The laws of the order, in force in 1878 and in 1881, contained these provisions:

"Art. VII., sec. 1. Each member of this lodge shall pay as dues, to commence with the date of receiving the degree of manhood, such sum as shall be prescribed in the by-laws, not less than twenty-five cents per month, which shall be due and payable quarterly in advance, on the last meeting night in March, June, September, and December; and a brother is in good standing until the dues so paid are consumed.

"Sec. 2. Any member who may become in arrears for dues or fines to this lodge shall not be entitled to vote, hold office, nor shall he be entitled to benefits; and when six months in arrears for dues or fines, or when he fails to comply with section 3 of law xv., he shall be suspended from the lodge."

"Law xv., sec. 3. Each member shall pay the amount due, on the notice of the reporter of his lodge, within thirty days from the date of such notice, and any member failing to pay such assessment within thirty days shall be suspended from his lodge."

Other regulations provided that only members "in good standing" could become representatives in the superior lodges of the order, or be allowed to receive sick benefits, or have the privilege of a withdrawal card for six months. It was also required that the notice of the death of a member, for the payment of a benefit thereupon, should certify "that he was in good standing."

In 1879 the following decision, made by the supreme dictator as executive head of the order, in answer to a question propounded, had been approved by the supreme lodge, the highest legislative body of the order:

"Question 20. If a member fails to pay an assessment within the thirty days allowed by the constitution, and dies between the expiration of the thirty days and the next meeting of the lodge, would his family or heirs be entitled to the death benefit? Answer. Yes. A member must be suspended in order to forfeit his death benefit, and he cannot be suspended after his decease."

The charter of the defendant empowered it to pay from its widows' and orphans' benefit fund, "on satisfactory evidence of the death of

a member of the corporation, who has complied with its lawful requirements, a sum not exceeding five thousand dollars," "to his family, or as he may direct."

Colyar, Marks & Childress, for plaintiff.

James O. Pierce, for defendant.

BAXTER, J. 1. The rights of the plaintiff are to be determined in accordance with the rules established by the constitution and laws of the order.

2. Decision No. 20, made by the supreme dictator in 1879, that a member must be suspended in order to forfeit his death benefit, applied to a case where a member died after the expiration of 30 days from the call of the assessment, and before the next meeting of his lodge, and does not apply to the present case.

3. The laws and rules of the order, in force in 1881, did not declare that a member was always in good standing until he had been legally suspended by a valid act of his lodge; and the failure of Guthrie Lodge No. 1,054 to legally suspend McMurry is not conclusive of this case.

4. McMurry having been at the time of his death in arrears for nine months dues to his lodge, and in arrears for eight assessments to the widows' and orphans' benefit fund, the time for the collection of which had fully expired, was by reason of these facts not in good standing, within the meaning of the benefit certificate sued on, and the plaintiff, therefore, cannot recover.

5. Payment of the assessment by the members is essential to the successful operation of the widows' and orphans' benefit fund of the order, as the plan of the same is exhibited in the constitution and laws of the order.

In re VETTERLEIN & Co., Bankrupts.

(*District Court, S. D. New York. April 19, 1884.*)

BANKRUPTCY—PREFERENCE—UNITED STATES.

Where a bankrupt firm, through fraudulent undervaluations of goods entered at the custom-house, has incurred a forfeiture of their value to the United States, the claim of the latter against the firm for the tort is joint and several; and upon proof of the debt, containing a statement of the facts, the United States is entitled, under sections 5501 and 3466 of the Revised Statutes, to priority of payment out of any of the proceeds of either the joint or several estates, without reference to what may be the particular claim of priority in its proof of debt.

In Bankruptcy.

Samuel B. Clark, Asst. Dist. Atty., for the United States.

Jas. K. Hill, for assignee.

BROWN, J. The proof of the debt made by the United States in this case, sworn to on April 1, 1878, declares that Theodore H. Vet-

terlein and Bernard T. Vetterlein, the bankrupts, were, and still are, justly indebted to the United States in the sum of \$99,951.25 for the value of goods imported in violation of the act of March 3, 1863, "to prevent and punish frauds upon the revenue," and which became forfeited to the United States thereby. The proof subsequently states that a claim is made for priority of payment out of the joint estate of said bankrupts as prescribed by law.

The above proof does not in terms claim priority of payment out of the individual estate of either of the bankrupts. The account of the assignee shows a joint estate and joint creditors, and a small separate estate of Theodore H. Vetterlein, one of the bankrupts, and private debts of the latter in excess of his estate. The assignee claims that the debt of the United States is not entitled to priority out of the separate estate, both because it has elected to prove the debt against the joint estate, and because it has not made an express claim of priority against the separate estate. Claims of the kind here referred to are both joint and several. It is unnecessary to determine whether a private creditor would, upon such debts and under the law of this country, be put to his election between the joint and several estates. *Mead v. Bank of Fayetteville*, 6 Blatchf. 180, and cases cited; *In re Bigelow*, 3 Ben. 146.

The decision of the supreme court in the case of *Lewis v. U. S.* 92 U. S. 618, holds that, under the fifth section of the act of March 3, 1797, (Rev. St. § 3466,) as well as under the bankruptcy act, § 5101, the priority of the United States is absolute against both the joint and separate estates, and that those provisions of law supersede the marshaling of assets, as recognized in equity, and by the bankrupt law, as between other creditors of the bankrupts. Under this decision, to which this court is bound to conform, no distinction of joint and separate estates can prevail as against the United States. The proof of debt above referred to states the facts upon which, according to the decision of the supreme court, the right of the United States must prevail against other creditors, for both the joint and separate property. It was unnecessary in the proof of debt to assert that the claim was made against the joint estate. It was immaterial whether this claim were made or were not made; and the assertion of a joint claim cannot debar the legal effect of the proof which, under the law as above stated, entitled the United States to priority out of the separate estate also.

The prior claim of the United States must therefore be allowed against both the joint and several estates.

HICKS v. FERDINAND and others.

(Circuit Court, S. D. New York. April 9, 1884.)

PATENT LAW—REHEARINGS OF CASES TO BE DISCOURAGED WHEN PRIOR USE IS THE DEFENSE.

Rehearings in equity cases should be generally denied, when the grounds offered therefor pertain to matters of evidence that could just as well have been procured before the trial already had. This should be especially the rule in patent cases when the defense is *prior use*, since it is seldom that the defendant cannot make it appear that he has discovered new evidence in support of such a defense.

In Equity.

Frost & Coe, for complainant.

Briesen & Steele and *Roscoe Conkling*, for defendants.

WALLACE, J. The application to amend the answer, and for a rehearing, should be denied, because it does not satisfactorily appear that the facts constituting the new defense could not have been discovered by the exercise of reasonable diligence before the cause went to a hearing. The complainant has conducted a difficult, protracted, and expensive litigation to a successful issue, and it would subject him to great hardship to compel him now to abandon the fruits and meet a new defense. It was his right to be apprised by the answer of the defenses which he would have to meet and overthrow, so that he could elect whether to proceed with his suit or abandon it. Amendments of pleadings which introduce a new defense are permitted with great reluctance in equity after a cause has been set for hearing, and after a hearing are rarely allowed. *Walden v. Bodley*, 14 Pet. 156, 160; *Smith v. Babcock*, 3 Sumn. 583. When the application is based upon the ground of newly-discovered evidence, a more liberal rule obtains; but courts of equity, as well as courts of law, in such cases proceed with great caution, and extend no indulgence to the negligent. Unless it appears affirmatively that the evidence could not have been obtained in due season if the party applying had used all reasonable efforts in that behalf, the application will be denied. It is due to the public interests, as well as to the immediate litigants, that rehearings for the purpose of letting in evidence which might and ought to have been introduced before the hearing should not be tolerated. In no class of cases should the practice of allowing rehearings be more strictly guarded than in cases like the present, where the defense of prior use is relied on to defeat the novelty of a patented invention, because it is seldom that a defendant cannot make it appear that he has discovered additional evidence in support of such a defense. The defendant states in his affidavit, in general terms, that he "has been eager to collect all material evidence," and "has made great exertion and every reasonable effort to defend the suit." These are his conclusions, but if the facts were specified they might not be the conclu-

sions of the court. Such generality of statement is not sufficient; if it could not be conscientiously made in almost every case, it could be in every case with facility and with entire safety.

The motion is denied.

WESTON DYNAMO-ELECTRIC MACHINE CO. v. ARNOUX and another.

(Circuit Court, S. D. New York. April 9, 1884.)

PATENT LAW—AUTOMATIC SWITCH FOR DYNAMO-MACHINE.

An automatic switch for a dynamo-machine for shifting the electric current from one path to another is the invention of Smith; the rheotomes and the devices of Siemens being circuit breakers designed for another purpose.

In Equity.

E. H. Brown and S. A. Duncan, for complainant.

Knox & Woodward, for defendants.

WALLACE, J. At the hearing of this cause all the questions involved were decided adversely to the defendant, for reasons then stated, except the question of the novelty of the invention. An examination of the proofs shows that the devices upon which the defendant mainly relies to negative novelty, and to which the testimony of the experts is principally addressed, have no bearing whatever upon the issue. These are the devices of Siemens referred to in the letter and report of Col. Abbott. It appears by the proofs that the invention described in the complainant's patent was conceived by Smith, the inventor, and embodied in a magneto-electric apparatus, in October, 1873. It is not shown that either of the Siemens machines purchased by Col. Abbott in Europe had arrived in this country at that time. While it may be conjectured from the statements of his letter (which by stipulation are made evidence of the facts) that he had received the machines prior to October, there is no proof to this effect.

It only remains, therefore, to consider the rheotomes and the apparatus described in Siemens' English patent of 1867. It is obvious that neither of these devices contain the invention of Smith. Smith's invention is an automatic switch for a dynamo-machine for shifting the electric current from one path to another. It is actuated and controlled by the electric current to open and close the connection between the primary circuit and the exterior or working circuit. It is a pivoted and ballasted lever, located between the two circuits, having an armature at the end nearest the primary circuit, and a weight and spring at the other end. The switch, as combined with the dynamo-machine and the primary and exterior circuits, is intended and is efficient to do work which had not theretofore been done by such a machine. The rheotome and the devices of Siemens are

circuit breakers designed and adapted for different work. In neither is there any necessity for shifting the path of the current from one circuit to another. They show the principle of breaking the current and deflecting it automatically employed by Smith, but the differences in the organization of the apparatus are as radical as the differences in the work for which each is designed.

A decree is ordered for complainant, adjudging the infringement of the second and fifth claims of the patent.

FETTER and others v. NEWHALL.

(Circuit Court, S. D. New York. April 23, 1884.)

PATENT—DRIVE-SCREW—INFRINGEMENT.

The orator's patent for a drive-screw *held* to be restricted to a screw having a smooth conical point large enough to divide the fibers of the wood so as to give free entrance to the threads of the screw.

In Equity.

Amos Broadnax, for orators.

William Bakewell, for defendant.

WHEELER, J. This cause has been heard on a motion for punishment of the defendant for violation of the injunction granted on final hearing. *Fetter v. Newhall*, 17 FED. REP. 841. The defendant appears to make or be concerned in making two kinds of drive-screws, one of which has a conical point in diameter at the base equal to the diameter of the shank within the threads, and the other having threads extending to the extremity of the point; the threads of each being of the same shape as those of the orators' patent. The novelty and utility of invention on which this patent was granted by the patent-office, accepted by the patentee, and held valid by this court, consisted in the conoidal or conical smooth point large enough to part the fibers of the wood, in driving, and make an entrance for the threads, so that they would not be forced against the fibres to make a pathway for themselves or for one another. It did not cover the threads separately from the point, and cannot be made to cover them now. *Key-stone Bridge Co. v. Phoenix Iron Co.* 95 U. S. 274. Neither of these devices of the defendant has such a point. It is urged that the threads at the point of the defendant's screws make the points the equivalent of the patented point. The foremost threads do, in driving, with the smaller point make way for the rest of the threads as the larger point does. This is the case with all drive-screws having a point smaller than the circumference of the threads; and this is what the patented point was patented for obviating. If the screw im-

proved upon was the equivalent of the patented improvement, the patent would cover nothing. The patent is a quite narrow one, and this construction would undermine the whole of it.

The motion is denied.

FETTER and another v. OLIVER and others.

(Circuit Court, S. D. New York. April 23, 1884.)

PATENT—INJUNCTION.

In Equity.

Amos Broadnax, for orators.

Bakewell & Kerr, for defendants.

WHEELER, J. The motion in this cause for a preliminary injunction rests upon the same grounds, and is denied for the same reasons, as the motion for an attachment in *Fetter v. Newhall*, ante, 113. Motion denied accordingly.

MUNDY v. LIDGERWOOD MANUF'G Co.

(Circuit Court, S. D. New York. April 23, 1884.)

PATENT—HOISTING-DRUMS—NOVELTY—INFRINGEMENT.

Reissued letters patent No. 9,289, for an improvement in friction drums for pile-drivers and hoisting-machines, although the friction surfaces claimed therein were anticipated by a previous patent, contain an element of novelty in the arrangement of the spring, and the patent is infringed by the use of a similar combination, including that kind of spring.

In Equity.

Edwin H. Brown, *Frederic H. Betts*, and *Ernest C. Webb*, for orator.
Livingston Gifford, for defendant.

WHEELER, J. This suit is brought upon reissued letters patent No. 9,289, dated July 13, 1883, the original of which was No. 158,967, dated January 19, 1875, granted to the orator for an improvement in friction drums for pile-drivers and hoisting-machines. The original had one claim; the reissue has three others, and this one, which is made the fourth, and is the only one relied upon. The defenses are lack of novelty and denial of infringement. The object of these inventions is to have a drum for the hoisting-rope which can be made to engage with, closely or loosely, and be released from, gearing in constant motion, so as to be started promptly but moderately,

and made to move rapidly or slowly, and to stop gradually or quickly, and be left to turn the other way, at the pleasure of the operator. The orator accomplished this by providing a conical projection on the side of the gear-wheel next to the drum, of nearly the same diameter, made of wedge-shaped pieces of wood, with the broad ends outward, forming a tapering friction surface on the ends of the wood; and a circular flange projecting from the circumference of the drum, loose on the same shaft, to fit tightly over the friction surface on the wheel when pressed toward it; and a spring coiled about the shaft, between the wheel and the drum, to separate the surfaces. The specification mentions a shell or flange on the side of the gear-wheel supporting the wood, and describes mechanism for pressing the drum towards the wheel and bringing the surfaces together. The claim is for the combination of the drum, loose, and the gear-wheel having the friction cone and side flange to support it and spring to repel it, fast upon the shaft, for this purpose. The defendant makes friction-drums like these in all respects, except that the wedge-shaped pieces of wood are bolted to the gear-wheel. Loose friction drums connecting with fast gear-wheels on the same shaft, with springs coiled about the shaft to repel them, and friction surfaces, one of metal, and the other of the ends of wood, for use for other purposes, were old and well known; and letters patent No. 150,765, dated May 12, 1874, were granted to John Knowlson, Jr., for improvements in similar apparatus, showing a gear-wheel with similar wedge-shaped pieces of wood, separated by radiating flanges on the side of the gear-wheel, presenting friction surfaces composed of the ends of the wood of each piece, and a drum with a similar projecting flange at each end to fit over the friction surfaces, and a wheel revolving with, but sliding along, the shaft at the other end of the drum, having a similar friction surface, with mechanism for pushing that along the shaft and bringing its friction surface in contact with that on that end of the drum, and thereby pressing the drum along and bringing the friction surfaces at the other end of the drum to a bearing, but without any springs to repel the friction surfaces. There is some contest as to which invention was first, Knowlson's or the orator's; but from the whole evidence it appears that Knowlson's was first accomplished.

It is strongly urged for the defendant that Knowlson's friction surfaces are substantially the same as the orator's; that there was no invention in putting the spring to the same purpose in the orator's devices that it had accomplished in prior similar devices; and that the orator really invented nothing but the shell or flange on the wheel for supporting the wood of the friction cone, which the defendants do not use. Apart from the mode of fastening the wood to the wheel, the friction cones of Knowlson perform the same functions in substantially the same way as those of the orator and of the defendant, although perhaps they would not wear so well as either. Each, however, may be considered for this purpose to be the mechanical equivalent of

the other. Then the orator is not entitled to a monopoly of this friction surface in such machines. It is said that beyond this he did nothing but to bring the spring of former machines into Knowlson's, which could be accomplished by the skill of good workmanship. Had this been all, the argument would be well founded. But he did more. One spring would not have answered to repel the friction surfaces in that machine; two would have been necessary, and of different power; one to repel the cone on the wheel not geared, and another and stronger to repel the drum and that from the gear-wheel. The orator dispensed with one of Knowlson's friction cones and flanges, rearranged and simplified the machine, and put the spring where it was needed or where he wanted it. This appears, after it was done, to have been easy to do; but no one did it before and it makes a more compact, economical, and useful machine. *Loom Co. v. Higgins*, 105 U. S. 580. The patent is for the new combination. It is further strenuously urged that the gear-wheel, with the cone, supported in the orator's peculiar manner, is one element of the combination, and that, as the defendant does not use that element, it does not infringe that combination. But the gear-wheel and friction cone of the defendant are the equivalent in the combination to those of the orator, and by the use of them the defendant takes the orator's patented combination.

Let there be a decree for the orator for an injunction and an account, with costs.

MALLORY MANUF'G Co. v. HICKOK and another.

(Circuit Court, D. Connecticut. April 5, 1884.)

PATENTS FOR INVENTIONS—INFRINGEMENT—PRELIMINARY INJUNCTION—PREVIOUS ADJUDICATION.

Upon the decision of a motion for a preliminary injunction against the infringement of a patent, which has been sustained by a previous adjudication, it is proper, as a general rule, to follow the construction of the patent given upon such adjudication, provided the construction was given with deliberation and thoughtfulness in the use of language.

Motion for Preliminary Injunction.

Eugene Treadwell, for plaintiff.

Wm. Edgar Simonds, for defendants.

SHIPMAN, J. This is a motion for a preliminary injunction against the infringement of letters patent to George Mallory, dated February 11, 1868, for an improvement in hats. The defense is non-infringement. The invention is described and the patent is construed in *Mallory Manuf'g Co. v. Marks*, 20 Blatchf. C. C. 32.¹ It is not claimed that the present defendants use twisted wire, and, for the purposes of

¹S. C. 11 FED. REP. 887.

this motion, it is admitted that round bent wire is used. The only question is whether such use is an infringement. Upon the decision of a motion for a preliminary injunction against the infringement of a patent which has been sustained by a previous adjudication, it is proper, as a general rule, to follow the construction of the patent which was given upon such adjudication, provided the construction was given with deliberation and thoughtfulness in the use of language. Judge BLATCHFORD says in his opinion that the specification uses the word "bent" as synonymous with the word "twisted;" and further says: "The hoop of the claim must be a spring hoop twisted substantially in the manner described in the patent. This construction is necessary to sustain the claim, in view of the state of the art as shown." I do not mean to say that the question in regard to the proper construction of the patent is to be considered as finally settled by the decision in the *Marks Case*, but, for the purposes of this motion, it is not expedient to depart from Judge BLATCHFORD's construction, which was carefully given.

The motion is denied.

VERMONT FARM MACHINE Co. and others v. MARBLE, Com'r, etc.

(Circuit Court, D. Vermont. April 12, 1884.)

1. JURISDICTION OF CIRCUIT COURT—ACCEPTANCE OF SERVICE.

By accepting service of process the defendant, in a suit arising under the patent laws, subjects himself to the jurisdiction of a court, sitting in a district of which he is not a resident.

2. SAME—BILL TO SECURE A PATENT.

The United States courts have jurisdiction of bills to obtain the issue of patents refused by the commissioner.

3. SAME—WANT OF POWER TO ENFORCE DECREE.

The fact that a circuit court cannot compel the commissioner of patents to obey its decree is no objection to its jurisdiction to entertain a bill against him for the purpose of obtaining a decree in favor of the orator's right to a patent. It is presumed that he will do his duty.

In Equity.

Frank T. Brown, for commissioner.

William E. Simonds, for orators.

WHEELER, J. The bill was brought for an adjudication that the orators were entitled to a patent, pursuant to section 4915, Rev. St. The defendant accepted service of the subpoena to have the same effect as if duly served on him by a proper officer, and acknowledged receipt of a copy, but did not appear in court, nor made any objection to proceeding to decree. After hearing the orators, a decree was made and entered in their favor. 19 FED. REP. 307. The present commissioner now moves for a rehearing, principally upon the ground

of alleged want of jurisdiction of this court. One mode of attempting to show that this court has not jurisdiction is by claiming that the supreme court of the District of Columbia has exclusive jurisdiction. The language of this section, however, seems to preclude this idea. It reads:

"Whenever a patent, on application, is refused, either by the commissioner of patents or by the supreme court of the District of Columbia upon appeal from the commissioner, the applicant may have remedy by bill in equity."

This seems to clearly imply that the remedy may be elsewhere. *Whipple v. Miner*, 15 FED. REP. 117. Another, and the principal mode is by claiming that no circuit court of a district away from the patent-office, and in which the commissioner does not reside, can acquire jurisdiction of such cases. The circuit courts have original jurisdiction,—*ninth*, of all suits at law or in equity arising under the patent or copyright laws of the United States. Rev. St. § 629. This is, unquestionably, a suit so arising. There is no restriction upon proceeding in these courts in such cases except that civil suits against inhabitants of the United States are not to be brought by original process in any other district than that in which the defendant resides or is found at the time of service. Id. § 739. The court had general jurisdiction of this subject, and the defendant by his acceptance of service consented to be found in this district; and did not appear in court to object to being bound by his consent.

In *Ex parte Schollenberger*, 98 U. S. 369, Mr. Chief Justice WAITE, in delivering the opinion of the court, says:

"The act of congress prescribing the place where a person may be sued is not one affecting the general jurisdiction of the courts. It is rather in the nature of a personal exemption in favor of a defendant, and one which he may waive. If the citizenship of the parties is sufficient a defendant may consent to be sued anywhere he pleases, and certainly jurisdiction will not be ousted because he has consented."

Here no question was made before; now where one on this subject is made it is not whether the commissioner can be compelled to answer, but whether he can consent to be sued away from the seat of government and his residence. *Prentiss v. Ellsworth*, Mirror of Pat. Off. 35; Laws Dig. 103; Whart. Dig. 365, raised the question as to the compulsion and not as to the consent, and it was held upon apparently sound reasoning by RANDALL, J., that the commissioner could not be compelled by process issuing out of the circuit court for the Eastern district of Pennsylvania to answer there. The question of jurisdiction founded on consent did not arise.

It is further objected against the jurisdiction here that the court here could not compel obedience of the commissioner at the patent-office to its decree. It is to be presumed, however, that a high officer of a department of the government will do his duty without compulsion, or even command, from any quarter, especially in a matter where he has no interest, nor the government any, except that the

duty be done. This provision of the statute is framed according to this view. The court does not decree that the commissioner shall issue a patent, but only "may adjudge that such applicant is entitled according to law to receive a patent for his invention as specified in his claim, or for any part thereof, as the facts in the case may appear. And such adjudication, if it be in favor of the right of the applicant, shall authorize the commissioner to issue such patent," etc. Granting the permission expressed the will of congress, which would be sufficient. Neither the adjudication nor issuing the patent under it will conclude any individual rights. The validity of the patent will be open to trial under the law. But if the patent is not granted no suit for infringement can be brought, and the right to the invention cannot be judicially tested. This jurisdiction has been exercised without challenge, except in *Prentiss v. Ellsworth*, *supra*. *Ellithorpe v. Robertson*, 2 Fish. 83. As this case is now considered the jurisdiction upon the consent of the commissioner seems to be ample. The question involved in the case on the merits was purely one of law, requiring the production of no models or exhibits, and no personal attendance, and might well be submitted anywhere. Whether, under the circumstances, it should be submitted here rested in the discretion of the commissioner. His act, in this respect, is binding upon his successor, like any other lawful act, and it oppresses no one. This ground presents no reason that appears to be sufficient for opening the case.

All the grounds now urged on the merits of the application for the patent were fully considered before, and no sufficient reason appears for going over the ground again.

The motion is denied.

NATIONAL WIRE MATTRESS CO. v. NEW YORK BRAIDED-WIRE
MATTRESS CO.

(Circuit Court, S. D. New York. April 23, 1884.)

1. PATENTS—BED-BOTTOM—INFRINGEMENT.

Neither the first claim of reissued letters No. 5,312 nor reissues 9,919 or 9,920, if restricted within the limits of the original claims, which is essential to their validity, is infringed by a bed-bottom of continuous zigzag wires, linked together at the corners of diamond-shaped figures, and connected at each end to the ends of the frame by springs.

2. SAME—NOVELTY.

The third claim of reissue 5,312, for an iron corner piece with a flange, is void, having been substantially anticipated by patent No. 113,559.

In Equity.

Charles E. Mitchell and Benj. F. Thurston, for orator
George W. Dyer, for defendant.

WHEELER, J. This suit is brought upon the first and third claims of reissued letters patent No. 5,312, granted to the orator as assignee of Andrew Turnbull and Rodolphus L. Webb, for an improvement in bed-bottoms, dated March 4, 1873; and upon reissued letters patent Nos. 9,919 and 9,920, granted to the orator as assignee of Edwin S. Field for improvements in spring bed-bottoms, dated November 1, 1881. The original of the former, which had been previously reissued in No. 5,185, was dated April 9, 1872; and those of the latter were dated May 6, 1873. The defenses are want of novelty, variance between the originals and the reissues, and lack of infringement. The first claim of the Turnbull and Webb reissue was sustained by decree in the district of Connecticut in 1875, and in the district of Massachusetts in 1878, but upon a somewhat different case. The patent of Charles Bigeon, dated January 16, 1872, was not introduced. All these bed-bottoms are made of wire. Wire bed-bottoms suspended on spiral springs attached to the frame of the bed, and bed-bottoms made of elastic looped wire, were known before. To have that part of the bed about an occupant yield and shape itself to the person of the occupant without disturbing other parts of the bed was desirable, as well as a generally yielding surface. Wire bottoms attached to the frame of the bed, or bottoms attached to frames suspended on springs, would not give this independent conformation to the person. It could be accomplished by having the longitudinal strands sufficiently yielding without any or but loose connection with each other. Bigeon's patent showed these independent strands, made elastic throughout by being looped. Turnbull and Webb formed them of wire links and rings, and made them elastic by coiled springs at each end, and connected them loosely with one another by transverse links between the rings. This part of their invention consisted really in making the strands elastic at their ends only, instead of throughout, and dividing them into rings and links; or in taking out the end pieces between the horizontal strands and springs to which they were suspended, as shown in the patent of F. Stanley Bradley, No. 74,293, of February 11, 1868, and connecting the springs directly with the strands. The first claim of the original patent was for these springs attached to end-bars and combined with these links. This claim was surrendered, and a broader claim taken for a bed-bottom composed of jointed links, made elastic longitudinally by the springs. The defendant's bed-bottom has continuous zigzag wires, linked together at the corners of diamond-shaped figures, and connected at each end to the ends of the frame by springs. This claim of this reissue is either too narrow for the defendant's bed, or too broad for the original invention and claim. If the defendant might be said to have the combination of the spring with the strand to connect it with the end piece, the claim which covered that combination has been surrendered, to make room for the new claim, which does not cover that by itself so as to protect it. The former decrees were not only made without ref-

erence to the Bigeon patent, but when much less strictness in comparing reissued patents with originals was required.

The third claim of this reissue is for a corner iron to connect the end pieces with the side rails, and to support the strain upon the end pieces by a flange on the iron extending nearly to the top of the end pieces, against which they bear directly. This flange, without reference anywhere to other parts of the iron, or any mode of attachment of the iron to the rails, is the distinctive feature of this claim. A similar flange for the same purpose is shown in the prior patent of George C. Perkins, No. 113,559, dated April 11, 1871. If there is any difference as to this patented feature of the flange, it consists in making the flange sufficiently lower than the top of the end piece, to be out of the way of the attachments of the springs. The difference of construction would be so obvious to any competent mechanic as not to amount to a patentable invention.

The original of the first Field reissue was for a netting composed of V-shaped links hooked together in a peculiar manner, and a link for forming the straight edges of the netting. The links made diamond-shaped figures. The reissue is for the combination in a bed-bottom of rails, end pieces, springs, and netting, composed of continuous diamond-shaped figures, and for the netting and links of the original. The original patent would not cover anything in the defendant's bed. What would cover anything in it is merely expansion of the original, and, as now understood, void.

The original of the second Field reissue was for peculiar links as a component part of a bed-bottom, and a bed-bottom composed of such links. The reissue is for connected and continuous zigzag wires connected with end rails by springs in a bed-bottom. There is nothing in this reissue, that is not an expansion from the original, which would cover anything in the defendant's structure. The result is that the defendant does not infringe anything that is valid in any of the orator's patents in controversy.

Let there be a decree dismissing the bill of complaint, with costs.

MORRIS v. KEMPSHALL MANUF'G CO.

(Circuit Court, D. Connecticut. April 30, 1884.)

PATENT—SASH-FASTENER—INFRINGEMENT.

Patent No. 212,487 issued to Morris for an improved sash-fastener, the characteristic features of which are the elevated notched plate and hinged pendant, is not infringed by the subsequent patent issued to Sparks having a notched flange at the top of the pivotal post above the sweep and pivoted latch.

In Equity.

S. D. Cozzens, for plaintiff.

Charles E. Mitchell, for defendant.

SHIPMAN, J. This is a bill in equity which is brought, under section 4918 of the Revised Statutes, by the patentee and owner of letters patent, No. 212,487, dated February 18, 1879, to John B. Morris for an improvement in fasteners for the meeting rails of sashes, and which seeks relief against the alleged interference of a subsequent patent. The junior patent was issued to the defendant, as assignee of William Sparks, on September 4, 1883. The defendant has demurred to the bill, and the question is whether the junior patent on its face interferes with, or claims in whole or in part, the same invention which is claimed in the first claim of the senior patent. The Morris device consists of a plate, without any projection above the general level of the plate-top, upon the surface of which the latch-bar swings, and which has upon its front edge a rectangular notch, *c'*, to receive and retain the pivoted handle, *H*, of the latch-bar, and upon its right side and upon its edge another sloping jog, *c''*, to receive and retain the handle when the bar is in its open position, and upon its left side another jog, *c'''*, to receive a projection from the under side of the latch-bar. This projection limits the swing of the bar. The bar is pivoted upon a pivot, *E*. The plate is called an elevated plate, and is sufficiently high to afford room for the jogs, *c'* and *c''*, and to enable the handle to swing clear of the sash rail. The first claim is as follows:

"The improved sash lock or fastening, consisting of the elevated plate, *C*, having shouldered notches, *c'*, *c''*, *c'''*, pivot, *E*, for swinging latch-bar, *F*, *f*, and the hinged pendant, *H*, for attachment to the lower sash, in combination with a stationary spur or cam-hook upon the upper sash, substantially as set forth."

The important portion of the Sparks invention is a flange or cap, which is preferably made integral with the post upon which the sweep is pivoted, and which "is provided with two shoulders or notches, *k*, made in the edge of the flange." When the sweep is brought to the front the handle end of its latch, which is heavy enough to overbalance the inner end of the latch, causes the latch to drop, and thereby the inner end is raised into engagement with one of the shoulders, and the sweep is locked. The invention consists, in substance, of the pivoted latch of the sweep, which locks into notches in the edge of the flange at the top of the post upon which the sweep is pivoted and above the sweep.

The language of the first claim of the Morris patent may be broad enough to include the Sparks fastener, but the elevated plate and the pendant of the Morris fastener are not the notched flange at the top of the post above the sweep and the pivoted latch of the Sparks fastener.

The demurrer is sustained.

ANDREWS and others v. FIELDING.

(Circuit Court, D. Connecticut. May 3, 1884.)

PATENTS FOR INVENTIONS—CONVEYANCE—RECONVEYANCE.

Letters patent conveyed by a patentee with condition of reconveyance upon a certain emergency; that emergency having arisen, the court decrees the execution of the reconveyance.

In Equity.

Charles E. Perkins, for plaintiffs.

Frank L. Hungerford, for defendants.

SHIPMAN, J. In the early part of January, 1881, Sanford S. Burr owned two letters patent, No. 230,105 and reissue No. 9,393, each for folding bedsteads, the exclusive use of which he had given to A. H. Andrews & Co., of Chicago, until February 14, 1881. The defendant, William I. Fielding, as the president and manager of the National Wire Mattress Company of New Britain, had also been selling to said firm patented wire nettings to be used upon the Burr bedsteads. Burr became anxious lest Andrews & Co., at the expiration of their license, should refuse to renew it, or should compel him to yield to an unfavorable contract. Fielding was also suspicious that Andrews & Co. intended to discontinue the use of his nettings, and hearing of Burr's anxiety, telegraphed to him, about January 17, 1881, to come to New Britain at his (Fielding's) expense, and to make no arrangements with Andrews & Co. Burr immediately went from Chicago to New Britain, and, upon Fielding's representations that a union of the two interests would be for the advantage of each, and that he desired to assist Burr, assigned to Fielding the said two bedstead patents, except for a specified portion of the United States, and received from him the following agreement:

"Whereas, Sanford S. Burr has this day conveyed to me certain letters patent, with the expectation that I shall grant licenses under the same as I shall deem best, the license fee not to be less than five per cent. of the gross sales of the articles patented. Now, I agree, in consideration of one dollar received, to reconvey said patents to said Burr within ninety days from date; subject, however, to any licenses which I may meanwhile grant, and I agree to assign to said Burr, at the time of such reconveyance, all royalties accrued or to accrue under such licenses."

Fielding then went to Chicago, and, representing that he was the owner of the Burr patents, made a verbal agreement with Andrews & Co. for a license for the use of the patents and for the purchase of his nettings. They sent to him a written agreement, in accordance with their understanding of the parol contract, but he refused to sign it upon the ground that it was inaccurately drawn. The point in dispute was that he desired an agreement that they would purchase his wire nettings during the life of the Burr patents, while they refused to specify the time during which they would so purchase. Neither

would yield, and Burr's interests were in jeopardy until he settled the controversy by making some concessions to Andrews & Co. in regard to the use of another of his patents, and by coming to New Britain and agreeing with Fielding, by a written agreement, subsequently signed and dated February 14, 1881, that so long as Andrews & Co. should use his nettings in the Burr beds and should pay to him the agreed royalty on the Burr patents, Burr should receive from Fielding all the royalties upon the sales of beds which were sold over \$28 each at retail, according to the Andrews price-list, and Fielding should have and retain one-half of all the royalties on beds which were sold at retail at less than \$28; and if Andrews & Co. should cease to use said nettings, then Fielding was to pay Burr only one-half of all the royalties received upon the sale of all the beds. The contract contained also the following provision:

"Said parties also agree that said Fielding shall be and is released from the obligations to reconvey said patents to said Burr contained in a former agreement, and it is now agreed between said parties that said Fielding shall continue to hold the title to both said patents; but if said Andrews & Co. shall terminate the agreement hereinbefore referred to, as provided therein, and shall reconvey the exclusive interest to said Fielding, said Fielding will thereupon reconvey said patents to said Burr, or will pay to Burr for the same the sum mentioned in a memorandum of even date, which said sum said Burr agrees to take in full payment therefor."

The sum mentioned in the memorandum was \$2,500. Thereupon Fielding agreed to sign and did sign the contract which had been sent to him by Andrews & Co., also dated February 14, 1881, by which he granted them the exclusive right of using said Burr patents for the whole of the territory of which he had control, and they agreed to pay him 5 per cent. of the net receipts from the sales of the folding beds which contained any of the improvements covered by either of said patents. No time was specified during which this license was to be enjoyed. The contract also provided that Fielding would furnish Andrews & Co. wire netting for the Burr beds at 93 cents less than the price theretofore charged, and that, as long as they used such nettings in such bedsteads, they would use no other style without his consent, in beds which were sold at \$28 each. The contract also contained the following provision:

"(6) If said Andrews & Co. at any time refuse to pay the royalty herein provided, or shall cease making beds containing any of the improvements patented in and by said patents for a continuous period of three months, except on account of inevitable accident, then this license shall be null and void, and said A. H. Andrews & Co. shall immediately reconvey to said Fielding all the interest and rights herein conveyed to said A. H. Andrews & Co."

The reason of Fielding's unwillingness to reconvey the patents to Burr was the fear that, being a man easily yielding to the persuasions of others, he would sell the patents to Andrews & Co.

In July, 1881, Andrews & Co. were first informed of the existence of the Burr contract, and of his interest in or real ownership of the

patents. They, thereupon, on July 15, 1881, purchased from him, for \$2,500, all his interest in the patents, and all his rights under said contract, he agreeing that if Fielding elected to buy the patents, as provided in the contract, he (Burr) would pay to them the money or property received from Fielding. Andrews & Co., on the same day, notified Fielding, that they had discontinued making beds under said patents, and that they should no longer pay royalties, and reconveyed to him all the interest and rights which he had conveyed to them, and did discontinue for three months making the beds described in said patents. Burr forthwith requested Fielding to reconvey the patents to him, or to pay him \$2,500, and, neither having been done, demanded of him, on September 9, 1881, a reconveyance of the patents. This demand has not been complied with, and no payment has been made. On July 27, 1881, Andrews & Co. notified Fielding that they should not thereafter use his springs or nettings in their folding beds, but should use a woven wire fabric. On August 2, 1881, Fielding returned to Andrews & Co. their deed or conveyance of July 15th, and denied their right to terminate the license of February 14th at that time, or at any time, except by his consent. Fielding has brought an action at law, which is now pending in this court, against Andrews & Co. to recover the royalties claimed by him to be due under said contract of February 14th. All the royalties which had accrued up to July 15, 1881, have been paid. This bill in equity prays for a reconveyance by Fielding to Burr, or to Andrews & Co., of all Fielding's interest in said patents, and that he be enjoined from claiming any rights thereunder, and from prosecuting said action at law. The plaintiffs all reside in and are citizens of the state of Illinois; the defendant resides in and is a citizen of the state of Connecticut, and the parties were such citizens, respectively, at the commencement of the suit.

The decision does not turn merely upon the question whether, by the terms of the contract between Andrews & Co. and Fielding, they had the right to terminate the license by their act alone, or whether the license was voidable at the option of Fielding, but upon the effect of the clause in the contract between Burr and Fielding in regard to his obligation in case Andrews & Co. did reconvey. If the language of the sixth paragraph of the contract of license stood alone, unexplained by any cotemporaneous agreement, it would be very doubtful whether the parties meant that the license could be ended at the option of the licensees. The construction which is given to this language in leases would probably prevail, viz., that, after default by the licensee, the contract should be voidable at the option of the licensor. In this case the agreement of even date with the license which was entered into between Fielding and Burr, and in consequence of which the license was executed by Fielding, and which was founded upon and refers to the license, says that if Andrews & Co. shall terminate the license "as provided therein, and shall reconvey

the exclusive interest to said Fielding, said Fielding will thereupon reconvey said patents to said Burr, or will pay to Burr for the same" \$2,500. This provision shows that these two parties thought that Andrews & Co. could terminate the license, and if they did so terminate, and if they reconveyed to Fielding, then his trust relation to the patents would cease, and he must either reconvey to Burr or obtain the absolute title by a payment of \$2,500. After receiving a reconveyance, provided such reconveyance was without fraudulent collusion on his part with Andrews & Co., his duty was to convey to his *cestui que trust* or to buy the patents.

It is not necessary for me to decide what Andrews & Co. had the power to do under the license alone. The agreement between Burr and Fielding was that when Andrews & Co. did all in their power to end the contract, and reconveyed to Fielding, he would no longer retain the patents, but would reconvey to Burr, and let him manage them as he chose, or would purchase them himself for \$2,500. In Fielding's contract he provided that as long as Andrews & Co. paid royalties he was to have a part of them. When payment was stopped, and the income ceased, then Burr was to have his patents, or Fielding would buy them. The condition of things which was provided for in this agreement has taken place. Andrews & Co. have tried to terminate, and have reconveyed, but Fielding has done nothing.

Let a decree be entered directing Fielding to convey to Burr the two patents, No. 230,105 and reissue No. 9,393, and restraining Fielding from prosecuting any action for royalties which accrued after the expiration of three months from and after July 15, 1881.

WORSWICK MANUF'G Co. and another v. CITY OF BUFFALO and others.

(Circuit Court, N. D. New York. May 8, 1884.

PATENT INFRINGEMENT—BURDEN OF PROOF.

When in a patent-infringement cause the defense relied on is that the plaintiff was not the original inventor, the burden of proof is on the defendant to satisfy the court on that point beyond a reasonable doubt

In Equity.

M. D. Leggett and John Crowell, for complainants.

Giles E. Stilwell, for defendants.

COXE, J. The complainants are the owners of letters patent, No. 171,190, granted December 14, 1875, to Edward O. Sullivan for improvements in harness for fire-engines. The patent relates not only to the construction of the harness but also to the manner of suspending it above the horse. The object of the invention is to enable the horses to be kept unharnessed until the moment of the alarm, and

then to attach them to the engine with great expedition. One man is thus enabled to do the work of three under the old system. The harness is made in sections, is permanently fastened to the neap or thills and suspended from the ceiling by means of straps and spring catches so that it may be dropped upon the horse and quickly secured. Before the use of this apparatus horses were kept continually in harness night and day. The result was that they were irritated and galled and the harness was injured and soon destroyed by the constant rubbing which this irritation occasioned. There can be no doubt regarding the utility of the invention. Its advantages may be summarized as follows: Relief to the horse, expedition in reaching the fire, durability and reliability of the harness, economy in the employment of firemen and harness makers. And when it is remembered that promptness in arriving at a fire has often prevented a great conflagration the indirect benefits can hardly be estimated.

The claim in controversy is the third. It is in these words:

"(3) The combination, with a harness for a fire-engine or like apparatus, of a device for suspending said harness above the place occupied by the horse when attached to the apparatus, substantially as and for the purpose set forth."

The defenses interposed are: *First*, the claim is void for the reason that there is an attempt to patent a mere abstraction—the idea of suspending a harness from the ceiling at a particular place; *second*, the defendants do not infringe if the claim is confined to the particular mechanism described in the specification; *third*, the patentee was not the original inventor.

So far as the records of the patent-office show Sullivan was the first to enter this field of invention. No other patent, American or foreign, is introduced to anticipate or limit the claim referred to. It should, therefore, be construed broadly to cover any similar apparatus which suspends a harness in substantially the same manner. The details of construction both in the harness and suspending apparatus are non-essentials, inferior and subordinate to the principle embodied in the patent which is the paramount and superior consideration. The man who first conceived the idea of suspending the harness above the horse and put it into successful and practical operation is the one who conferred the benefit and is entitled to the reward. It would be an exceedingly illiberal and narrow construction to hold that he should be deprived of the fruits of his ingenuity by one who simply changed the form of the harness or of the device by which it is suspended. No principle is better settled than that a mere abstract idea is not the subject of a patent, but that principle has little application here, for the reason that the inventor has put his idea into tangible shape and given it form and substance. For years the problem was how to get the engine to the fire in the shortest possible time. By a combination of old devices Sullivan has reduced time to the minimum and accomplished a confessedly beneficial result. It is not an ab-

straction he seeks to secure, but the apparatus by which the idea is carried out.

With the claim thus construed and in view of the state of the art very little need be said upon the question of infringement. The defendants have adopted an analogous combination. The harness and hoisting apparatus used by them are substantially the same as those described in the patent. They have quite likely introduced some improvements; they have employed the well-known mechanical equivalent of a pulley and weight for a coiled spring; they suspend the whole harness and attach no part of it to the pole, and there are minor points of difference between the two mechanisms, but in all essential particulars they are alike. The main effort on the part of the defendants has been to show that Sullivan was not the original inventor. Here the burden is upon them to satisfy the court beyond a reasonable doubt. A mere preponderance of evidence is not enough; the proof must be of such a convincing character that the court can say without hesitancy that the allegations of the answer in that behalf are true. Has such proof been offered? It is thought not. A fair conclusion to draw from the evidence is, that the defendants have succeeded only in casting doubt upon the title of the patentee. Instead of capturing the citadel they have simply made a breach. True it is that before the patent vague conceptions of the invention had entered other minds; true it is that others had approximated more or less closely to the successful realization. No one had quite reached the goal.

The evidence shows that in one instance, while the horse was standing harnessed in the stall, the collar was, by means of a cord, pulley, and weight, raised on his neck to prevent chafing, heat, and irritation. In another case a single harness, without collar and hames, was attached to the thills of a light fire wagon. The harness and thills were elevated to the ceiling by a rope, pulley, and weight. A similar method was, at another time, applied to the harness of hose carts, excepting that the collar and hames were left on the horse. There was also evidence tending to show that in 1872, at Louisville the harness of a hose cart was suspended by a rope and pulley from the ceiling and that the collar was hinged and was fastened by a snap or spring-lock at the bottom. No witness was called who recollected seeing a harness for fire engines suspended prior to the date of the patent. But, if not discredited, the evidence relating to the Louisville apparatus would certainly have the effect of restricting the claim within exceedingly narrow limits. The complainants have, however, succeeded in showing that there may well be a mistake both as to the time when, and the manner in which, the harness was suspended at Louisville. The chief and assistant chief of the fire department of that city during the year 1872, never saw or heard of the apparatus described by the defendants' witnesses. The chief next in succession who, previous to his elevation to that office, had been in and

about the engine-houses for 20 years, gave like evidence. A member of the Cleveland fire department who came to Louisville in 1879 for the purpose of explaining and introducing the Sullivan apparatus testified that he visited the different engine-houses but saw nothing at all resembling a swinging harness. The Louisville firemen were surprised and pleased with the invention and it was immediately adopted by them.

It must, therefore, be said within the rule heretofore adverted to, that the defendants have not succeeded in establishing their defense.

There should be a decree for an injunction and an account, with costs.

THE J. W. TUCKER.

(District Court, S. D. New York. April 24, 1884.)

1. MARITIME LIENS—PRIORITY—ORDER OF PAYMENT—DEFICIENCY.

Parties before the court, having different maritime liens of the same rank, are entitled to be paid, in case of deficiency, according to the equitable priority of the liens themselves, without reference to the first arrest of the vessel.

2. SAME—THE FRANK G. FOWLER, 17 FED. REP. 653, FOLLOWED.

The former rule of this district, giving priority to the claim under which the vessel was first arrested, being based upon a view of maritime liens since discarded, and, being incompatible with the principles of the recent decision in this circuit in the case of *The Frank G. Fowler*, 17 FED. REP. 653, should no longer be adhered to.

3. SAME—PRESERVATION OR IMPROVEMENT OF VESSEL.

Liens of the same rank, not concurrent, but which arise from the preservation or improvement of the vessel, are to be paid in the inverse order of their dates.

4. SAME—CONCURRENT LIENS.

Concurrent liens, or such as in practice are treated as contemporaneous,—such as repairs or supplies in preparation for the same voyage,—are to be paid *pro rata*.

5. SAME—OTHER LIENS.

Claims which are not concurrent, and not for the improvement or preservation of the ship, and not having in themselves any ground of equitable priority, are to be satisfied in the order of the dates at which they accrue. But the ordinary rule giving priority to beneficial liens of the same class in the inverse order of their dates, not being properly applicable to canal-boats and similar crafts making short trips during the open season of navigation, and laid up in the winter, *held* that the rule applied to navigation on the Great Lakes should be adopted, distributing the proceeds *pro rata* among all claimants of the same class during the same season.

6. SAME—LIEN FOR TOWAGE.

Where two maritime liens were for towage services rendered to a canal-boat upon numerous trips from New York to ports on the Connecticut river and back, during the same period, from April to November, *held*, that the first libellant was not entitled to priority for the payment of his whole bill, by reason of his first arrest of the vessel; but that the proceeds of the vessel, after paying the first libellant's costs, should be applied *pro rata* upon the claims of each, without regard to the dates at which they accrued, all being during the same season.

7. SAME—COSTS.

Costs as against the fund not allowed, except upon the first libel filed and the other necessary disbursements. Claimants not appearing, if any, will be barred after order for the payment of the money out of the registry.

On December 12, 1883, the canal-boat J. W. Tucker was libeled in this court by David Cox, and in that proceeding she was subsequently sold. After satisfying the amount due on that libel with costs, the sum of \$206.23 remained, which was deposited in the registry of the court. Prior to the sale the petitioner Stillman filed his libel against the boat on the twenty-seventh of December, 1883; and on the twenty-second day of January following, the petitioner Dentz filed her petition against the same; both claiming maritime liens on the boat and its proceeds. The claim of Stillman amounts to \$398.90 for various towage services rendered to the canal-boat on the Connecticut river, between Saybrook, New Haven, Middletown, and Hartford, during each month from April 9, 1883, to November, 2, 1883. The claim of the petitioner Dentz is for a balance of \$340 for towage services during each month from May to November 6, 1883, between Jersey City, Saybrook, and New Haven, or Greenpoint. The claims for towage services rendered by each were in the usual course of the business of the canal-boat upon her trips from Jersey City to the points upon the Connecticut river above named and back. The money in the registry being insufficient to pay the claim of either in full, the libelant Stillman claims the whole amount on the ground that the boat was first libeled and attached in his suit.

Benedict, Taft & Benedict, for Stillman.

Jas. K. Hill, Wing & Shoudy, for Dentz.

BROWN, J. The claim of the libelant Stillman presents in its simplest form the question whether, as between maritime liens of the same rank, priority is to be given to that on which the libel is first filed and the vessel first arrested, without regard to the dates at which the liens respectively accrued. Such was the rule declared in this district in the case of *The Triumph*, (1841,) 2 Blatchf. 433, note, and *The Globe*, Id. 433, (1852,) and which has been more or less followed since. The principle on which this rule was based, in the language of those cases, is that a maritime lien "is, in reality, only a privilege to arrest the vessel for a debt which, of itself, constitutes *no incumbrance* on the vessel, and becomes such only by virtue of an actual attachment." Upon this view of the nature of a maritime lien, it is obvious that the parties first attaching the vessel must necessarily have a prior right. But this view of the nature of maritime liens, which is the foundation of the rule in question, has long since been superseded. In the case of *The Young Mechanic*, 3 Ware, 85, WARE, J., defines it as "a *jus in re*, a proprietary interest in the thing, which may be enforced directly against the thing itself by a libel *in rem*, in whosoever possession it may be, and to whomsoever the general title may be transferred." The subject was elaborately con-

sidered by CURTIS, J., on appeal in the same case, 2 Curt. 404. The definition of maritime liens, as stated by WARE, J., was affirmed, and the view of the nature of such liens, as expressed in the case of *The Triumph*, was shown to be unsound, (page 412.) The same view was affirmed in the following year (1856) by the supreme court, in the case of *The Yankee Blade*, 19 How. 82, 89, and has since then been universally recognized and followed. In the case of *The Lottawanna* the supreme court say, (21 Wall. 579:) "A lien is a right of property, and not a mere matter of procedure." WARE, J., in the case of *The Paragon*, 1 Ware, 322, 380, held, according to this view of such liens, that "when all the debts hold the same rank of privilege, if the property is not sufficient to fully pay all, the rule is that creditors shall be paid concurrently, each in proportion to the amount of his demand." LOWELL, J., in the case of *The Fanny*, 2 Low. 508, says: "The general rule in admiralty is that all lienholders of like degree share *pro rata* in the proceeds of the *res*, without regard to the date of their libels or suits, if all are pending together." The same view was taken by Judge HALL, in the case of *The America*, 16 Law Rep. 264, 271. So, in the cases of *The Superior*, 1 Newb. 176; *The Kate Hinchman*, 6 Biss. 367; *The General Burnside*, 3 FED. REP. 228, 236; *The Arcturus*, 18 FED. REP. 748; *The Desdemona*, 1 Swabey, 158, it was held that concurrent liens of the same rank should be paid *pro rata*, where the proceeds were insufficient to pay all, without regard to the date of the libel or the attachment of the vessel by either. ROSCOE, Adm. 101. Such is the provision, also, of the French law. Code de Com. 191.

The precise question here presented has not, so far as I can ascertain, arisen of late years within this district. In the Eastern district, in the case of *The Samuel J. Christian*, 16 FED. REP. 796, the question seems to have been regarded by BENEDICT, J., as an open one. He there held that a lien for damages by collision was subject to the prior claims of material-men, and did not acquire any priority over the latter through the prior filing of the libel; and he concludes his opinion by saying that "it is unnecessary to consider the question whether, as between claims of equal rank, a prior seizure of the vessel secures priority in the distribution of the proceeds."

The recent decision in the circuit court in this district, however, in the case of *The Frank G. Fowler*, 17 FED. REP. 653, accords in principle with the several cases recently decided, to which I have above referred, holding that mere priority of attachment does not entitle to a preference. That decision seems to me plainly incompatible with the rule adopted in the cases of *The Triumph* and *The Globe*, *supra*, and with the views upon which that rule was founded. In the case of *The Fowler*, damages in favor of different lienors had accrued by two collisions upon successive voyages of the same vessel. The libel for the last collision was filed three days before the libel for the previous collision; but the attachment of the vessel by the marshal

was made upon both processes at the same time. The proceeds of sale being insufficient to pay both claims, this court held, for reasons which need not be here referred to, that the liens should be paid in the inverse order of the time at which they accrued. 8 FED. REP. 331. On appeal, BLATCHFORD, J., reversed this ruling, and held that the earlier damage should first be paid in full. Had the rule of priority depended upon the time of *filing* the libel, the judgment of the district court should have been affirmed, since the libel on the last lien was first filed; had priority depended upon the time of the *arrest* of the vessel alone, then, as the arrest upon both libels was at the same time, and the claims were of the same rank, neither had priority of the other, and the proceeds should have been divided *pro rata* between them. Neither of these courses was pursued. The decision, on the contrary, in awarding priority to the earlier lien, established for this circuit the principle, which has been repeatedly affirmed elsewhere, that a lien is a vested proprietary interest in the *res* itself, from the time when it accrues; and also that failure to enforce such a lien by immediate suit, before the vessel proceeds on another voyage, is neither laches nor sufficient, by any equity or rule of policy, to displace its priority, as a vested proprietary interest, over a subsequent lien of the same rank upon which the vessel is arrested at the same time. The former rule in this district, which made priority among liens of the same rank depend upon the date of filing the libel, or the arrest of the vessel in the proceeding to enforce it, must be regarded, therefore, as superseded; not merely because the foundation upon which that rule rested has been wholly swept away, but also because the rule adopted by the circuit court in the case of *The Frank G. Fowler* is incompatible with its longer existence.

Viewing maritime liens, therefore, as a proprietary interest in the vessel itself, and the filing of the libel and seizure of the vessel as proceedings merely to enforce a right already vested, it follows, necessarily, that, as between different lienors, any proceeds in the registry should be distributed according to the rightful priorities of the liens themselves, and not according to priority of the proceedings merely to enforce them. This rule permits all the equities of such liens to be considered and enforced, instead of subordinating these equities to a mere race of diligence.

Where the liens are of the same rank, there is often an equitable priority among them arising out of the character of the liens themselves, or the time when they accrued. A later lien for salvage is entitled to priority over a former salvage, because the last service has preserved the benefit of the former. The same is true of successive repairs of a vessel on different voyages, or on different parts of the same voyage, or of liens on successive bottomry bonds. The later improvements or advances are for the preservation of the former, or for further improvements upon the vessel; and they have, therefore, an equitable priority. As regards such liens, therefore, the rule is

that they shall be discharged in the inverse order of their dates. 3 Kent, 197; *The Eliza*, 3 Hagg. 87; *The Rhadamanthe*, 1 Dods. 201; *The Bold Buccleugh*, 7 Moore, P. C. 267; *The St. Lawrence*, 5 Prob. Div. 250; *The Fanny*, 2 Low. 508; *The Jerusalem*, 2 Gall. 345; *The America*, 16 Law Rep. 273; *Poscoe*, Adm. 98; *The De Smet*, 10 Fed. Rep. 489, note.

If the liens are of the same rank and for supplies, or materials, or services in preparation for the same voyage; or if they arise upon different bottomry bonds to different holders for advances at the same time, for the same repairs, such claims are regarded as contemporaneous and concurrent with each other, and they will be discharged *pro rata*. *The Exeter*, 1 C. Rob. 173; *The Albion*, 1 Hagg. 333; *The Desdemona*, 1 Swab. 158; *The Saracen*, 2 Wm. Rob. 458; *The Rapid Transit*, 11 Fed. Rep. 322, 334, 335; *The Paragon*, 1 Ware, 325, and cases first above cited. But if the liens arise from causes which are of no benefit to the ship, such as liens for damages by collision, or other torts, or negligence; and if the claims are such as cannot be treated as contemporaneous or concurrent; and if there are no equitable grounds for preferring the later liens, such as laches in the enforcement of prior ones, or other grounds of general policy,—then, as stated by STORY, J., in the case of *The Jerusalem*, “the rule would seem to apply, *qui prior est tempore, potior est jure*,” (2 Gall. 345, 350;) and the liens should be satisfied in the order in which they accrue, as was held in this circuit in the case of *The Frank G. Fowler*, *supra*; Macl. Shipp. 702, 703.

As maritime liens are secret incumbrances, and tend to mislead those who subsequently trust to the ship, unless they are enforced with diligence, according to the circumstances and the existing opportunities for enforcing them, they will be deemed either abandoned through laches as against subsequent lienors or incumbrancers, or postponed to the claims of the latter, as circumstances may require. There is no fixed rule applicable to all cases determining what shall be deemed a reasonable time, or what shall be considered as laches in enforcing such liens. In ordinary ocean voyages, the preference allowed even to bottomry will be lost after a subsequent voyage, if reasonable opportunity previously existed for the arrest of the ship. *Blaine v. The Carter*, 4 Cranch, 332; *The Royal Arch*, 1 Swab. 269–284; *The Rapid Transit*, 11 Fed. Rep. 322, 334. BETTS, J., held that the same rule should be applied to ordinary liens for supplies. *The Utility*, Blatchf. & H. 218, 225; *The Boston*, Id. 309, 327. If this rule were strictly applied to vessels which make very short and frequent voyages, of only a few days' or a few weeks' duration, and which remain in port but a short time between such trips, the effect would be practically to destroy all credit to the ship, and to defeat, therefore, the very object for which maritime liens are allowed; since every lienor would be compelled to enforce his lien almost immediately, or run the risk of having it postponed to all subsequent ones.

As respects liens arising in the course of navigation on the western lakes and rivers, where the voyages are short and frequent, the rule has been adopted to a considerable extent of making the division of claims by the successive open seasons of navigation, instead of by the separate voyages during each season. *The Buckeye State*, 1 Newb. 111; *The Dubuque*, 2 Abb. (U.S.) 20, 32; *The Hercules*, 1 Brown, Adm. 560; *The Detroit*, Id. 141; *The Athenian*, 3 FED. REP. 248; *The City of Tawas*, Id. 170; *The Arcturus*, 18 FED. REP. 743, 746. The uniform practice, therefore, has been there adopted of paying maritime liens for repairs and supplies accruing during the same season *pro rata*, without regard to the particular date or voyage at which they accrued. *The Superior*, 1 Newb. 176, 185; *The Kate Hinchman*, 6 Biss. 367; *The General Burnside*, 3 FED. REP. 228, 236; *The Athenian* and *The City of Tawas*, *ut supra*.

While this rule is neither strictly logical nor consistent with the theory of beneficial liens, yet, as applied to short and frequent voyages during the open season of each year, it is not merely convenient in application, but on the whole, as I think, it works out practical justice better than any other rule suggested. It occupies a middle ground, and is in effect a compromise between the theoretical right of priority of the material-man who furnishes supplies for the last voyage on the one hand, and the corresponding obligation on his part to prosecute at once in order to retain that priority which commercial policy would disallow. The season of navigation is regarded as in the nature of a single voyage; and the rules applicable to a single ocean voyage are applied, as regards liens for supplies, to the navigation of a whole season. *The City of Tawas*, 3 FED. REP. 170, 173.

As respects liens arising under the state laws, the decisions are at variance whether such liens stand upon the same footing as strictly maritime liens. While the greater number of decisions do not allow the same *status* to statutory liens, (*The Superior*, 1 Newb. 176; *The E. A. Barnard*, 2 FED. REP. 712, 721, 722, and cases there cited,) the contrary view, according to later decisions, placing both on the same footing, seems the more likely to prevail. *The General Burnside*, 3 FED. REP. 228; *The Guiding Star*, 18 FED. REP. 263.

As the best practical rule attainable in such cases, and as a rule already supported by many decisions in the western districts, I think the *pro rata* rule of distribution should be adopted here as respects beneficial liens of the same class, in the case of canal-boats and other similar craft which make short and frequent trips upon the canals and rivers, and are laid up during the winter season, when the canals and rivers are frozen over. The same considerations of convenience, justice, and policy apply to this class of cases as in navigation upon the great lakes. They cannot be applied, however, to other craft navigating about this port, making short ocean voyages, without interruption, the year round.

The towage services rendered in this case hold the same rank as claims for necessary materials and supplies, (*The City of Tawas*, 3 FED. REP. 170; *The St. Lawrence*, 5 Prob. Div. 250; *The Athenian*, 3 FED. REP. 248; *The Constancia*, 4 Notes Cas. 512; *Macl. Shipp.* 703,) and on the above rule the claims should be paid *pro rata*.

In one of the bills there is a credit of \$130. This credit should be applied upon the earliest items. The costs of the first libel should first be paid out of the fund, and the residue should be divided *pro rata* between the claimants without regard to the dates during the season at which they accrued.

Where there are various lienors entitled to the fund, and the fund is small, no costs after the first libel, beyond necessary disbursements, should be allowed out of the fund. *The Jerusalem*, 2 Gall. 351; *The Kate Hinchman*, 6 Biss. 369; *The Guiding Star*, 18 FED. REP. 269. See *The De Smet*, 10 FED. REP. 490, note. Bonds for latent claims are not now required, except on special order, even in the English practice, (Rule 129, Coote, Adm. Pr. 205; *The Desdemona*, 1 Swab. 159;) and other parties, if any, who have liens, but have not appeared under the monition and after due publication, will be barred from the time of the final decree of distribution, (*The Saracen*, 2 Wm. Rob. 451; *The City of Tawas*, 3 FED. REP. 170.)

Since the foregoing was written I have consulted the circuit judge, and am authorized to say that a decision to the same substantial effect has been heretofore made by him in a case arising in the Northern district.

THE EXPLORER.¹

(Circuit Court, E. D. Louisiana. April 11, 1884.)

MARINE TORT—DAMAGES.

In the case of marine torts it is the rule of the courts of admiralty to exercise a conscientious discretion, and give or withhold damages upon enlarged principles of justice and equity. A party who is *in delictu* ought to make a strong case to entitle himself to general relief.

Admiralty Appeal.

James R. Beckwith, for libellant.

Henry C. Miller, for claimant.

PARDEE, J. On February 8, 1882, the libellant, Thomas McGrath, while descending the main hatchway of the steam-ship Explorer, had his left arm caught in the wheels of a revolving steam-winch, break-

¹Reported by Joseph P. Hornor, Esq., of the New Orleans bar.

ing the bones and tearing off the muscle, resulting in great suffering and in permanently disabling the arm. At the time the steam-ship Explorer lay in the Mississippi river, her bow up the stream, at her wharf in the city of New Orleans, taking on cargo for Liverpool. McGrath was employed as one of a gang of screwmen under the direction of a stevedore engaged in storing cargo in the ship. His duties were in that part of the hold under and reached by the main hatchway. There was near to and forward of the main hatchway a steam-hoisting winch used for taking on and lowering the cargo down the said main hatchway. The barrel or winding shaft of this winch extended in a direction across or athwart the ship, and the gear-wheels at right angles with the barrel or winding shaft revolved fore and aft. From the middle of the forward coaming or frame-work around the hatchway, a ladder extended down into the hold, used by those employed on the ship to reach the hold. The winch was in use taking on cargo, and its gear-wheels revolving, and this use was constant except at short intermissions; the winch was put in motion or stopped by the man stationed at the lever or crank, who stood in the rear of the wheels, facing aft, and on notification to that man the movement of the winch and wheels could be stopped or stayed while any one was in the act of passing between the coaming of the hatchway and the winch and down the ladder to go below. It was during one of these intermissions of working the winch that McGrath started from the port or outer side of the ship to go to this ladder and descend into the hold. He gave no signal, directly or through any one, to the man at the winch not to put it in motion. The man in charge of the winch being ignorant of McGrath's purpose to go below, the winch was put in motion while he was proceeding to or had reached this ladder, and his left arm was caught or drawn between the revolving wheels of the winch and thereby seriously injured as aforesaid.

The winch and the wheels were near to the coaming around the main hatchway, how near the evidence is uncertain, but there was a space between the wheels and other parts of the winch and the frame or coaming of the hatchway, and in that space it was practicable, with care and precaution, for one to pass in safety to the ladder and go below, although the winch might be in motion. The weight of evidence is that the winch was not nearer the main hatchway than is usual on steam-ships. Although housing or covering of the cog-wheels of the winch was provided, and on board of the ship, no housing or covering was on or over the winch, as is usual and necessary when in use; but after the accident, by direction of the master of the ship, the covering was put on. It does not appear that the stevedore or any of his men knew that housing was provided, or where it was stowed aboard ship. McGrath had no occasion of duty or employment to be on deck; his duty was in the main hold. There was a safer, though a more roundabout way of reaching the main

hold, than the ladder down the main hatchway. This was by the forward hatchway, which, (although in use for hoisting cargo,) by reason of the distance between decks, required no ladder. McGrath knew, when he accepted employment on the ship, of the location of the winch and of the proximity of the wheels to the main hatchway, and of the danger in using the ladder to go below while using the steam-winch. He also knew, or ought to have known, when he started down the ladder that in the business of hoisting in cargo the winch, though stopped for the moment, was liable to be started at any moment. McGrath's injuries were such as to confine him in the hospital under care of the surgeon 40 days, and his arm is left permanently crippled, unfitting him from pursuing his occupation as a screwman, although in other and lighter occupations he will be able to earn a living. Forty dollars entrance fee to the hospital was paid. As a screwman, during the season McGrath earned seven dollars per day.

From this statement of the facts, shown by the evidence, it seems clear that there was fault in not having the housing over the machinery of the winch. Such housing is usual, was provided by the ship, and all the witnesses agree that if it had been on, the injury to McGrath would not have happened.

Some effort is made to throw the responsibility for failure to have the housing on, from the ship and its officers, to the stevedore and his foreman. It is urged that the ship had provided the housing and had it aboard, ready for use, that the loading was turned over to the stevedore and his men, over whom the officers of the ship had no control; that they had the machinery of the ship to use, and did use it in their own way, and if they used it carelessly, and through negligence injured one of themselves, the ship ought not to be held responsible. Perhaps if this were all true, the ship could escape responsibility, but it does not appear that the stevedore had the entire control of the machinery and of the loading of the ship, nor that the housing was furnished, or its presence on the ship known, to him or his men. Besides, the ship furnished the machinery and should have furnished it complete, and while the owners may not have been in fault, as the housing was provided and aboard the ship, their servant, the master, was in fault in not producing it and seeing that it was used. The alacrity with which it was produced and used after the accident shows what was the original duty of the master. It seems to be clear from the evidence that the libellant contributed by his negligence, want of care and precaution, to bring about the accident which resulted in his injury. Neither his duty nor his employment called him on deck. According to several witnesses, if he had been where his employment required, he would not have been injured. He knew the danger in attempting to go down the hatchway when the winch was in motion; he knew that, if not at the time ac-

tually in motion, it was only stopped temporarily, and was subject to be started at any moment, and he failed to give any notice or warning to the person in charge of the winch, of his purpose to go down the hatch and ladder, when, as appears by the evidence, the giving of such notice was usual and customary. If, as ordinary prudence required, he had given the notice, no accident would have occurred. As both the ship and libelant were in fault, the case made is one of contributory negligence. At the common-law, the injured party whose negligence has directly contributed to the injury cannot recover damages. See Sedg. Dam. (6th Ed.) p. 573, side page 468 *et seq.*; Moak, Und. Torts, rule 27, p. 289 *et seq.*, and the cases there cited; and see *Railroad Co. v. Houston*, 95 U. S. 697. The same principle was held in the civil law. Inst. lib. 4, iii., 7.

In Louisiana the supreme court by Justice MANNING says: "The doctrine of contributory negligence is now imbedded in our jurisprudence, and is recognized and applied in all the states and by the national courts." *Murray v. R. Co.* 31 La. Ann. 490, and any number of Louisiana authorities might be cited in support.

But it is claimed that a different rule prevails in the admiralty. In cases of collision of vessels it is well settled. See *The Catherine*, 17 How. 170, in which case it is said: "Under circumstances attending these disasters, in case of mutual fault, we think the rule dividing the loss the most just and equitable, and as best tending to induce care and vigilance on both sides in navigation." For the English rule in admiralty to same effect, see Abb. Shipp. 232; Maol. Shipp. 305, and it seems that now, by act of parliament, the admiralty rule is to prevail in regard to such cases in all of the divisions of the high court. Maol. 311. In the black book of admiralty it will be found that nearly all the old Codes provided for a division of damages in cases of collision by mutual fault or inevitable accident, for the reason that "an old ship places itself willingly in the way of a better ship to strike the other ship if it should have all its damages, but when it knows that it must share the damages in moieties it places itself willingly out of the way." In prize cases also the doctrine of the common and civil law as to contributory negligence does not apply. 1 Kent, Comm. 156, citing *The Marianna Flora*, 11 Wheat. 54, in which case, which was one of prize, Mr. Justice STORY says: "The present case stands upon a strong analogy, and to inflict damages would be to desert the analogy. Even in cases of marine torts, independent of prize, courts of admiralty are in the habit of giving or withholding damages upon enlarged principles of justice and equity, and have not circumscribed themselves within the positive boundaries of mere municipal law. They have exercised a conscientious discretion on the subject. A party who is *in delicto* ought to make a strong case to entitle himself to general relief." Again, in the case of *The Palmyra*, 12 Wheat. 1, Mr. Justice STORY says: "In the admiralty the

award of damages always rests in the sound discretion of the court, under all the circumstances." And in each case he cites Lord STOWELL in *The Le Louis*, 2 Dod. 210.

From the examination I have been able to make of text books and admiralty reports, I do not find that outside of collision and prize cases, the admiralty courts have claimed or exercised a different rule as to cases of contributory, concurrent, or comparative negligence from that applied generally in courts of law and equity, in cases of damage and torts committed or suffered on land. It is true that as to mariners who are injured, no matter how, in the line of their duty aboard ship, certain responsibilities as to care, attention, wages, etc., devolve upon the ship; but I have not been able to find a case where a seaman, freighter, or passenger, injured through his own negligence, has been allowed to recover damages outside of care and attendance from the ship or her owners. I notice that in the case of *Leathers v. Blessing*, 105 U. S. 626, it was specifically found as a fact "that libellant was in no manner negligent or in fault whereby he contributed to his said injury." And in *Sunney v. Holt*, 15 FED. REP. 880, which was a case where a deck hand on a boat fell through an open hatchway, the court said: "One who, by his own negligence, has brought injury upon himself, cannot recover damages for it." In the eastern circuits I find that as against landmen employed in port to load ships, the courts of admiralty apply the common-law doctrines as to contributory negligence and as to the negligence of fellow employees. See *The Victoria*, 18 FED. REP. 43; *Dwyer v. Nat. Steam-ship Co.* 17 Blatchf. 472; S. C. 4 FED. REP. 493; *The Germania*, 9 Ben. 356. However, from all the authorities examined, I am disposed to hold that in cases of marine torts it is the rule of the courts of admiralty to exercise "a conscientious discretion and give or withhold damages upon enlarged principles of justice and equity."

Applying this rule to this case, in justice and equity what damages should be given to or withheld from libellant? Justice STORY, in *The Marianna Flora*, *supra*, in declaring the admiralty rule, said: "A party who is *in delicto* ought to make a strong case to entitle himself to general relief." Libellant's negligence is so apparent and led so directly to his injury that he does not make a strong case except in the extent of his suffering and the permanency of his injury. "The rule which denies relief to a plaintiff guilty of contributory negligence is based less upon considerations of what is just to the defendant, than upon grounds of public policy which require, in the interest of the whole community, that every one should take such care of himself as can reasonably be expected of him. It is a part of the same policy which regards suicide as a crime, and which punishes vagrancy and idleness." Shear. & R. Neg. (2d Ed.) § 42. "Both being guilty of negligence, they are the common authors of what immediately flowed from it, and it was not a consequence of the negligence of either. The court cannot accurately and will not undertake to dis-

criminate between them as to the extent of the negligence of each and the share of the result produced by each." *Moak. Und. Torts*, 280. These considerations of general application in the law courts of the land lose no force in determining what justice and equity require in the admiralty courts. From which it is easy to see that, while the negligence of the libelant cuts him off from the right to compensation, the negligence of the respondent does not stand excused. Which may be taken to mean that the libelant can recover nothing as compensation, and that the respondent or claimant in this case shall pay the expenses.

Libelant was laid up in the hospital 40 days, and thereby lost that many days' work, which at that season was proved to have been worth \$7 per day in his occupation as a screwman, amounting to say \$280. There is no evidence as to surgeon's fees, or medicines, or nursing, except that \$40 was paid for libelant's admission to the hospital, making with the labor lost the sum of \$320. This amount with the costs of this case will be decreed against the claimant as the ship's share of the expenses resulting from an injury to which the ship contributed through the negligence of her master and officers. To allow the libelant more would be to compensate and reward negligence, and in my opinion would not be in accordance with the exercise of a conscientious discretion, in applying enlarged principles of justice and equity. It would approach very near to judicial liberality. Under the evidence in the case the libelant is not so badly injured but what he can earn support for himself and family, and there is nothing in evidence to show that either is likely to become a burden on the community, so that there is no reason to mulct the ship in the interest of the general public.

A decree will be entered for libelant for the sum of \$320 and costs.

THE WANDERER.¹

(Circuit Court, E. D. Louisiana. April 11, 1884.)

1. MARINE TORT.

In cases of marine tort courts of the admiralty are not bound by the common and civil law rules governing cases of contributory negligence, but will, in the exercise of a sound discretion, give or withhold damages according to principles of equity and justice, considering all the circumstances of the case.

The Explorer, ante, 135, followed.

2. SAME—LIABILITY OF SHIP—CONTRIBUTORY NEGLIGENCE.

Where the libelant was injured severely through the negligence of the ship, his own negligence contributing thereto, so much so that without his contributory negligence he would not have been injured at all, *held* that while equity will not justify his being rewarded for his negligence at the expense of the ship,

¹ Reported by Joseph P. Hornor, Esq., of the New Orleans bar.

equity and good conscience will permit that the ship shall be held responsible for its negligence resulting in injury to the extent of paying for the direct care, attention, medical services, and expenses required for the injured party, not as compensation for the injury, but as required by decency and humanity from a party without whose fault there would have been no injury.

3. Costs.

Under the facts of this case, and the libellant undoubtedly believing that he was entitled to compensation, and prosecuting in good faith, costs were taxed against the claimant.

Admiralty appeal.

Geo. L. Bright, for libellant.

J. Ward Gurley, Jr., for claimant.

PARDEE, J. The libellant complains that he was a seaman on the *Wanderer*; that there was on the steamer a ladder leading from the upper deck to the steerage, and to the lower deck; that this ladder was always fastened to the lower deck so as to prevent it from slipping; that the ladder and the cleats that fastened it were removed, and that the ladder was put back without cleats or fastenings of any kind; that when he was going down this ladder the ladder slipped, he fell, suffered great pain and injury by the fall, injured his groin and testicles, so as to unfit him for work for at least six months. He charges that his injuries resulted from the carelessness of the master and owner of the vessel in not properly securing the ladder. The answer denies that libellant fell or was injured as alleged, and alleges that the ladder was at all times properly secured, and had never been removed; that the libellant had no right to go down the ladder, and if he did go down the same it was not in the line of his duty; and that the libellant's injuries, if he was injured, were not caused by the neglect or carelessness of the respondent.

From the evidence it seems clear that the ladder in question was not properly secured on the day libellant alleges he received injury by its falling. It had been secured prior to that time, but in repairing some pump underneath, the ladder was removed, and by the time it was replaced the proper cleats at the bottom had disappeared. The evidence on this point is uncontradicted, except by the master of the ship, and his testimony in relation to the cleat is inferential and negative in character. That the ladder slipped and fell when libellant was going down it, and that he was injured thereby, depends entirely upon the evidence of libellant himself. No person saw him go down or come up, saw the ladder fall, or saw it replaced. At the time he neither called for assistance nor reported to any one that he had fallen. That night he told a comrade he had fallen with the ladder, and complained of severe and painful injury. It seems that he continued on duty for several days, when the mate, seeing him limping, inquired what was the matter, and was told by libellant that he had fallen down with the steps in the steerage, and then the mate made entry of the complaint in the log. It seems that the master was first informed, and by libellant, of the alleged hurt, when the ship

arrived at Belize, but he swears he had no idea that libelant had fallen down a ladder until the ship returned to New Orleans, when his owners told him that such a claim was made.

The character and extent of the alleged injury depends also to a great degree upon the unsupported evidence of libelant. One of his comrades, three or four days after the alleged injury, saw that he had a large and painful swelling and bandaged it up.

The surgeon in charge of the hospital at Belize, where libelant went for six days while the *Wanderer* remained in port, testified that he treated libelant for acute orchitis; that he could not tell what caused it; that he was discharged cured; and that he did not think any permanent injury would result from his affection, and that in his opinion he would have been able to resume work in a few days after being discharged. "Orchitis is inflammation of the secreting structure of the testicle. It occurs sometimes spontaneously in an acute way. It is the malady of the testicle seen in connection with mumps, and is most apt to result from local injury. The pain in orchitis is intense and often of a peculiar sickening character. A chill may precede its outbreak. The natural terminations are in resolution, atrophy, or abscess. The first two occur in the spontaneous variety of orchitis and in that seen with mumps. Abscess is not often seen, except after local violence." See *Wood Household Practice*, vol. 2, p. 528. The surgeon's testimony and certificates in the record show recovery, but say nothing of atrophy or abscess in the case of libelant.

The libelant swears to a swelling of the testicle, to continuous pain, and to inability to work as a sailor; but that he had declined to go to the hospital here, was being treated by no physician, but was being treated by a druggist internally and externally, and that he was laboring a little at stevedoring, hooking on the tubs and driving the steam winch. According to the medical authority quoted *supra*, the natural termination of the libelant's complaint should be recovery, a shrinking or wasting away of the organ, or an abscess. He repudiates a recovery, but he is silent as to atrophy or abscess, neither of which, had it happened, could have escaped his attention.

As to whether the libelant had any right to go down the ladder into the steerage the evidence is conflicting, the preponderance being against the right. He was not sent there on any duty; the ship's stores were there, and the regulations of the ship prohibited the crew from going there unless sent on duty. The libelant contends, and is supported by three several witnesses, that the crew were compelled to go there for fit drinking water, the supply from the deck pump, which had recently been repaired, being oily and unfit, and that the habit and necessity of the crew to go there for water was well-known to and not forbidden by the officers. This is denied by the captain, first mate, second mate, and steward. It does not seem probable that enough oil would be likely to be used about the pump, which was what is called a pitcher pump, to affect the water for any time, and that

fact not be generally known on the ship. There is no doubt under the evidence that water from the pump on deck was continuously used for drinking and cooking on that voyage. On the whole showing it seems that the most favorable case that can be made for the libelant is that he was injured severely through the negligence of the ship, his own negligence contributing thereto, so much so that without his contributory negligence he would not have been injured at all. As this court has just held, in the case of *The Explorer*, ante, 135, in cases of marine tort, courts of the admiralty are not bound by the common and civil-law rules governing cases of contributory negligence, but will, in the exercise of a sound discretion, give or withhold damages according to principles of equity and justice considering all the circumstances of the case.

The libelant's case under the proof is not a strong one, either as to his actually having been injured, or as to the extent of his injury. The fault of the ship was accidental. It is not equitable to reward a person who has helped to injure himself. The libelant is a laboring man, without means. He was a sailor aboard a ship at the time he received injury. Considering the manner in which he received injury, his service at the time and his estate, while equity will not justify his being rewarded for his negligence at the expense of the ship, equity and good conscience will permit that the ship shall be held responsible for its negligence resulting in injury to the extent of paying for the direct care, attention, medical services, and expenses required for the injured party; this not as a compensation for the injury, but as required by decency and humanity from a party without whose fault there would have been no injury. It seems, however, in this case that libelant was sent to the hospital in Belize, where he remained until pronounced cured; that he returned to the ship, and thereon to this port, was required to do no work, and received his pay for the entire time of the trip. That on his arrival here he was offered by the ship further hospital treatment, which he declined. The treatment he received was without expense to him, and he proves in this case no expenditures for care, attention, medical services or medicines. If any such expenses had been proved they would be allowed.

There remains to determine responsibility for the costs in the case. These are also within the jurisdiction of the court. The libelant undoubtedly believed and will probably always believe that he was entitled to compensation from the ship for his injury, and to that extent the prosecution has been in good faith. It is known to the court that he prosecuted his case in the district court *in forma pauperis*, and the record shows that he comes to this court on the bond of his proctor, who, undoubtedly, believed that his client's case had merit. Under the facts found in the case as to the ship's negligence and these circumstances as to costs, it would seem fair and just that the costs

should be taxed to the claimant. The decree of the district court dismissed the libel, but decreed no costs.

The decree of this court will be entered dismissing the libel, but directing the claimant to pay costs.

'THE CYPRUS.'

(Circuit Court, E. D. Louisiana. March 27, 1884.)

1. CHARTER-PARTY—COMMENCEMENT OF LAY DAYS.

Charterers had furnished cargo and asked and received bills of lading on December 7, 1880; and furnished more cargo on December 9th and again on December 11th, on which last day the ship was first fully prepared to receive cargo at all hatches. *Held*, that the action of libelants in furnishing cargo and receiving bills of lading therefor on December 7th ought to estop them from denying that the lay days for loading had then commenced.

2. SAME—WORKING DAYS.

Where the charter provided that "eighteen working days, *Sundays excepted*," should be allowed, that provision shows that custom was not to control, and the exception of Sundays was the intent and meaning of the parties as to what should be considered working days, and therefore "rainy days" could not also be excepted.

3. SAME—TECHNICAL VIOLATION OF.

A technical violation of the charter-party, otherwise fully executed, would not entitle either party to claim the full penalty named in the contract.

Admiralty Appeal.

E. W. Huntington and *Horace L. Dufour*, for libelants.

James R. Beckwith, for claimant.

PARDEE, J. The original libel demands the recovery of \$23,000, the estimated amount of freight under charter-party, penalty for alleged violations of the charter-party, to wit: (1) That the master of the ship claimed and exacted demurrage to which the ship was not entitled; (2) that cargo was stored in improper places, thereby causing loss to libelants by forcing them to provide additional cargo for the ship; (3) that the master refused to give draft, as per terms of the charter-party, for amount of excess of actual freight, as per bills of lading, over amount fixed by the charter-party; (4) The supplemental libel alleged that the steam-ship was liable to the libelants in the sum of \$3,163.45, for advances, difference of freight, and commissions; (5) and for the further sum of \$1,162.50, amount of demurrage illegally exacted.

1. As to the matter of demurrage, the charter party provides as follows:

"Eighteen working days, *Sundays excepted*, are to be allowed the said freighters (if the steamer be not sooner dispatched) for loading, and *to be discharged with all possible dispatch, as customary*. And ten days on demur-

¹ Reported by Joseph P. Hornor, Esq., of the New Orleans bar.

rage, over and above the said lay days, at the rate of six pence per gross register ton per day."

The parties differ on two points: (a) when did the lay days commence, and (b) are rainy days to be counted?

(a) The proof is that libelants furnished cargo and asked and received bills of lading therefor on December 7, 1880; that more cargo was furnished on December 9th, and again on December 11th, on which last-named day was the ship first fully prepared to receive cargo at all hatches. It would seem that the action of libelants in furnishing cargo and receiving bills therefor on the 7th ought to estop them from denying that the lay days for loading had then commenced. The contract required them to furnish cargo in 18 working days from the time they commenced, and if they did that it was no concern of theirs what time was spent in loading and stowing without their fault. At any rate they ought not be heard to deny that the lay days had commenced on the day they took for their own advantage the first bill of lading.

(b) As to the second point, the contract is too specific to leave anything to be determined by custom. By the contract the loading was to take 18 working days, (Sundays excepted,) and the discharging was to be with customary possible dispatch. The provision as to discharging shows that custom was not to control in the loading, and the exception of Sundays was the intent and meaning of the parties as to what should be considered working days. If the parties had not expressed themselves as to what exception should be made from working days, then I think there is no doubt both Sundays and holidays would have been excepted under the legal interpretation which have been given to the words "working days." But I know of no custom nor legal interpretation that can stand against the clear, express, unambiguous terms of a written contract. As a matter of fact in this case, legal holidays were excepted, as well as Sundays, by the master, in claiming demurrage. As to the rainy days, while, as I have shown, the contract includes them, the evidence does not show that the original parties to the charter had any knowledge of the alleged custom of this port in regard to them. See Chit. Cont. 142; 3 Kent, Comm. 260, note c; *Renner v. Bank of Columbia*, 9 Wheat. 587. And where the contract expressly determines the number of lay days, as it does in this case, the freighter is liable if the loading be not done within the stipulated time, unless the delay be caused by the fault of the ship-owner or his servant, "and accordingly it has been held that delays loading or unloading a vessel beyond her running days, if occasioned by frost or prohibition of a foreign government, or by custom-house regulation, or by unlawful seizure, or by the crowded state of the docks, or by default of the shippers, or by a casualty, cause, or accident other than the default of the ship-owner or his servant, are misfortunes which must fall upon the freighter." See 23 Amer. Law Reg. 155, and cases there cited. In this case it v.20,no.2—10

seems to be clear that the ship was entitled to demurrage after the twenty-eighth day of December, 1880.

2. The evidence on the subject of stowing cargo in improper places leaves the matter in doubt, whether in this case there was such stowage. Drysdale, stevedore for libelants, and who loaded the ship, says: "All vessels that are chartered by the lump sum do not carry cargo in the thwartship bunker, the forepeak, the cabin, or the deck houses, but in all vessels that we have loaded where they carry cotton by the pound, we put the cotton almost every place where we can get a bale." And this sounds very probable as a matter of self-interest. But if it is conceded that in this instance there was such improper stowage, the evidence fails to show that it damaged or prejudiced libelants in any sum or amount. How much cotton was so stowed, or what the freight thereon, or how it affected the balance (excess or shortage) under the charter party are all left to conjecture. Of course, a technical violation of the charter party otherwise fully executed, would not entitle either party to claim the full penalty named in the contract.

3. As I find the evidence, there was nothing due the charterers for excess of freight as per bills of lading over freight fixed by the charter party. The returned bills of lading show that the account is the other way to the amount of £30 12s. 3d. Some of the evidence points to a claim by libelants that there should be deducted from the invoice weights on this side, some percentage for shrinkage in transit, and 4 per cent. off from the gross weights on this side is claimed. The performed bills show no deficit or reclamation, but a full delivery. If this claim of libelants is based on any custom, such custom is not proved. If it means that shippers are to be charged the full amount, and that 4 per cent. is to be deducted for the charterers from the earnings of the ship, it is hardly reasonable. If it means that the gross weights on this side are to be taken as fixing the freight received and earned, and an estimated deduction to be taken from weights on the other side in determining the freight allowed by the terms of the charter-party, that is not reasonable either.

4. The difference in freight being against the charterers, that item in the account claimed in supplemental libel is disposed of. The charter party stipulates, "the steamer to be addressed to the charterers' agents at the port of loading *free of commission*." The claim made as under letters of owners of ship, Taylor and Sanderson, to Hayn, Roman & Co., of Liverpool, carried no right as to libelants, or as against the ship, and it appears, by the record, to have been settled by the parties outside of this case. There remains, then, of the claim made by the libelants in the supplemental libel, the amount of advances made for the ship, admitted to be \$957.77, to which 2½ per cent. should be allowed, making a total of \$967.34 as due from the ship to libelants at the time the original libel was filed. For this amount the master was obligated by the charter-party to draw

in favor of libelants on his consignee at port of discharge at 60 days sight. It seems that no specific draft for such sum was demanded; that no consignee had been selected; and that, in the numerous disputes between the parties as to the excess of freight, the proper clauses to be in the bills of lading, stowage of cargo, and demurrage, the demand, if made, was always so complicated with other matters as to receive no particular significance. At any rate, that amount represents the maximum amount of libelants' claims against the ship, and will be taken as their credit in making up account between the parties.

The case for the claimants, as made by the answer and cross-libel, are: (1) Denial of the valid assignment of charter party without owners' consent. (2) Claim for £30 12s. 3d. difference between freight stipulated and freight earned. (3) Claim for damages for illegal and oppressive seizure in the courts of the state and in the court *a qua*.

1. It seems to be too late to question the validity of the assignment as being without consent of the owners. The master recognized the libelants as legitimate assignees, reporting to them, receiving their freight, calling upon them for, and receiving from them advances and demurrage, before any question of the assignment was made. The ship and her owners ought to be estopped by this conduct of the master, all of which was in their interest and to their advantage.

2. The claim for difference of freight, as I have shown elsewhere, should be allowed.

3. The question of damages, by reason of the two seizures, presents more difficulty. That in the state court was oppressive and improvident, and the distinctive damages from that seizure should be allowed as far as proved; but aside from the trouble in giving bond to release the seizure and one day's demurrage, none are proved, for it seems that on the next day after that seizure the ship was libeled in the district court, and both seizures were released the next day thereafter. The seizure in the district court was oppressive for being so largely in excess of the amount due from the ship. It is true, that by the charter-party the amount advanced the ship was to be paid by a 60 days draft, but the parties had, as I have before shown, got into difficulty and confusion over conflicting claims, the ship had taken her business from libelants, and on the whole case I am not prepared to say that the libelants had not the right to protect themselves by libeling the ship for the real sum due them. They were not in such bad faith, nor was the master of the ship in such good faith that any beyond actual damages should be allowed. The proof is that claimants were at an expense of $2\frac{1}{2}$ per cent. to give the bonds exacted. The ship was delayed one day (January 3d) by seizure in the state court, and two days (January 4th and 5th) by the combined seizures. There is no proof of any other damages in the record. There is no claim by libelants for damages by cross libel and no proof of any. The record does not show, as alleged by proctor of libelants in his

brief, that the seizure in the district court could have been released for a less amount of bond than was given. I think that the claimants' side of the account should be stated thus:

Difference in freight—short of contract, £30 12s. 3d.	-	-	\$148 98
One day's demurrage	-	-	232 50
Two and one-half per cent. on \$23,800, excess of bond exacted	-	-	595 00
Total	-	-	\$976 48

—which amount, it will be seen, overruns by a few dollars the credit due the libelants.

In this state of the case equity requires that a decree should be entered declaring all claims and demands between the parties compensated and extinguished, the costs of the district court to be equally divided between the parties, and as the decree of the district court was for a large sum against the claimants, the costs of appeal, including the costs of transcript, to be paid by the libelants. And it is so ordered.

TEUTONIA INS. CO. v. BOYLSTON MUT. INS. CO.¹

(Circuit Court, E. D. Louisiana. April 10, 1884.)

INSURANCE.

Ambiguous language in an insurance policy should be construed against the insurer.

In this case, which is a suit on an open policy for reinsurance, the parties have waived a jury, and submitted the case to the court on the following agreed state of facts:

(1) That at several places on the Yazoo river, which is a tributary to the Mississippi river, on the twelfth and fourteenth days of November, 1883, several persons delivered on board the steam-boat E. C. Carroll, Jr., with privilege of reshipping, several parcels of cotton; that is to say, 79 bales of cotton, the property of the persons to whom the same were consigned at New Orleans, and for whose account the plaintiff insured the same for the sum of \$3,950 against the perils of the rivers, fires, jettisons, etc., from places at which the same were laden to New Orleans.

(2) That at several places on the said Yazoo river, on the thirteenth and fifteenth days of said month, several other persons delivered on board the steam-boat S. H. Parisot (she being then on a voyage from a place or places on the said Yazoo river to New Orleans) several other parcels of cotton, that is to say, 22 bales of cotton, the property of the persons to whom the same were consigned at New Orleans, and for whose account the plaintiff insured the same for the sum of \$1,100 against the perils, fires, jettisons, etc., from the place at which the same were laden to New Orleans.

(3) That the said steam-boats Carroll and Parisot carried all said cotton safely to Vicksburg, a port on the Mississippi river, and that, on the sixteenth day of said month, all the said cotton on the said steam-boat E. C. Carroll, Jr.,

.Reported by Joseph P. Hornor, Esq., of the New Orleans bar.

was unladen and reshipped on the said steam-boat S. H. Parisot, in the Mississippi river at Vicksburg aforesaid, and the said steam-boat S. H. Parisot, on the said sixteenth day of said month, (after the reshipment of the said cotton from the said E. C. Carroll, Jr.,) departed from Vicksburg, with all said cotton on board, continuing her voyage from a place or places on the said Yazoo river to New Orleans, with right to stop at intermediate way landings on the Mississippi river.

(4) That on the seventeenth day of said month the said steam-boat, S. H. Parisot, touched at Goldman's Landing and at Rodney, at which last-named places several other persons delivered on board said last-named steam-boat several other parcels of cotton, that is to say, 24 bales and one half-bale of cotton, the property of the persons to whom the same were consigned at New Orleans, and for whose account the plaintiff insured the same for the sum of \$1,225 against the perils of the rivers, fires, jettisons, etc., from the places last-named to New Orleans.

(5) That said steam-boat, S. H. Parisot, pursued her voyage with all the cotton mentioned on board thereof, until said steam-boat and all said cotton were burned and consumed by fire on said Mississippi river, below Rodney, on the eighteenth day of said month.

(6) That the value of said several parcels of cotton exceeded the several sums insured by the plaintiff.

(7) That the persons for whose account the plaintiffs insured said cotton made proper proofs of their interest in the cotton, and of their losses and damages, and demanded of the plaintiffs payment of the same, and the plaintiffs admitted their liability to pay said demands and paid the same in full, namely, \$6,725.

(8) That when the said several parcels of cotton were delivered to said several steam-boats, as aforesaid, there was a contract of the defendant, reinsuring the plaintiffs, which contract the plaintiffs have filed with their petition in this cause, but whether said contract applied to the cotton mentioned is the only dispute between the parties. The said contract is made part of this stipulation.

(9) That the plaintiffs delivered to the defendants proper notice of the loss of said cotton, and requested the defendants to enter the same on said contract of reinsurance, and tendered payment of the premium of reinsurance and demanded of defendants payment of the sum of \$1,275, but defendants refused to recognize plaintiff's request and demand, on the ground that said contract of reinsurance never attached to any of the cotton above mentioned.

(10) If the contract of reinsurance never attached to any of the cotton above mentioned, defendants are to have judgment for costs; and if it did attach, the plaintiffs are to have judgment for \$1,275 and costs.

The following is the part of the policy in question pertinent to the case:

"No. 27—Teutonia Insurance Company.—From points and places on the Mississippi river and its tributaries to New Orleans. This insurance is understood and agreed to be on the excess which the said Teutonia Insurance Company may have on all their policies on cotton, sugar, and molasses, and cotton seed, issued at their office in New Orleans, or at their Shreveport agency as follows, viz.: On the excess of \$10,000 on boats from places on the Mississippi river, but said excess not to exceed \$5,000 by any one boat.

"On their excess of \$5,000 on boats from places on the tributaries of the Mississippi river, but said excess not to exceed \$15,000 by any one boat. This insurance is to cover from and after January 1, 1883, and to be deemed continuous, but may be canceled at any time by either party giving ten days notice, without prejudice to risks pending at the time of cancellation.

"Subject to the same risks, conditions, valuations, privileges, and mode of

adjustment as may be assumed or adopted by the Teutonia Insurance Company, and loss, if any, payable *pro rata* with, at the same time and in the same manner as by said company."

E. M. Hudson, for plaintiff.

O. B. Sansum, for defendant.

PARDEE, J. The question at issue is one of construction of the written clause in the policy, whether it is descriptive of the boats or of the freight; whether the excess for reinsurance was to be determined by the places the boats were from or by the places the freight was from. The question is one of great difficulty, and however decided the rule adopted would lead to contingencies evidently not contemplated by the parties. From the language of the clause in question it is clear that the defendant limited its risk to \$15,000 on any one boat; that the policy was intended to protect plaintiff's risk above \$10,000 on any one boat on the Mississippi river, and above \$5,000 on any one boat on the tributaries of the Mississippi; and this is conceded by the learned counsel for defendant. Now suppose the case of a boat running between New Orleans and Memphis. At Memphis she takes on \$10,000 freight which is insured by plaintiff. At the mouth of the Yazoo she takes on \$5,000 more freight, shipped from Yazoo City with privilege of reshipment, and also insured by plaintiff. The plaintiff has then \$15,000 risk on one boat running on the Mississippi. The contract in question was intended to reinsure all in excess of \$10,000. To accomplish this intent of the parties the clause in question must be construed as descriptive of the boats carrying the freight and not of the freight, for if we construe it as descriptive of freight, then the plaintiff has a risk of over \$10,000 on one boat on the Mississippi and no re-insurance, because only \$10,000 is from places on the Mississippi, and only \$5,000 is from places on the tributaries of the Mississippi, and this is in conflict with the conceded intent of the parties. On the other hand, if we construe the contract as descriptive of the boats, then we have a case where the risk is determined, not by the route over which the goods are to be transported, which is the ordinary consideration, but by the fact as to where the boat had made her voyage before the risk was assumed.

The contention of the defendant with regard to the proper construction, as most clearly and concisely stated by the counsel, is that the words "on boats from places on the tributaries of the Mississippi river" must be construed with reference to the principal purpose of the contract, which is the insurance on cotton, etc., from points and places on the Mississippi river and its tributaries to New Orleans. There is no doubt the details of the contract should be construed with reference to the main purpose of the contract, but this concession does not relieve us of the difficulty in this case. Of course the purpose of the contract is the insurance of cotton, etc., in transit, and to reach it intelligently four things have to be provided for: (1) The territorial limit of the proposed risk; (2) the character and kind of property to be risked; (3) the character and kind of transportation

to be employed, and (4) the amount of risk to be assumed. These things are provided for in this policy in order, to-wit, from points and places on the Mississippi river and its tributaries, on cotton, sugar, molasses, and cotton-seed, transported on boats from places on the Mississippi river, and on boats from places on the tributaries of the Mississippi river, and in the one case on the excess of the \$10,000, and in the other on the excess of \$5,000. The construction claimed by the defendant would ignore all differences between the character and kind of boats plying on the Mississippi river and of the boats plying on the tributaries, while the contract makes the two classes and provides different responsibilities for each class. The construction claimed would be the plain letter of the clause in controversy if we should strike out where they occur the words "on boats," for it would read in this case "on their excess of \$5,000 from places on the tributaries of the Mississippi river." The rules of construction will not allow us to strike out these words, but do require us to give meaning and force to them if possible. If we take the words of the contract as the parties have left them, and in the connection that they have used them, it would seem to be more in consonance with the real intent of the parties and with the rules of construction of such contracts, to construe them as descriptive of boats rather than as descriptive of freight.

Ambiguous language in an insurance policy should be construed against the insurer. See *May, Ins.* §§ 174-176, and *Wood, Ins.* 140 *et seq.* This construction is in accord with the only adjudged case cited in argument. See *Phoenix Ins. Co. v. Cochran*, 51 Pa. St. 143. The insurance in that case was on two policies of same date for \$5,000, each for one year, on oil in bulk or barrels, on board the good barges trading as to one policy, between the wells on Oil Creek, Allegheny River, and Pittsburgh, as to the other between Oil City and Pittsburgh; the wells on Oil Creek are above Oil City, which is at the mouth of Oil Creek; and the court held that these points were descriptive of the barges, and not the freight, and that whenever the oil was taken on or delivered between these points it was within the policies if the barges were trading between these points. This construction is also in accord with what, from well-known facts, would seem to be the motive of the parties in discriminating as to the amount of reinsurance against the tributaries and in favor of the Mississippi, because it is well known that in quality of boats and in dangers of navigation the difference is largely in favor of the Mississippi. In deference to the very clear, earnest, and forcible manner in which counsel for defendant has presented his case, I have most carefully considered the question presented, and while I am not free from doubt, I cannot avoid the conclusion that the clause in the policy in suit is descriptive of the boats and not entirely of the freight. Reaching this conclusion, under the agreed state of facts, judgment must go for the plaintiff for \$1,275 and costs; and it is so ordered.

THE NIAGARA.

ACKER v. THE NIAGARA.

FOX v. SAME.

MECHANICS' & TRADERS' INS. CO. v. SAME.

COLES v. SAME.

(District Court, S. D. New York. April 4, 1884.)

1. COLLISION—TOWAGE—NEGLIGENCE—DUTY.

While tugs are not insurers of tows in their charge, and are answerable for negligence only, negligence is shown by the want of ordinary skill in navigation, and of the exercise of such care and diligence in handling the tow as a man of ordinary prudence would exercise in the protection of his own property. In making up a tow of numerous boats each is entitled to the same reasonable care for her safety as if she were the only boat in the tow.

2. SAME—POSITION OF CANAL-BOAT—HAWSER TIER.

It is negligence to place an open-deck canal-boat, deeply loaded, in the hawser tier, for a trip up the Hudson river, with the wind blowing from the north or north-west from 15 to 18 miles per hour.

3. SAME—UNFITNESS—NOTICE.

When notice is given, with an order for towing, that the boat is unfit to go in the front tier, those who make up the tow are bound to take notice thereof; and if put in the front tier without the captain's consent it will be at the risk of the tug.

4. SAME—CASE STATED.

Where the captain of the canal-boat B., finding that his boat was about to be put in the front tier, protested, and desired to be put back into the dock, rather than go in the front tier, which request was disregarded; and the hawser was made fast to her by those in charge of the tug, and the B. was afterwards swamped and sunk through taking in water over her bows, *held*, that the tug was solely in fault, and that the B. could not be held jointly answerable as for a hazardous undertaking by the consent of both parties, as in the case of *The William Cox*, 9 FED. REP. 672, and *The Bordentown*, 16 FED. REP. 270

The above four libels are brought to recover damages sustained in consequence of the sinking of the canal-boat Belle in the Hudson river, between 5 and 6 in the morning of the fifth of October, 1881, while in tow of the steam-tug Niagara, near the long dock at Piermont. The Niagara belonged to what is known as Schuyler's line, which, during the season of navigation, takes a tow of numerous boats every night from New York up the North river to Albany. The Niagara left New York on the night of October 4th with a tow of 24 boats, of which four were deeply loaded, having about 200 tons aboard, and called plugs; six other canal-boats were somewhat smaller, having not over 110 to 115 tons each; twelve other boats were light, and two were light hay barges. The Belle was one of the four deeply-loaded boats called plugs, which were placed in the hawser tier, the Belle being second from the port side. The Belle was an open boat, without hatch covers; the open part of her deck was about 70 feet in

length by 9 in breadth, with coamings about six inches high around the edges. The other three boats which formed the hawser tier were covered with close hatches. The record of the weather bureau shows that the wind, from 3 o'clock that afternoon until the next forenoon, was from north-west to north, and gradually increasing from 16 miles an hour to 21 miles. After passing the Palisades, on entering the broad expanse of the Hudson at the Tappan Zee, being less under the shelter of the land, and the wind apparently about the same time veering to the northward and increasing, the tow encountered a heavy chop, from which, in the course of half an hour, the Belle, in the front tier, took in water over her bows sufficient to carry her down head-foremost. All was done that could be done on board the Belle to save her, both by pumping and by sounding a horn to give notice to the tug ahead. The horn was not heard, and pumping was of little avail. Just before she sank her lines attached to the other boats were unloosed. A few moments after sinking a part of her stern appeared again above water, and by its collision with the boats behind divided the tow, and set two of the other boats adrift. The latter were blown downward and across the river upon the rocks on the eastern shore, where they suffered injuries, on account of which the last two libels are brought, the first two being for the boat Belle and her cargo.

E. D. McCarthy, for E. A. Parker and Wm. Fox.

Carpenter & Mosher, for Mechanics' & Tradesmen's Ins. Co. and C. Sanford Coles.

Owen & Gray, for the Niagara.

BROWN, J. The owners of the tug-boat contend that they are not responsible for the loss, because there was no negligence on their part. They allege that it was customary to put boats like the Belle in the hawser tier; that there were no indications of tempestuous weather at the time when the tow was made up on the evening of October 4th, and that the only proper place for the Belle, a heavy and deeply-laden boat, was in the front tier, and not in the rear of lighter boats. Owners of tugs are not insurers of the tows in their charge. They are, indeed, answerable for negligence only; but negligence consists in the want of ordinary skill in navigation, and of the exercise of such care and diligence in handling the tow as a man of ordinary prudence would exercise in the preservation of his own property. Where the trip undertaken will occupy a considerable time, they are bound to take all such safeguards as are necessary to preserve the tow from loss or injury through any of the contingencies which may ordinarily be expected to arise upon the trip. The time usually occupied by tows in going from New York to Troy is about 36 hours. In commencing such a trip, sufficiently long to encounter all kinds of weather, the claimants were bound to arrange all such boats as they took in tow so that they should be reasonably safe against the contingency of a strong head-wind and heavy chop, such as caused

the loss of the Belle in this case. There is no question in my mind, despite some reservations on the part of the claimants' witnesses, that the most dangerous place for a deeply-laden open boat is the hawser tier, or along the windward side of the tow; that the Belle could have gone safely in almost any part of the inside of the tow; and that her loss is due entirely to her being put in the front tier, for which she was obviously unfit. When the order for towing the Belle was given, it was stated that she was an open boat, deeply loaded, and unfit to go in the hawser tier, and must not be placed there. When she was taken, at night, by the helper to the place where the tow was made up, and it was seen by the captain that she was about to be put in the hawser tier, he remonstrated against it with great vehemence, on the ground that, as a deeply-laden, open boat, she was unfit to go in the hawser tier. All the witnesses agree as to the master's remonstrance. Several witnesses on his side support him in the further statement that at the time of this protest he also demanded to be taken back to the dock rather than go in the hawser tier; that those making up the tow claimed the right to put the Belle where they pleased, and insisted upon doing so. Two witnesses on behalf of the claimants deny that the master demanded to be taken back to the dock; but they say that the master of the helper, the Quaker City, offered to take the Belle back to the dock if he did not want to go in the hawser tier. The libelants' witnesses deny this, and add that the captain replied that, if he was put in the hawser tier, it must be at the risk of the tug.

I must hold that this open boat, so deeply laden and with low coamings, was unfit to go in the hawser tier,—that is, that she would be safe there in mild weather only, and would be in danger of being sunk through any strong head-wind that might be met upon the trip; that these dangers were so obvious that it was negligence in the tug to put the Belle in the hawser tier; and that in all such cases the tug is chargeable in case of loss arising from such a cause. There are some open boats, like those of the Lackawanna Company, built for navigating on the Hudson in all weathers, which have never experienced any such accident; but they run comparatively light, and have coamings around the open space a foot high. It is not pretended that the Belle was a boat of this character. It is clear that her owner and captain knew her to be not safe in the hawser tier; and this was made known to those in charge of Schuyler's line from the first. In disregarding this notice and putting the boat in the hawser tier, the tug must be held not to have acted with that reasonable prudence required by the rule above stated, and must be held responsible for what afterwards happened. She was not bound to take the Belle at all. If she did take her, she was bound to put her in a place of reasonable safety and out of danger, in reference to her special condition. The tug manifestly acted with full notice, and putting the Belle in the hawser tier was at the tug's own risk.

Some evidence was given that the heavier boats must be put in front. From the testimony on that subject, I infer that a tow can be handled probably with more ease and celerity by that method of arranging the boats than by any other; but I am by no means satisfied that that is the only practicable arrangement of a few heavy boats when there are many other lighter ones, such as made up this tow. It was shown that formerly, in such cases, the practice was to place the few heavy boats in a line, one after the other; and in this case no sufficient reasons appear why the Belle, an open boat, could not, without any serious inconvenience even, have been placed astern of one of the other deep boats, and, in her place, a covered boat of 140 tons have been put in front.

In behalf of the claimants it is urged, however, that the captain of the Belle, after all, preferred to go in the front tier rather than be taken back to the dock; and that the Belle is at least jointly chargeable with the loss, on the principles laid down in the cases of *The William Murtagh*, 17 FED. REP. 259; *The William Cox*, 9 FED. REP. 672; and I should so hold if I could find the facts to be as claimed. Navigation voluntarily entered upon under circumstances involving carelessness and needless danger or hazard, within the knowledge of those taking part in it, is a tortious act; and when the captains of both the tow and the tug concur in starting upon such a trip, both violate the duties which they owe to the respective owners of the tug and of the tow and her cargo. Both should, therefore, be held chargeable with any loss incurred by such wrongful acts. As the lives and property of third persons, also, are nearly always more or less involved in these cases, public policy requires, in order to avoid such hazards, that the liability of both should be maintained and enforced. No mere notice, by either, that such a dangerous trip would be at the other's risk, nor even any agreement to that effect, should, therefore, be regarded. Responsibility for the sacrifice of the lives and property of third persons cannot be shifted by any bargaining between those who, by their own concurrent acts, cause the loss. But it is obvious that this principle cannot be justly applied except where such hazards are knowingly entered upon by the voluntary and concurrent acts of both tug and tow.

In the case of *The Bordentown*, 16 FED. REP. 270, it was held, in this court, that a simple objection or protest by the captain of the tow against being put in the hawser tier was not sufficient to relieve him of joint liability, it appearing that his objection was not on the ground that his boat was unfit for that place, and that he did not object to go along with the tow in that position. Objections by boatmen to the places assigned them in tows are of daily and constant occurrence; and they are made, for the most part, from mere reasons of individual convenience or preference. Such objections are manifestly of no weight; and, as testified to in this case, if they were list-

ened to, the tow would never get started. But in this case the objections were obviously of a very different character from those in the case of *The Bordentown*. They were made specifically on the ground that the Belle, by her deep loading and open deck, was not fit for the front tier, and could not safely go there. I think the weight of the testimony is clearly to the effect that the captain demanded to be put back into the dock rather than go in front. This is no after-thought on the part of the libellant; it is specifically set up in the libel. The testimony of the captain and mate of the tug is such as to strengthen the testimony of the libellant's witnesses in this respect; for they state explicitly that they should have paid no attention to such a demand if made. Their view of their rights in this respect, even as a matter of custom among towing lines, is not sustained by the superintendents of two other lines whom they called to prove the general usage in this business. Both these experts testified that they should consider such a notice and demand as were given in this case to be binding upon them. That such was the legal obligation there cannot be a particle of doubt. Whatever may be the rights of those who make up a tow, in the disposition of the different boats, it is their duty to make it up for the benefit and safety of each, as well as of all; and their rights are plainly subject to the one supreme condition that not one boat of the whole tow shall be subjected to any unreasonable hazard, or to any danger which she is not reasonably fit to encounter. Every boat taken is entitled to the same reasonable prudence and care for her safety as though she were the only boat in the tow. A boat which, by reason of her deep loading and open decks, could not be prudently placed in the front tier, might, nevertheless, be entirely safe in the inside, under the protection of other boats. There was no impropriety, therefore, in the application in behalf of the Belle to be taken in tow, but not in the hawser tier. The claimants, as I have already said, were not bound to take her at all; but if they did receive her in the tow, they were bound, not only under the notice given them, but by the obvious character of the boat, not to put her in the front tier on such a trip.

I cannot find, in this case, that there was any ultimate, voluntary concurrence on the part of the captain of the Belle in going on in the front tier. The Belle was put in position by the representative of the claimants; the tug's hawser was fastened by them to the Belle's bow; and they made fast also the spring-lines on one side, in despite of her captain's protest; and she was refused to be taken back, as I think the weight of evidence shows, after these lines had been thus fastened by those making up the tow. The fact that her captain afterwards fastened the spring-lines upon the other side, I cannot regard as sufficient evidence of any voluntary concurrence on his part. After she was already partly fastened in the tow in the place assigned, despite his earnest protest, his duty was to do whatever remained to be done

for her safety. Among these duties was fastening the spring-lines upon the other side of his boat.

The libelants are entitled to decrees, with costs, and to an order of reference to compute the damages.

THE CADIZ.

Circuit Court, E. D. Louisiana. April 1, 1884.

1. COLLISION—REV. ST., ART. 4233, RULE 20.

Steamer found in fault for violating rule 20, art. 4233, of the Revised Statutes: "If two vessels, one of which is a sail vessel and one a steam vessel, are proceeding in such directions as to involve a risk of collision, the steam vessel shall keep out of the way of the sail vessel, and the sail vessel shall keep her course.

2. COLLISION—EFFORTS MADE IN EXTREMIS.

In this case of collision, what was evidently done *in extremis*, if unwise, was error and not fault.

3. SUBROGATION.

The original libelant having died during the pendency of the suit, and his widow as executrix having been made a party, and she having sworn to the sale and transfer of the claim by the original libelant to the subrogee, the court finds that the proper parties are before it and the subrogee properly subrogated and entitled to judgment.

Admiralty Appeal.

Emmet D. Craig, for libelant.

George L. Bright, for claimant.

PARDEE, J. In April, 1883, the steamship Cadiz, bound up the Mississippi river, when near the head of the Passes, about nine miles above the jetties, collided with the small schooner Maggie, then bound down the river. There was little, if any wind, and the schooner was going with the current from four to five miles an hour, aided by one port oar with which she was working up to the right hand or west shore. When she was struck she was midway between the middle of the pass (then about 500 feet wide with 250 feet channel) and the right bank, and was working nearer to the shore. The Cadiz at the time of the collision was running at seven to eight miles an hour, and was crossing from the left to the right bank side of the channel to save distance in the bend just above. She had plenty of water on both sides of her, and was not compelled, but by convenience, to take the exact course she did take. The steamer struck the schooner on the port side, and with her starboard anchor tore out the schooner's masts and sails, and caused other injuries. The schooner's crew, before the collision, hallooed, the steamer whistled and the pilot and officers of the steamer saw the schooner before the collision, saw the colli-

¹ Reported by Joseph P. Hornor, Esq., of the New Orleans bar.

sion, saw the schooner with her crew drift by in a helpless condition, and at no time changed her course or slackened her speed. The schooner was towed to Port Eads, and from there to the city of New Orleans, where she now lies, her owner not repairing her from alleged inability. An examination showed that her bows were torn up, her bit carried away, also her bow-sprit and gaffs and part of her iron work, her bulwarks and bow all open, her masts broken and her sails torn and her standing and running rigging rendered worthless.

That the steamer was in fault there can be no doubt, for she was violating the well known rule of navigation. "If two vessels, one a sail vessel and one a steam vessel, are proceeding in such directions as to involve a risk of collision, the steam vessel shall keep out of the way of the sail vessel and the sail vessel shall keep her course," and also the rules provided by the secretary of war for the regulation of the navigation of South Pass, the fourth rule providing as follows: "All upward bound vessels must keep to the right or nearest to the east bank of the Pass, giving the right of way to those bound in the opposite direction." The schooner was without fault, unless the conduct of her crew in making increased effort to throw her towards the right bank, when, so far as the schooner was concerned, the collision was inevitable, was wrong. Under the evidence I cannot say that it was wrong or had much effect other than to present more of the schooner's broadside to the approaching steamer." What was done in this direction was evidently done *in extremis*, and if unwise, was an error and not a fault. See Cohen, Adm. 221, and cases there cited.

An effort is made by claimant to show that the schooner was in fault in not having a full set of oars, one having been lost and the other broken, but I cannot see that this affected the collision, and it is hardly consistent to claim that it did, along with the claim that the oars the schooner did have were misused. The fact seems to be that the schooner was in the river with no breeze and no ability to propel herself, floating with the current, and if she had any right to be there, which is not disputed, the steamer had no right to run her down. The damages allowed by the commissioner appear to be sustained by the evidence. The matter was examined and re examined by the district court, and upon every disputed item the district judge found, as I find, that the weight of the evidence in the conflicting testimony given as to estimates, is with the libelant.

In the proceedings in the district court the claimant denies that Cietcovich was the owner of the injured schooner, but he does not disclose who was the owner. On this point the libelants' case is clear by the documentary evidence offered and by the sworn testimony of Popovich and Milanovich, to one of whom claimant, by inference, imputes ownership.

The technical right of Popovich, subrogee, is attacked in this court, the claimant pretending that as Cietcovich died during the proceedings in the district court and his executrix was made a party, that she

only could have had the right to recover, and then, as she denied that the schooner belonged to the succession of Cietcovich, no one could recover. The answer to this appears in the record. Cietcovich, July 10, 1883, sold the schooner to Popovich, and on the thirteenth of July, transferred to him, by order on his attorney, the claim for damages in suit, and on November 13, 1883, on showing that the said libellant "did transfer his interest in above-entitled cause to M. Popovich, of this city as will appear by document on file, it is ordered by the court that said Popovich be subrogated to all the rights of said Cietcovich in said suit." The record does not show when Cietcovich died, but his widow swears to the sale and transfer by him to Popovich, and on all the showing made there can be no doubt that proper parties are before the court, and that Popovich is properly subrogated and entitled to judgment in the case.

A decree will be entered in the same terms as that appealed from, with costs of this court added.

THE CITY OF MACON.

RAMSAY v. THE CITY OF MACON.

(District Court, S. D. New York. March 30, 1884.)

1. ADMIRALTY—COLLISION—WHARVES AND SLIPS—PROPELLER IN MOTION—CARGO.

A steamer having a propeller in motion while lying inside a slip is bound to be prepared to stop it upon being hailed from other boats whose safety requires it.

2. SAME—CASE STATED—CARRIER—DAMAGES.

Where the canal-boat Y. came into the slip where the City of M. was lying with her propeller in motion, shortly before her departure, and the captain of the Y. hailed the steamer to stop her wheel, but she did not do so, and the Y. was drawn by the suction against the wheel of the engine, *held*, that the steamer was in fault; but it appearing also that the captain of the Y. was acquainted with the slip, and the customary starting of the propeller before the steamer sailed; that he might have seen it before coming along-side, and might also have proceeded further up the slip and out of danger, instead of stopping to fasten along-side another barge; *held*, that the captain of the Y. was also negligent, and that the damages should be divided. *Also held*, that, being liable as carrier of the cargo, he might recover also for one-half the loss of the cargo.

In Admiralty.

Carpenter & Mosher, for libellant.

John E. Ward, for claimants.

BROWN, J. The cases of *The Nevada*, 106 U. S. 154, S. C. 1 Sup. Ct. Rep. 234, and *The Colon*, 8 Ben. 512, show that the claimant's vessel must be held in fault for not being prepared, while their propeller was in motion in the slip, to stop at once upon being hailed, as

they were, by the captain of the libelant's boat. But the captain of the Yorktown must also be held in fault. He was acquainted with the slip where for years the claimants' steamers had been in the habit of lying, and from which they left for sea at regular hours, being always accustomed to use their propeller for a time before starting. The Yorktown entered the slip at about the time of the steamer's starting, and her captain must not only have known of the customary use of the steamer's propeller within the slip and the dangers attending it, but the motion of the propeller itself and the stir of the water could not fail to be noticeable had the captain attended to it as, under such circumstances, he was bound to do in going into the slip at that time. Nor am I satisfied that he did not, in fact, know that the propeller was in motion before he fastened his stern line. There was no reason why he should not have followed on after the Vosburgh, which immediately preceded him, past the Macon, and towards the bulk-head, into a place of entire safety. His stopping immediately abreast of the City of Macon, and within but a few feet of her, under the circumstances stated, I cannot help regarding as obvious negligence and want of prudence on his part, which charge him with joint negligence contributing to the accident.

In respect to the cargo, the libelant will evidently be responsible for its delivery, and he is, therefore, entitled to recover one-half of the injury to the cargo as well as to the boat. If the parties do not agree on the amount, let a reference be taken to ascertain the amount, with costs to the libelant.

THE JENNIE B. GILKEY.

LOUD and others v. LORING and others.

(Circuit Court, D. Massachusetts: April 23, 1884.)

LIEN ON SHIP—NONE ATTACHES IN FAVOR OF ONE CO-OWNER.

A part owner has no lien or right of priority in equity upon the ship itself for balance of account which may be due him.

In Equity.

C. T. & T. H. Russell, for complainant.

C. M. Reed, for defendant.

LOWELL, J. The plaintiffs, citizens of New York, bring this bill against certain citizens of states other than New York, for an adjustment of accounts between the parties as common owners of the schooner Jennie B. Gilkey. The plaintiffs allege that they made certain advances for the benefit of the defendants, to enable the vessel to perform her last voyage and earn her freight; and made certain other payments in defending and compromising an action brought against the owners in New York for the wages of the mate. They now move for a preliminary injunction to restrain the defendants from receiving from the registry of the district court their several shares of the proceeds of the vessel, amounting, after payment of the privileged debts, to about \$2,900. The plaintiffs admit that they have no privilege in admiralty, nor any right as creditors at large, having recovered no judgment, to intercept these proceedings; but they insist that, in equity, one part owner has a lien upon the ship for advances which he may have made for supplying her needs for a voyage, or for the benefit of his co-owners in any other respect. This brings up the question whether the decision of Lord HARDWICKE in *Doddington v. Hallett*, 1 Ves. Sr. 497, is to be taken as law here. It was long since overruled in England. See *Ex parte Young*, 2 Ves. & B. 242, and 2 Rose, 78, note; *Ex parte Harrison*, 2 Rose, 76; *Ex parte Hill*, 1 Madd. 61; *Green v. Briggs*, 7 Hare, 279, per WIGRAM, V. C.; Lindl. Partn. (4th Eng. Ed.) 67. In this country it has been held in the courts of New York and Kentucky to announce a sound rule of equity. *Mumford v. Nicoll*, 20 Johns. 611; *Hewitt v. Sturdevant*, 4 B. Mon. 453; *Pragoff v. Heslep*, 1 Amer. Law Reg. 747. In some other courts the later English rule has been thought the more sound. *Merrill v. Bartlett*, 6 Pick. 46; *The Randolph*, Gilp. 457; 3 Kent, Comm. 40; Story, Partn. §§ 442-444, and notes; Story, Eq. § 1442, and note. In this circuit, two judges of the supreme court have said that a part owner has no lien or right of priority in equity upon the ship itself for a balance of account which may be due him. *Macy v. De Wolf*, 3 Wood. & M. 193; *The Larch*, 2 Curt. C. C. 427, 434. And while Mr. Justice STORY, in one of the works above cited, seems to

v.20,no.3—11

approve of the decision of Lord HARDWICKE, in the other he gives the objections to it an apparent preponderance. In a question of granting a preliminary injunction, which is rather a matter of convenience for the plaintiffs than at all essential to the maintenance of their rights, I feel bound to follow the opinion of the justices of this circuit, until a more deliberate and solemn decision shall show that they were mistaken.

Motion denied.

WOOSTER v. MUSER and others.

(Circuit Court, S. D. New York. April 23, 1884.)

EQUITY PLEADING—WAIVER OF FAULTS.

In a suit for the infringement of a patent, although an answer denying information as to the infringement and denying damages is wholly insufficient, the orator, by replying to it, admits its sufficiency, and takes upon himself the burden of proving the infringement.

In Equity.

Frederic H. Betts, for orator.

Edmund Wetmore, for defendants.

WHEELER, J. The bill states the issuing of a patent to one Douglass, the assignment and a reissue of it to the orator; that the defendants, in order to deprive him of profits, infringed it and derived profits to themselves, and greatly injured him; and prays an account of profits and damages. One of the defendants answers for himself and in the name of the others, by himself as attorney for each, and states that they are not informed as to the issuing and assignment of the patent, and therefore deny the same, and leave the orator to make such proofs thereof as he shall be advised; and, further answering, denies "that they have deprived the complainant of any profits or inflicted upon him any damages," and prays for dismissal, with costs. The orator, by replication in usual form, traversed the answer, put the reissued patent in evidence, and examined two witnesses as to infringement. The cause has been heard on these pleadings and proofs. The principal questions are as to where, on these pleadings, the burden of proof rests; and if upon the orator, whether he has made out his case. An answer in equity is required for discovery and evidence as well as for grounds of defense, and evidence cannot be given by attorney; therefore an answer cannot be made by attorney, and this answer is, as to those answering in that way, wholly irregular. And then the gist of the charge in the bill is the infringement. The answer does not meet that, but denies resulting damages and deprivations of profits, which, if true, would not defeat the right to maintain the bill. But still, as the orator did not move to have the answer taken off the file for the irregularity; nor to have the bill taken *pro confesso* for want of an

answer, as if the answer was void; nor except to the answer for insufficiency,—by replying to it he admitted it to be sufficient, however imperfect it might be. Story, Eq. Pl. § 877. The issue joined upon the answer by the traverse was upon its allegations and denials as they were, and the orator, by joining that issue, placed himself where he must overcome the denials and maintain his bill. *Young v. Grundy*, 6 Cranch, 51. The reissue of the patent ran directly to the orator, and was founded upon assignments entitling him to it, and the production of it would show *prima facie* that all the preliminary steps had been taken. The law would presume damage and deprivation of profits from infringement, but there must be at least proof of that to make out either by it. The proof is wholly as to use. It comes from a reluctant witness so situated that full force should be given to what he does say, but beyond what he says and what may fairly be inferred from that there is no proof. Without going beyond that, and into suspicion and conjecture, the fact of the use by the defendants of the device patented by this patent does not appear. The orator may have a good case, but the defendants have not admitted it; neither has he proved it.

Let there be a decree dismissing the bill, with costs.

WERNER v. REINHARDT and others.

(Circuit Court, S. D. New York. May 1, 1884.)

EQUITY—DECREE OF COURT—INTEREST OF COMPLAINANT IN.

The successful complainant is not properly concerned in the interests of any one, under the decree, but himself.

In Equity.

Briesen & Steele, for complainant.

Jacob L. Hanes, for defendants.

WHEELER, J. The orator is entitled only to a decree settling his own rights. The master is entitled to have the amount of his fees fixed, and to an order for their payment, and, if necessary, to an attachment to make the order effectual. Equity rule 82. The proposed addition to this decree does not at all fix the amount of the fees, but is a mere general direction to the defendant to pay them, whatever the amount may be. This is not sufficient. As this might as well, and, perhaps, more properly, be by separate order, the decree is signed without it. *Myers v. Dunbar*, 12 Blatchf. 380.

LOCKWOOD v. CLEVELAND and others.

(Circuit Court, D. New Jersey. March 25, 1884.)

REOPENING A FINAL DECREE.

Efforts to reopen a final decree should be discouraged, no matter how meritorious the grounds. The party has his remedy by offering a fresh grievance, and upon suit therefor introducing the new defense.

On motion for Rehearing. See 18 FED. REP. 37.

Bedle, Muirheid & McGee, for the motion.

Browne & Witter, contra.

NIXON, J. This is a motion to allow one of the defendants to open a decree entered in the above case, to amend the answer, and to take new proofs. The original bill was filed under the provisions of section 4918 of the Revised Statutes. The only question involved was the one of priority of invention between two patentees. An interference had been declared in the patent-office, and after many conflicting opinions, in the progress of the case, an ultimate decision had been reached adverse to Lockwood and in favor of Horton. Not satisfied with the result, the complainant came into this court, praying for a decree declaring the Horton patent void. The defendants answered, denying priority of invention in Lockwood, and claiming it for Horton; and, under the peculiar provisions of that section, asking for a decree that complainant's patent be declared void. There was, however, no suggestion that it was void for any other reason except that the patented invention had been anticipated by Horton. Upon this issue and the proofs, the court held that while both were original inventions, Lockwood was the first, and that, as between them, his patent should stand and the defendants' should be vacated. One of the defendants now files a petition for a rehearing. He practically admits that the decree, as far as it goes, is correct; for he alleges in his petition that he has now discovered that the invention claimed in the two interfering patents has been known and in public use for fifteen years. He complains that the decree does not go far enough. He wants to add something to it, to-wit, that complainant's patent is also void,—not, as was claimed in the answer, because it was anticipated by the invention of Horton, but for want of novelty generally. In order to introduce such a defense, he asks leave to amend by including such an allegation in the answer.

The learned counsel of the complainant, at the hearing, happily characterized the proceeding as a change of base by defendants after defeat. We do not say that circumstances may not arise which would justify the court in opening a final decree, allowing new defenses to be added, new proofs to be taken, and another hearing to be had. But such a course is unusual, and, if easily obtained, it would render a final decree in equity of little practical value. Courts

do not look upon applications of the kind with favor. Mr. Justice McLEAN, in *Waldon v. Bodley*, 14 Pet. 160, alluding to the subject of amendments, said.

"There are cases (in chancery) where amendments are permitted at any stage of the progress of a case, as where an essential party has been omitted; but amendments which change the character of the bill or answer, so as to make substantially a new case, should rarely, if ever, be admitted after the cause has been set down for hearing, much less after it has been heard."

And, it may be added, still more rarely after the cause has been decided.

But this is not the most serious hindrance to granting the request of the defendant. We are satisfied that the defense which he wishes to introduce is not allowable. The sole question that can be litigated under section 4918 is the question of priority between the two interfering patents. In the patent act, as it now stands, we find no authority given to the courts, to set aside or annul a patent for mere want of novelty. By the sixth section of the act of February 21, 1793, (1 St. 322,) where the defenses to a suit for violation are enumerated, it is provided that where any of the defenses are established, the court shall declare the patent void. But this provision was dropped in section 15 of the act of July 4, 1836, (5 St. 123,) and has never since been re-enacted.

In the case of *Mowry v. Whitney*, 14 Wall. 434, the question of the authority of individuals and of judicial tribunals to set aside or declare void a patent, was raised, fully discussed, and decided. Whitney, holding a patent for an improvement in annealing and cooling cast-iron wheels, brought suit against Mowry for an infringement. Pending the proceedings, he applied to the commissioner of patents for a seven-years extension, and in so doing furnished a statement in writing, under oath, of the ascertained value of the invention, and of the expenditures and receipts accruing to him by its use. The extension was granted. Mowry was declared an infringer, and a reference was ordered to ascertain the profits and damages. Conceiving that the profits proved were much larger than Whitney had sworn them to be in the statement he exhibited before the commissioner when seeking his extension, Mowry filed a bill in the circuit court of the United States for the Eastern district of Pennsylvania to have the extension set aside on the ground of fraud. A demurrer was filed, and one of the grounds of demurrer was that complainant could not, in his own right, sustain such a suit. The court said that they were of the opinion that no one but the government, either in its own name or in the name of its appropriate officer, or by some form of proceedings which gave official assurance or the sanction of the proper authority, could institute judicial proceedings for the purpose of vacating or rescinding the patent which the government had issued to an individual, except in the cases provided in section 16 of the act of July 4, 1836, (sections 4915 and 4918, Rev. St.) and that a suit by

individuals is limited by said sections to persons claiming under interfering patents, or one whose claim to a patent has been rejected because his invention was covered by a patent already issued.

If congress intended in these sections to allow general defenses to be set up, outside of the naked question of priority of conflicting patents, we do not see why the provision was incorporated that the judgment or adjudication should not affect the right of any person except the parties to the suit, and those deriving title under them, subject to the rendition of the judgment. The only opinion we have found which seems to throw any doubt upon such a limitation of the scope of the sections is in the case of *Foster v. Lindsay*, 3 Dill. 126, in which the learned judge holds that under proper pleadings the courts have authority to declare both patents void. The case was cited by us in *Lockwood v. Cleveland*, 6 FED. REP. 726, not to approve of that proposition, but to uphold the doctrine which was sought to be established in the opinion, that in proceedings in a contest between the owners of interfering patents, under section 4918, courts had power, without a cross-bill, to grant affirmative relief to defendant when prayed for in the answer. There is nothing in the decree as entered to hinder the petitioner from using the invention claimed in the Lockwood patents in the prosecution of the business of the company. If he does so, and is sued for infringement, he can raise the defense which he is endeavoring to incorporate into this case. Believing that to be his proper course and remedy, we must decline to reopen the case.

But, irrespective of the foregoing considerations, and after reading the affidavits of the petitioner, we are further of the opinion that the petitioner is obnoxious to the charge of laches; or, at least, that he states nothing to relieve himself from the charge. He alleges in his petition that the new facts which he wishes to introduce into the proofs are the public use of the invention, and that anticipation of complainant's patent, and that the invention was well known and publicly used in the trade more than 15 years ago. The evidence, therefore, was easily accessible, and the only reason suggested why it was not obtained was the fact that he did not understand its materiality.

The motion must be refused.

WOOSTER v. GUMBINNER.

*(Circuit Court, S. D. New York. May 5, 1884.)***EQUITY PRACTICE—MASTER TO PASS ON QUESTIONS OF EVIDENCE.**

Under the seventy-seventh rule of equity the admission and rejection of evidence, according as it may be proper or otherwise, rests entirely within the sound discretion of the master.

In Equity.

A. Comstock, for complainant.

Jas. S. O'Callaghan, for defendant.

WHEELER, J. The question in this case, certified by the master, as to whether the orator shall be allowed, in rebuttal, to introduce evidence that is not strictly rebutting to the defendant's evidence, but tends to prove the orator's case, as made in his opening, more fully and specifically than his opening evidence did, must, in the first instance, at least, rest in the sound discretion of the master. The seventy-seventh rule in equity provides that he shall regulate all the proceedings, and shall have full authority "to direct the mode in which the matters requiring evidence shall be proved before him." These provisions must include the order of putting in evidence that would, at any stage of the proceedings, be lawful and competent, and which would not deprive either party of any substantial legal right. The question is remitted to the master.

Cook and others, Ex'rs, v. SHERMAN, Assignee, and others. (Two Cases.)

(Circuit Court, D. Iowa, C. D. May, 1882.)

1. CORPORATION — OFFICERS AND DIRECTORS ACQUIRING ADVERSE INTEREST — CONTRACT—SPECIFIC PERFORMANCE.

Where the officers and directors of a railroad company enter into a contract to purchase lands and to locate the line of their projected road and its depots and stations on or near the lands so purchased, such a contract is contrary to public policy, and one which will not be enforced or made the basis of any relief in a court of equity.

2. SAME—DUTY OF DIRECTORS.

Directors of a railroad corporation are *quasi* public officers; they occupy a position of trust and act in a fiduciary capacity; they represent the stockholders, and cannot acquire any interests adverse to them.

3. SAME—ILLEGAL CONTRACT—RIGHTS OF PARTIES.

Where several persons enter into an illegal contract for their own benefit, and the illegal transaction has been consummated, and the proceeds of the enterprise have been actually received and carried to the credit of one of such parties, so that he can maintain an action therefor without requiring the aid of the illegal transaction to establish his case, he may be entitled to relief.

4. LIMITATION IN BANKRUPTCY—REV. ST. § 5057—FRAUD—ACTION AGAINST ASSIGNEE.

In a suit for fraud, the limitation prescribed by Rev. St. § 5057, does not begin to run until the discovery of the fraud; and, in an action against the assignee of a bankrupt, he will be chargeable with constructive notice of any concealment of the fraud by the bankrupt; and if the facts constituting the fraud were known only to the bankrupt, and were of such a character as to conceal themselves, no proof of actual concealment by the assignee is necessary.

5. TRUSTEE AND CESTUI QUE TRUST—PURCHASE OF TRUST PROPERTY.

Where several parties buy real estate, and the title is taken in the name of one of them for their joint benefit, with authority to sell the same and divide the proceeds, the party holding the title is a trustee, and he cannot purchase the interests of the others unless he makes a full and fair disclosure of all the facts, and enables them to deal with him on terms of perfect equality.

6. SAME—SETTLEMENT OF ACCOUNTS—RESCISSION OF CONTRACT.

The rule respecting the rescission of a fraudulent contract immediately upon the discovery of the fraud, and the return of the consideration by the defrauded party, does not apply to a settlement of accounts between trustee and *cestui que trust*, in which the trustee, by concealing material facts, obtains a conveyance of the trust property for an inadequate consideration.

On Final Hearing.

In 1868 B. F. Allen, Ebenezer Cook, who were directors of the Chicago, Rock Island & Pacific Railroad Company, and John F. Cook made a verbal contract to purchase grounds for the company upon which to locate its stations between De Sota, Iowa, and Council Bluffs, and also for the purchase of lands adjacent to such stations, a part of which was to be laid out into town lots. J. F. Tracy, the president of the company, and E. H. Johnson, the chief engineer, were to have an interest in the profits, though not named in the contract. In 1870 this agreement was reduced to writing, and provided that Allen should advance the money to make the purchases, to be returned to him out of the money realized from the sale of the lands, with 10 per cent. interest, the title to be taken in his name for their joint benefit, the lands sold by him, and the profits paid, one-half to Ebenezer Cook, one-fourth to Allen, and one-fourth to John P. Cook. Allen sold some of the lands, and kept an account of his receipts and expenditures, but such account was disputed. John P. Cook sold his interest to E. E. Cook in 1871, and he and Ebenezer Cook having died, their legal representatives and heirs joining E. E. Cook as a party, instituted suits to set aside an assignment made to Allen in settlement of their affairs, alleging fraud and misrepresentations on the part of Allen. Allen having been adjudged a bankrupt, Hoyt Sherman, made defendant in the suits, was appointed his assignee, and afterwards made receiver in these cases. The facts alleged to constitute the fraud were discovered August, 1878, and the bills filed, respectively, March 24, 1880, and May 10, 1880.

Wright, Cummins & Wright and Bills & Block, for complainants.

Nourse & Kauffman, for respondents.

MCCRARY, J. In these cases the two most important questions to be considered are,—*First*, is the contract declared upon contrary to

public policy so that no relief can be based upon it? and, *second*, if so, have the complainants made out a case for relief independently of the contract?

It clearly appears that Allen and Ebenezer Cook, who were directors of the Chicago, Rock Island & Pacific Railroad Company, and J. F. Tracy, the president, and Edward H. Johnson, the chief engineer, of that company, entered into an agreement into which John P. Cook was admitted as a party in interest, to purchase the lands in question in advance of the location of the line and of the depots and stations of said railroad, with a view to locating the same on or near such lands. Such a contract by officers of a railroad corporation is contrary to public policy, and one which will not be enforced or made the basis of any relief in a court of equity. The directors of such a corporation are *quasi* public officers. They occupy a position of trust and act in a fiduciary capacity. They represent, not themselves, but the stockholders. They are, in all their official actions, to consider, not their private interest, but that of the stockholders, whose property they manage and control. If, as in this case, they are directors of a railway company, with power to locate and construct a public highway, they owe a duty to the public as well as to the stockholders, and are therefore doubly bound to abstain from entering into any scheme to pervert their trusts to their private gain. The law does not permit these officials to subject themselves to any temptation to serve their own interests in preference to the interests of the stockholders and of the public.

If the courts should enforce such contracts they would lend their sanction to a practice the inevitable tendency of which is to encourage breaches of trust to the sacrifice of private rights and of the public interest. The managing officers of *quasi* public corporations, possessing vast powers and engaged in great enterprises, are too apt to forget that they are not to have any interest adverse to those whom they represent, and the courts of justice should not in the least relax the rule requiring of them scrupulous fidelity and entire impartiality in the discharge of their official duties.

The present case well illustrates the importance of the rule of law to which we refer. The parties interested in this contract controlled the location of the railroad and of its depots and station grounds. After they had bought lands along the line, with a view to making money by the location of the line and of the depots and stations upon or near them, it needs no argument to show that they were utterly unfit and incompetent to decide as between a location upon their own lands and a location elsewhere.

It follows that the contract under consideration can neither be enforced nor made the basis of any relief whatever in a court of equity. The court will leave the parties to such a contract precisely where it finds them. *Marshall v. Railroad Co.* 16 How. 314; *Bank v. Owens*, 2 Pet. 539; 2 Redf. Ry. 576-584; Pom. Spec. Perf. 284-286; *Wight*

v. Rindskopf, 43 Wis. 344; *McWilliams v. Phillips*, 51 Miss. 196; *Guernsey v. Cook*, 120 Mass. 501; *Setter v. Alvey*, 15 Kan. 157; *Creath's Adm'r v. Sims*, 5 How. 204; *Bestor v. Wathen*, 60 Ill. 138.

This brings us to the consideration of the second question, which is, have the complainants shown themselves entitled to relief independently of the illegal contract? It has been decided by the supreme court of the United States that "where several persons enter into an illegal contract for their own benefit, and the illegal transaction has been consummated, and the proceeds of the enterprise have been actually received and carried to the credit of one of such parties, so that he can maintain an action therefor without requiring the aid of the illegal transaction to establish his case, he may be entitled to relief." *Brooks v. Martin*, 2 Wall. 70; *Planters' Bank v. Union Bank*, 16 Wall. 483:

The rule upon this subject is accurately stated in the last-named case, as follows:

"But when the illegal transaction has been consummated; when no court has been called upon to give aid to it; when the proceeds of the sale have been actually received, and received in that which the law recognizes as having had value; and when they have been carried to the credit of the plaintiff, —the case is different. The court is there not asked to enforce an illegal contract. The plaintiffs do not require the aid of any illegal transaction to establish their case. It is enough that the defendants have in hand a thing of value that belongs to them."

According to this rule, the question in such cases must always be, can the plaintiff maintain his action without enforcing the illegal contract? or, in other words, has he a cause of action independently of the illegal contract? If it appears that the defendants in a given case have received money or property from the complainants, and which belongs to the latter, the same may be recovered without any inquiry into the nature of the contract under which such money or property was acquired. The distinction is between enforcing an illegal contract and asserting title to money and property which has arisen from it. Applying this rule, we have no difficulty in holding that the complainants in the case last above named cannot recover.

It does not appear that Ebenezer Cook ever contributed any money, property, or services towards the acquisition of the property in question. His representatives, therefore, have no right which can be enforced without the aid of the illegal contract. As to them, the bill, in effect, is a suit to enforce the contract by decreeing a division of profits in accordance with its terms. It follows that the bill in that case (No. 1,779) must be dismissed.

As to the other case there is more difficulty. The evidence does show that John P. Cook contributed his services, and probably, also, he expended some money to acquire the property in question. His representatives, therefore, are, upon the principle above stated, entitled to an accounting, and to receive from the joint account such sum

as he would have been entitled to by reason of those contributions, unless the suit is barred by law or by reason of the laches of the complainants.

It is insisted that the suit is barred by the two-years limitation provided by section 5057 of the Revised Statutes of the United States, which requires that all suits at law or in equity against an assignee in bankruptcy, touching any property or rights of property transferable to or vested in such assignee, shall be brought within two years from the time when the cause of action accrued. It will be borne in mind that this suit is brought to set aside for fraud the release executed by complainants to Allen, as well as to recover the complainants' share in the joint account. The suit was not brought within two years from the execution of said release, but we think the proof shows that it was brought within two years from the time when the complainants discovered the facts. If the facts were such as to render the transaction fraudulent, then the statute did not begin to run until they were discovered. *Bailey v. Glover*, 21 Wall. 342.

In that case it was held that the statute above referred to is a statute of limitation precisely like other statutes of limitation, and that in construing it we are to apply the rule that, where the action is intended to obtain redress against a fraud concealed by the party, or which from its nature remains secret, the bar does not commence to run until the fraud is discovered.

Without discussing at length the question of fact presented, we hold that the release was obtained by Allen under circumstances which renders it fraudulent and void. The relation which existed between the parties was one of trust and confidence. The title was vested in Allen, to be held for the use and benefit of the other parties in interest. He was advised as to the situation and value of the property, and as to the state of the joint account. He was bound, therefore, to make a full and fair disclosure of all the facts so as to enable the other parties to deal with him upon terms of perfect equality. He seems to have assumed, on the contrary, that he was at liberty to make the best bargain possible for himself. He did not accurately state to them the condition of the joint account, or the amount of his claim against the same, and by his actions and words he led them to believe that it was extremely doubtful whether any profit could be realized out of the transaction, and in this belief they executed the release. It must therefore be held to be fraudulent and void.

The complainants did not discover the facts constituting this fraud until within less than two years from the time of the commencement of this suit. It is insisted by counsel for respondents that the statute does not apply to this case because the assignee in bankruptcy, who pleads the limitation, is not charged with the commission or concealment of any fraud. It is said that the rule applies only to a case

where the party pleading the statute is himself guilty of a fraud, which he has concealed, and that therefore it does not apply to the assignee. While the general rule is, no doubt, as stated, it does not follow that a distinction in this respect can be made between the bankrupt and his assignee. For the purposes of the statute of limitations they must be treated as one person. The assignee takes the place of the bankrupt. If, by reason of the fraud of the bankrupt, the two years' limitation had not commenced to run at the time of the bankruptcy, it did not begin to run by reason alone of the transfer of the estate to the assignee. The question in every such case must be, did the fraud continue to be unknown to the plaintiff after the appointment of the assignee, without any negligence or laches on the part of plaintiff? If, indeed, the fraud of the bankrupt was of such a character as to require special efforts on the part of the assignee to keep it secret, so that but for such efforts on his part the plaintiff must have discovered it by reasonable diligence, then it might be necessary to show affirmative acts of concealment on the part of the assignee; but if the facts constituting the fraud were known only to the bankrupt, and were of such a character as to conceal themselves, no proof of actual concealment by the assignee is necessary. The assignee himself may be ignorant of the fraud, as in most cases it is to be presumed he would be, yet he represents the bankrupt, stands in his shoes, and is charged with constructive notice of his fraudulent acts. If it were otherwise, the bankrupt might, by concealing even the grossest frauds for two years from the assignee, as well as from others, be enabled to consummate them. We hold, therefore, that it is not necessary to show in this case affirmative acts of concealment on the part of the assignee. As we shall presently see, the facts constituting the fraud on the part of the bankrupt, or at least a material part of them, were such as to conceal themselves.

It is also insisted that this case does not fall within the rule laid down in the case of *Bailey v. Glover*, because the fraud was not concealed by any affirmative acts of Allen. Is it true that complainants are bound to show such affirmative acts? The rule upon the subject by which we must be governed is thus stated in the opinion of the court, pronounced by Justice MILLER, in *Bailey v. Glover*:

"We also think that, in suits in equity, the decided weight of authority is in favor of the proposition that where the party injured by the fraud remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered, though there be no special circumstances or efforts on the part of the party committing the fraud to conceal it from the knowledge of the other party."

In this case, as we have already seen, the fraud was committed by a trustee against his *cestui que trust* by failing to make a full disclosure as to the state of the joint account, and as to the value of the joint estate. The proof shows, as we have already said, that the

facts as to the state of the accounts were exclusively within the knowledge of Allen; and it is apparent, also, that as to the location, character, and value of the lands he had far better means of knowledge, and doubtless much more accurate information, than any other of the parties in interest. In fact, after the death of John P. Cook, the parties in interest, aside from Allen, had little or no information upon the subject.

In view of the relation existing between the parties, we are of the opinion that the complainants were at liberty to rely upon the representations of Allen as to the value of the lands acquired under the contract, without visiting and examining the lands, or investigating for themselves the question of their actual value. But a further and more conclusive answer to this suggestion is to be found in the fact that the misrepresentations and concealments by means of which the release was obtained did not relate exclusively to the value of the lands, but had reference in part to the joint account, the amount of Allen's claim against the same, and the balance in his hands for distribution, all being matters exclusively within Allen's knowledge, and concerning which the complainants were obliged to rely upon him. The amount of Allen's claim against the joint account was largely overstated by him, and the quantity of land sold and the sum realized from sales by him was largely understated, as was also the amount of bills receivable held by him. These matters of themselves were sufficient to render the transaction null and void, without reference to the representations made concerning the value of the lands, and they are manifestly matters which could not be discovered so long as Allen chose to conceal them. In other words, they constituted a fraud which was of such a nature as to conceal itself.

It is insisted that the complainants, or some of them, had information more than two years before the commencement of this suit, which was sufficient to put them on inquiry and charge them with notice of the fact. The proof is that E. E. Cook heard Thomas F. Withrow remark, more than two years before the commencement of this suit, that Allen had defrauded or swindled the other parties in interest; but the remark was made in a casual way. No particulars of any alleged fraud were given, and Cook, having strong faith in Allen's integrity, might well have disbelieved and disregarded the statement. There is nothing to show that his confidence in Allen was shaken by the remark, and, if not, he was not called upon to act upon it. We hold that the suit is not barred by the statute.

Another question of some difficulty arises in this case. It is whether the complainants were bound, immediately upon the discovery of the fraud, to give notice of rescission, and to offer to return the consideration for the release, within the principle of *Grymes v. Sanders*, 93 U. S. 62. After much consideration we have reached the conclusion that the doctrine of that case does not apply here.

The transaction which we are now considering was not a contract of purchase and sale in the ordinary sense, but it was a settlement between a trustee and his *cestui que trust*. Allen, as trustee, held certain money and property belonging to complainants; the complainants had received some money and property on account. Upon settlement it was agreed that Allen should hold all in his hands, and complainants should keep what they had themselves. Nothing was actually paid. The complainants kept in their possession what they had previously received. In such a case there was nothing to return, and the reason for prompt rescission and return of the consideration does not exist. It is enough if the party defrauded in such a settlement, upon bringing a suit to set it aside, avers a willingness to be charged with the sum in his hands. It would be an idle and useless proceeding to require him to pay it over to the trustee and immediately decree its return to him. We do not think that the doctrine respecting the rescission of a fraudulent contract upon the discovery of the fraud, and the return of the consideration received by the defrauded party, applies to settlements of accounts between trustee and *cestui que trust* under the circumstances of the present case. See *Elfelt v. Hart*, 1 McCrary, 11; S. C. 1 FED. REP. 264.

It may be said that, in order to hold that Allen was a trustee for John P. Cook with respect to the services or property put into the joint account by the latter, it is necessary to take notice of the provisions of the illegal contract, and that this court cannot do. A sufficient answer to this suggestion is that while the illegal contract cannot be enforced or made the basis of relief, there is nothing in the law of evidence, or in the principles of equity, to prevent its being considered as evidence in a case between the parties to it, and as defining their relations to each other with respect to the property acquired under it. As evidence, the contract may be competent as tending to show the right of plaintiff to recover independently of any contract rights conferred by it.

The result of these views is that there must be a decree in this case setting aside, as fraudulent and void, the release, assignment, and conveyance executed by the executors of John P. Cook, and the said Edward E. Cook individually, to said B. F. Allen of their respective interests in the joint account and property, and for an accounting, to the end that the complainants may recover to the extent of the value of the services rendered and money contributed by John P. Cook to the joint account; and for the purpose of ascertaining the sum to which they are entitled, this case will be referred to a master for such accounting and for report.

A question may arise as to the proper measure of damages. Can complainants recover upon the basis of the contract, or only for the value of the services, etc., contributed by him to the joint account? We do not decide this question now, but will direct the master to re-

port the sum that would be due upon each hypothesis, reserving the question until the final hearing.

LOVE, J., concurs.

I. RELATIONS OF CONFIDENCE BETWEEN DIRECTORS AND STOCKHOLDERS—EFFECT OF DIRECTORS BEING INTERESTED ADVERSELY TO CORPORATION. The case of *Goodin v. Cincinnati & Whitewater Canal Co.*¹ is a leading case upon the first question discussed in the foregoing opinion. In that case it appeared that the canal company owned a canal extending from Harrison to Cincinnati; that the L. & C. R. R. Co.'s road extended from Indianapolis to Harrison, from which point it reached Cincinnati over the tracks of another company. Desiring to have a line of its own to that city, a corporation was formed by the officers of the L. & C. Co., known as the C. & I. R. R. Co., to purchase the canal property; one H. C. Lord being president of both railroad companies. Lord proceeded to purchase a majority of the stock of the canal company at nominal rates, and to elect directors favorable to the interests of the railroad companies, who chose Lord as president of the canal company. A condemnation proceeding was then begun in the probate court by the new railroad company to condemn the canal property for its purposes. By agreement of the directors of that company and the canal company a judgment was entered assessing the damages at \$55,000. At that time the canal company was largely in debt, three several mortgages being upon its entire property, which were then in suit in the district court. Through the instrumentality of said Lord, who had, on behalf of said railroad companies, purchased at nominal figures a controlling amount of the mortgage debts represented in that suit, an order was entered placing the \$55,000, agreed on in the condemnation proceedings, in the hands of Lord, as receiver, in lieu of the property. Lord, as president of the C. & I. R. R. Co., drew a check for that amount upon its funds in favor of himself, as receiver. The railroad company took possession of the canal property, and expended large sums in adapting the same to its uses. Upon bill filed by a stockholder and creditor of the canal company to set aside these proceedings, it appeared that the property was worth much more than \$55,000. The court held that those proceedings were fraudulent, and the railroad company must account for the real value of the canal property; and that "the rule of valuation in such cases is what the interest of the canal company was worth, not for canal purposes merely, or for any other particular use, but what it was worth generally for any and all uses for which it might be suitable." In the course of his opinion WELCH, J., said: "As to the *agreement*, by which the price or compensation was fixed at \$55,000, we have no hesitation in saying that it ought not to be allowed to stand so as to affect the rights of those who gave no assent thereto. Without attempting to decide as to the power of directors, in absence of authority given by the stockholders, to fix a price or compensation for the property so sought to be appropriated, it is enough to say that this is not such an agreement as equity will sustain. There was not only such a gross inadequacy of price as to shock the moral sense, but there was, in effect, a sale by a trustee to himself, or to his own use and benefit. This equity will never permit, not even where there is good faith and an adequate consideration. Here there was neither. The vendor and purchaser were in the same interest. As directors of the canal company it was the *duty* of Mr. Lord and his associates to obtain the *highest* price for the property; while as stockholders of the railroad company it was their *interest* to get it as *low* as possible. It was, in effect, a sale by the railroad company to itself. There was no adverse interest, or ad-

¹18 Ohio St. 169.

versary parties, and the sale was a mere form. Nothing is better settled in equity than that such a transaction, on the part of a trustee, does not bind the *cestui que trust*. It is equally well settled that the property of a corporation is a trust fund in the hands of its directors for the benefit of its creditors and stockholders.¹ If it was desired or intended to make such a purchase of the property as would bind the stockholders and creditors of the canal company, *all* of them should have either been consulted or bought out. That would have been the fair way to accomplish the object. To undertake, by getting control of the company, and then, under pretense of acting as *agents and trustees for all* the stockholders and creditors, deliberately to trample under foot the rights of the minority, is rather a sharp practice, and one which a court of equity will never tolerate. A director whose personal interests are adverse to those of the corporation has no right to be or act as a director. As soon as he finds that he has personal interests which are in conflict with those of the company, he ought to resign. No matter if a majority of stockholders, as well as himself, have personal interests in conflict with those of the company. He does not represent them as *persons*, or represent their *personal* interests. He represents them as *stockholders*, and their interest *as such*. He is trustee for the *company*, and whenever he acts against *its* interest—no matter how much he thereby benefits *foreign* interests of the individual stockholders, or how many of the individual stockholders act with him—he is guilty of a breach of trust, and a court of equity will set his acts aside at the instance of stockholders or creditors who are damnified thereby. Any act of the director by which they intentionally diminish the value of the stock or property of the company is a breach of trust, for which any of the stockholders or creditors may justly complain, although all the other stockholders and creditors are benefited, in some other way, more than they are injured as such.”²

In *Rolling Stock Co. v. Railroad Co.*³ the same court said: “The rule which prevents the agent or trustee from acting for himself in a matter where his interest would conflict with his duty, also prevents him from acting for another whose interest is adverse to that of the principal; and in all cases where, without the assent of the principal, the agent has assumed to act in such double capacity, the principal may avoid the transaction at his election. No question of fairness or unfairness can be raised. The law holds it constructively fraudulent, and voidable at the election of the principal.” These principles are supported by a long line of authorities.⁴ The decisions are collected and the doctrine clearly and accurately stated in *Morawetz, Priv. Corp.*,⁵ which, in my humble judgment, is the best work yet written on the subject.⁶

II. RECENT CASES. It is not my purpose in this note to consider the question at large. It is so fully discussed in the works named that all that will be attempted here will be to refer to some of the very recent cases upon the subject.

A court will refuse to give effect to arrangements by directors of a railroad

¹Story, Eq. 1252; *Aberdeen R. Co. v. Blackie*, 1 Macq. 461; *Wood v. Dummer*, 3 Mason, 309.

²Pages 182, 183.

³34 Ohio St. 450, 460, (1878.)

⁴*Cumberland Coal Co. v. Sherman*, 30 Barb. 553; *Aberdeen Ry. Co. v. Blackie*, 1 Macq. 461; *York Buildings Co. v. Mackenzie*, 3 Paton, H. L. 378; *Koehler v. Black Riv., etc.*, Co. 2 Black, 715; *Cumberland Coal Co. v. Parish*, 42 Md. 598; *Blake v. Buffalo Creek R. Co.* 56 N. Y. 485; *Covington, etc., R. Co. v. Bowler*, 9 Bush, 468; *Port v. Russell*, 36 Ind. 60; *Cook v. Ber-*

lin, etc., Co. 43 Wis. 433; *Harts v. Brown*, 77 Ill. 227; *Stewart v. Lehigh Valley R. Co.* 38 N. J. Law, 505; *Rice's Appeal*, 79 Pa. St. 168; *First Nat. Bank v. Gifford*, 47 Iowa, 575; *Levises v. Shreveport, etc.*, Co. 27 La. Ann. 641; *Austin City R. Co. v. Swisher*, (Tex. Ct. App.) 15 Reporter, 760.

⁵Sections 243 et seq.

⁶See, also, *Pierce on Railroads*, 36 et seq.; *Thompson, Liab. of Officers, etc., of Corp.*, 360 et seq.; 16 Amer. Law Rev. 917; *Bissit v. Ky. Riv. Nav. Co.* 15 Fed. Rep. 353, and note.

company to secure, at its expense, undue advantages to themselves by forming, as an auxiliary to it, a new company, with the understanding that they or some of them shall become stockholders in it, and then that valuable contracts shall be given to it by the railroad company, in the profits of which they, as such stockholders, shall share.¹ It is sufficient ground for equitable interference, at the suit of a stockholder of a corporation, that the officers thereof, who are members of one family and own a majority of the stock, have combined to appropriate the profits of the corporation in the form of salaries, and through a contract with a firm of which they are members, and that they have also combined to keep him in ignorance with regard to these transactions.² Where a statute authorizes a telegraph company to lease or sell its franchises and property to any other telegraph company, provided the lease or transfer be approved by a three-fifths vote of its board of directors, and also by the consent in writing, or by vote at a general meeting, of three-fifths in interest of the stockholders, a lease of the property and franchises of a telegraph company is voidable at the election of the lessor, if at the time the lease was made a majority of the board of directors of the lessor were directors of the lessee also, and the lessee owned nearly two-fifths of the stock of the lessor.³ A contract between a railroad company and a construction company is void where any of the directors of the former are members of the construction company. Such contract cannot be ratified by a board of directors composed in part of members of the construction company, and mere knowledge and inaction on the part of the stockholders for a time will not estop them from resisting the enforcement of the contract.⁴ But a recovery may be had to the extent the railroad company was actually benefited by the work done under such contract, on the basis of a *quantum meruit*.⁵ If a contract made by a director with the corporation is to be construed so as to involve the granting to him of enormous commissions, without regard to the debts of the corporation, it is unreasonable, as injuriously affecting the rights of the stockholders, and is beyond the power of the directors to make with their co-directors. A contract which provides that one is to be elected a director, and invests him with power as though already a director, must be construed as if he was a director when it was made.⁶ Where defendant and other directors of a corporation levied an assessment upon its stock, upon which but a small per cent. had been paid, and threatened further assessments for the purposes of the corporation, whereby plaintiff was induced to sell and transfer his stock, held, that such sale was not so tainted with fraud as to render it void.⁷

III. NATURE OF ADVERSE INTEREST NECESSARY TO RENDER CONTRACT INVALID. In *Hallam v. Indianola Hotel Co.*⁸ the supreme court of Iowa held that there is no objection to a director of a corporation becoming its creditor, or to his taking security for his debt, but his conduct in enforcing his claim will be more closely scrutinized than that of an ordinary creditor, and proceedings for such enforcement will be set aside if it appears he has not acted in good faith as director. It appeared in that case that Perry &

¹ Wardell v. Union Pac. R. Co. 103 U. S. 651, (S. C. 12 Cent. Law J. 559,) affirming 4 Dill. 330; Thomas v. Railroad Co. 109 U. S. 522; S. C. 3 Sup. Ct. Rep. 315; Meeker v. Winthrop Iron Co. 17 Fed. Rep. 48, and note by Francis Wharton.

² Sellers v. Phoenix Iron Co. 13 Fed. Rep. 20.

³ Bill v. Western Union Tel. Co. 16 Fed. Rep. 14.

⁴ Thomas v. Brownville, etc., Ry. Co. 2 Fed. Rep. 877; affirmed, Thomas v. Brown-

ville, etc., R. Co. 109 U. S. 522; S. C. 3 Sup. Ct. Rep. 315.

⁵ Thomas v. Brownville, etc. Ry. Co. 109 U. S. 522; S. C. 3 Sup. Ct. Rep. 315; reversing upon that point the same case, 2 Fed. Rep. 877.

⁶ Hubbard v. N. Y., etc., Investment Co. 14 Fed. Rep. 675.

⁷ Grant v. Attrill, 11 Fed. Rep. 469. See 19 Amer. Law Rev. 919.

⁸ N. W. Rep. 111; 12 Reporter, 361; 21 Amer. Law Reg. (N. S.) 443, and note by Mr. Adelbert Hamilton.

Lucas obtained a decree of foreclosure upon the property of the hotel company. The property was sold upon execution, and purchased by Perry, who was one of the directors of the hotel company, for a little over \$4,000. It cost \$19,000, and in the opinion of the court was worth \$10,000. ADAMS, C. J., said: "That it [the property] was allowed to be sold upon execution, and was not redeemed, nor the right of redemption sold, but a sheriff's deed allowed to issue, while not sufficient to establish fraud, is sufficient to excite suspicion, and give some support to the claim strenuously insisted upon by the plaintiffs, and of which we think that there was some slight evidence, at least, that there was concert of action between Perry and the other officers of the company looking to the attainment of the result which has been reached. Now, Perry was charged with the duty, as much as any other director was, of making a reasonable effort to prevent this result. It follows that, our minds being affected with suspicion that such effort was not made, * * * we think that the sale should be set aside." The president of a corporation occupies a position of trust, and may be called upon in equity to account for and make restitution of any part of the property confided to his care, which he has improperly applied to his own use. While a contract by which a corporation delivers to its president, with power of sale, unissued stock, as security for a loan from him, will be looked upon with suspicion, it will be enforced when shown to have been made for the benefit of the corporation, and to be just. And an order was entered permitting a sale of sufficient of such stock to satisfy the amount actually loaned by the president, unless that amount was paid to him.¹ If a director of a railroad corporation enters into a contract for the construction of the road of his corporation, he cannot then, nor subsequently, personally derive any benefit from such contract.² A corporation which has resolved to borrow money to pay its debts is not bound by a mortgage executed by its president to a firm of which he was a member, to secure debts he had purchased and assigned to the firm.³ A note was made by the directors of one corporation, as individuals, and transferred to another corporation, one of the makers being payee and indorser and president of both corporations. Held, that he could not consent for the creditors (the corporation holding the note) to any arrangement releasing or impairing the individual liability of himself or his co-directors.⁴ A director of a bank loaned the moneys of the bank on a note running to the bank at a stipulated rate of interest, but upon a secret agreement with the borrowers that he should participate in the profits of lands to be purchased with the moneys. Held, that he was bound to surrender those acquired profits to the bank.⁵ Where one of the sureties on an official bond given by a city officer, was also mayor of the city, who had concurrent power with the recorder to approve such bonds, the fact that he was a party to the bond would preclude him from acting officially in regard to it; and his knowledge of a fact tending to invalidate it could not bind the city. He could not act at the same time in a public and private capacity, and in antagonistic interests.⁶ As to when notice to an officer is notice to the corporation, see *Waynesville Nat. Bank v. Irons*.⁷ The knowledge that a cashier was acting for himself as well as for the bank in issuing a certificate of stock, put the person dealing with such cashier upon inquiry as to his authority and good faith; and, having failed to make it, the bank is not liable upon the certificate.⁸

¹ Combination Trust Co. v. Weed, 2 Fed. Rep. 24.

² European Ry. Co. v. Poor, 59 Me. 277.

³ Davis v. Rock Creek, etc., Co. 55 Cal. 359; S. C. 36 Amer. Rep. 40.

⁴ Gallery v. Nat. Ex. Bank, 41 Mich. 169; 36 Amer. Rep. 149.

⁵ Farmers' & Merchants' Bank v. Downey, 53 Cal. 466; S. C. 31 Amer. Rep. 62.

⁶ Stevenson v. Bay City, 26 Mich. 44.

⁷ 8 Fed. Rep. 1, and note, in which the authorities are fully collected and considered.

⁸ Moores v. Citizens' Nat. Bank, 15 Fed. Rep. 141. See same case in 4 Sup. Ct. Rep.

IV. UNDER WHAT CIRCUMSTANCES AN OFFICER MAY ACQUIRE AN INTEREST ADVERSE TO THE CORPORATION. The case of the *Twin Lick Oil Co. v. Marbury*¹ contains an excellent statement of the circumstances under which an officer may acquire an interest adverse to the corporation. The supreme court there held that a director of a corporation is not prohibited from lending it moneys when they are needed for its benefit, and the transaction is open and otherwise free from blame; nor is his subsequent purchase of its property, at a fair public sale by a trustee, under a deed of trust executed to secure the payment of them, invalid. The right of a corporation to avoid the sale of its property by reason of the fiduciary relations of the purchaser, must be exercised within a reasonable time after the facts connected therewith are made known, or can, by due diligence, be ascertained. As the courts have never prescribed a specific period as applicable to every case, like the statute of limitations, the determination as to what constitutes a reasonable time in any particular case must be arrived at by a consideration of all the elements which affect that question. The property in controversy in the present suit had been appropriated and used for the production of mineral oil from wells, — a species of property which is, more than any other, subject to rapid, frequent, and extreme fluctuations in value. The director who bought it committed no actual fraud, and the corporators knew at the time of his purchase all the facts upon which their right to avoid it depended. They refused to join him in it, or to pay assessments when made on their stock; and it was nearly four years thereafter, when the hazard was over, and his skill, energy, and money had made his investment profitable, that any claim to or assertion of right in the property was made by the corporation or the stockholders. Held, that the court below properly dismissed the bill of complaint of the corporation, praying that the purchaser should be decreed to hold as its trustee, and to account for the profits during the time he had the property. .

V. DIRECTORS OCCUPY CONFIDENTIAL RELATIONS ALSO TO CREDITORS OF CORPORATION. The directors of a corporation stand in confidential relations to its creditors, towards whom they are bound to act with perfect fairness. They are, at least, *quasi* trustees for the creditors, and where the corporation is insolvent, good faith forbids that the directors should use their position to save themselves, or one of their number, at the expense of other creditors. Where the board of directors of an insolvent corporation confessed a judgment against the corporation in favor of one of their number, who was also president of the corporation and principal stockholder, with a view of giving him priority of lien over another creditor, who was about to obtain a judgment in a judicial proceeding, held, that such preference could not be upheld, but that the two judgments must stand on a footing of equality in respect to the commencement of the lien, and share *pro rata* in the proceeds of the property available for their payment.²

VI. EFFECT OF A MINORITY ONLY OF THE DIRECTORS BEING INTERESTED. In the case of the *U. S. Rolling Stock Co. v. A. & G. W. R. Co.*³ a contract was made by which the plaintiff was to furnish the defendant the rolling stock needed by it for seven years, at a fixed rental. At the time the contract was entered into and confirmed by defendant's board of directors, and for some two years afterwards, five of defendant's board of thirteen directors were the sole members of plaintiff's board of directors. It was claimed also by the plaintiff that the contract had been ratified by the subsequent action of defendant's officers and agents. The court held that "a contract

345, where the judgment of the court below was affirmed.

¹ 91 U. S. 587.

² *Cooks v. Tome*, 9 Fed. Rep. 532. See

also, *Thompson, Liability of Officers, etc.*, p. 397, § 24 et seq.; *Goodin v. Canal Co.* 18 Ohio St. 169.

³ 34 Ohio St. 450.

made between two corporations, through their respective boards of directors, is not voidable at the election of one of the parties thereto from the mere circumstance that a minority of its board of directors are also directors of the other company." BOYNTON, J., said: "If it be granted that the confirmation of the contract by the defendant's board of directors at the meeting of August 2, 1872, was voidable in equity, at the election of the company, for want of the presence at that meeting of the board of a quorum of directors who were not directors of the plaintiff, it nevertheless appears that the board was composed of 13 persons, a clear majority of whom were affected with no incapacity to act for the best interests of the company, and who sustained no fiduciary relation to the plaintiff whatever. This majority possessed ample power to restrain and control the action of the minority; and if the contract was voidable at the option of the company, it had full power to express the company's election if it saw fit to avoid the contract. The fact that some of the persons composing this majority might vote with those who were members of both boards, and thereby create a majority in favor of the contract, would in nowise affect the validity of the transaction, nor relieve the board from the duty to move in the matter, if they desired the company's escape from liability. We have not, upon the most diligent research, been able to find a case holding a contract made between two corporations by their respective boards of directors invalid or voidable, at the election of one of the parties thereto, from the mere circumstance that a minority of its board of directors are also directors of the other company. Nor do we think such a rule ought to be adopted. There is no just reason, where a quorum of directors, sustaining no relation of trust or duty to the other corporation, are present, participating in the action of the board, why such action should not be binding upon the company, in the absence of such fraud as would lead a court of equity to undo or set aside the transaction. If the mere fact that a minority of one board are members of the other gives the company an option to avoid the contract, without respect to its fairness, the same result would follow where such minority consisted of but one person, and notwithstanding the board might consist of 20 or more. In our judgment, where a majority of the board are not adversely interested, and have no adverse employment, the right to avoid the contract or transaction does not exist without proof of fraud or unfairness, and hence the fact that five of the defendant's board of directors were members of the plaintiff's board, whatever may have been its effect on the defendant's right to disaffirm or repudiate the contract, if exercised within a reasonable time, did not disable the defendant from subsequently affirming the contract, if satisfied with its terms, or rejecting it if not; nor did it relieve it from the duty to exercise its election to avoid or rescind within a reasonable time, if not willing to abide by its terms."¹

It may be questioned, from the authorities heretofore referred to, and the general tendency of decisions upon the relations of directors and other officers to the stockholders and creditors, whether the foregoing will be accepted as the correct view of the effect of the presence of an adversely interested minority. It is respectfully suggested that the stockholders and creditors contracted for a full board of impartial, disinterested directors. Judge WELCH well said, in the *Goodin Case*,² "a director whose personal interests are adverse to those of the corporation has no right to be or act as director. As soon as he finds that he has personal interests in conflict with those of the company, he ought to resign." The doctrine advanced by Judge BOYNTON, on the other hand, not only deprives them of a full board of such men, but saddles upon

¹Pages 465, 467. See, also, Morawetz, Priv. Corp. § 245, note 3, and cases cited;

Flagg v. Manhattan Ry. Co. 10 Fed. Rep. 413, 433; Harts v. Brown, 77 Ill. 226.

²18 Ohio St. 183.

them an interested minority, with all the vantage ground possessed through the confidence of and influence with their fellow-members which such directors may have acquired by their association together in such relation. In the *Rolling Stock Co. Case*, for instance, instead of that company being compelled to influence the votes of seven members of the board, as would have been the case had all the directors of the railroad company been impartial, it was necessary for them to secure only two more in addition to those who composed the board of the rolling stock company. If the question is to turn upon the unfairness of the contract, it is believed that as to many exceedingly prejudicial contracts it will be almost impossible for those objecting to show them to be such. "Besides," as said by Judge McCrary,¹ "where shall we draw the lines? If the presence of two interested directors in the board at the time of the ratification does not vitiate the act, would the presence of a larger number of such directors have that effect, and, if so, what number?"²

VII. DIRECTORS PERSONALLY LIABLE. Directors are personally responsible for frauds and losses resulting from gross negligence and inattention to the duties of their trust.³ The opinion of Judge HUGHES, in *Trustees v. Bosseiuux*, is an exhaustive examination of the question. *Ackerman v. Halsey* grows out of the celebrated Mechanics' National Bank of Newark, New Jersey, failure, caused by Baldwin, its cashier, embezzling over \$2,000,000 of the bank's funds. The chancellor there, upon demurrer, sustained a bill filed by a creditor and stockholder against the president and directors, alleging gross neglect of duty and mismanagement in permitting such loss, where reasonable care would have prevented it. He held that the directors are bound to use reasonable diligence, such as men usually exercise in their own affairs of a similar nature. The bill must be for the benefit of all stockholders and creditors. As to liability for fraudulent issue of stock, see *Langdon v. Fogg*.⁴

VIII. LIMITATIONS UPON POWER OF MAJORITY OF STOCKHOLDERS. The holders of a majority of the stock of a corporation may legally control the company's business, prescribe its general policy, make themselves its agents, and take reasonable compensation for their services. But, in thus assuming the control, they also take upon themselves the correlative duty of diligence and good faith. They cannot lawfully manipulate the company's business in their own interests to the injury of other stockholders. They cannot by their votes in a stockholders' meeting lawfully authorize its officers to lease its property to themselves, or to another corporation formed for the purpose and exclusively owned by them, unless such lease is made in good faith and is supported by an adequate consideration; and, in a suit properly prosecuted to set aside such a contract, the burden of proof, showing fairness and adequacy, is upon the party or parties claiming thereunder. All doubts will be solved in favor of the corporation for whom such stockholders assumed to act.⁵

IX. STOCKHOLDERS IMPEACHING ACTION OF DIRECTORS—PREREQUISITES. A stockholder in a corporation cannot set aside the transactions of its directors unless he held his interest at the time of the proceeding complained of, nor unless he has exhausted all the means within his reach to obtain redress without resort to a court of law.⁶ He must make every reasonable effort to get the proper officers of the corporation to take action, before he will be per-

¹ *Thomas v. Ry. Co.* 2 Fed. Rep. 879.

² See same case, 109 U. S. 522, S. C. 3 Sup. Ct. Rep. 315, where the holding of Judge McCrary as to the voidability of the contract was affirmed.

³ *Trustees v. Bosseiuux*, 3 Fed. Rep. 817;

Ackerman v. Halsey, 17 Cent. Law J. 433, (N. J. Ch. Ct.)

⁴ 18 Fed. Rep. 5.

⁵ *Meeker v. Winthrop Iron Co.* 17 Fed. Rep. 48, and note by Francis Wharton.

⁶ *Dirmpfel v. Ohio & M. Ry. Co.* 3 Sup. Ct. Rep. 573; 110 U. S. 209.

mitted to sue in behalf the corporation himself.¹ In *Hawes v. Oakland*² the supreme court of the United States held that, in order to entitle a stockholder to sue in behalf of the corporation, there must be shown: "(1) Some action or threatened action of the directors or trustees which is beyond the authority conferred by the charter or the law under which the company was organized; or (2) such a fraudulent transaction, completed or threatened by them, either among themselves or with some other party, or with shareholders, as will result in serious injury to the company or the other shareholders; or (3) that the directors, or a majority of them, are acting for their own interests in a manner destructive of the company, or the rights of the other shareholders; or (4) that the majority of the shareholders are oppressively and illegally pursuing, in the name of the company, a course in violation of the rights of the other shareholders which can only be restrained by a court of equity; (5) it must also be made to appear that the complainant made an earnest effort to obtain redress at the hands of the directors and shareholders of the corporation, and that the ownership of the stock was vested in him at the time of the transactions of which he complains, or was thereafter transferred to him by operation of law."

X. DEMAND UPON DIRECTORS TO SUE, BEFORE STOCKHOLDER CAN DO SO, NOT NECESSARY, WHEN. "If the agents of the corporation, in whom the authority to direct its litigation is vested, are themselves guilty of a wrong against the corporation, a court of equity will interfere at the suit of a stockholder to protect his interest in the corporation, without requiring him first to request the guilty agents to proceed in the name of the corporation against themselves."³

XI. COMPENSATION OF OFFICERS. When an officer of a corporation performs the usual and ordinary duties of his office, as defined by the charter and by-laws, he cannot recover any compensation therefor unless it has been so specially agreed.⁴ And a subsequent vote of the board of directors to pay a director or other officer for his services, when there was no previous agreement, is not binding.⁵ In *Loan Association v. Steinmetz*,⁶ defendant, a director, was chairman of committee on short loans. His duties were quite burdensome. No salary had been agreed upon, but after he had held the position a year and a half the board of directors voted him a salary of \$200 a year, and ordered him paid \$300 back salary, for which an order was issued to him. He brought suit upon it, and recovered judgment in the lower court, but the supreme court, in reversing it, said: "We regard it as contrary to all sound policy to allow a director of a corporation, elected to serve without compensation, to recover payment for services performed in that capacity, or as incidental to his office. It would be a sad spectacle to see the managers of any corporation, ecclesiastical or lay, civil or eleemosynary, assembling together and parceling out among themselves the obligations or other property of the corporation in payment for their past services. The expectation of a director that he was to receive compensation, there being no

¹ *Memphis City v. Dean*, 8 Wall. 78; *Cook v. Berlin Mills Co.* 6 Reporter, 188; *Davenport v. Dows*, 18 Wall. 626; *Taylor v. Holmes*, 14 Fed. Rep. 498; *Detroit v. Dean*, 106 U. S. 537; S. C. 1 Sup. Ct. Rep. 560; *Bissit v. Ky. Riv. Nav. Co.* 15 Fed. Rep. 361, note.

² 104 U. S. 450; S. C. 21 Amer. Law Reg. (N. S.) 252; 14 Cent. Law J. 288.

³ *Morawetz, Priv. Corp.* § 386, and cases cited. See, also, note to *Bissit v. Ky. Riv. Nav. Co.* 15 Fed. Rep. 353, 361.

⁴ *Citizens' Nat. Bank v. Elliott*, 7 N. W.

Rep. 506; S. C. 55 Iowa, 104; 39 Amer. Rep. 167; *Austin City R. Co. v. Swisher*, 15 Reporter, 760, (Tex. Ct. App.)

⁵ *Pierce, R. R. 31*; *Loan Ass'n v. Steinmetz*, 29 Pa. St. 534; *Kilpatrick v. Bridge Co.* 49 Pa. St. 118; *Dunston v. Gas Co.* 3 B. & A. 125; *Holder v. L., etc.*, Co. 71 Ill. 106; *Maux Ferry Gravel Co. v. Branagan*, 40 Ind. 361; N. Y., etc., R. Co. v. *Ketchum*, 27 Conn. 170; *Austin City R. Co. v. Swisher*, supra. And see cases collected in *Pierce, R. R. 31*, and notes.

⁶ *Supra*.

previous vote or promise, does not entitle him to it. The rule which excludes compensation applies to the president chosen by the directors from their own number, and also to a treasurer when a director." The supreme court of Kansas, in a late case, after an exhaustive examination of the question, conclude: "We do not agree with all the authorities heretofore cited as to the lack of power on the part of the directors to appropriate money in payment of the salary of the cashier or other officer after the services have been rendered, and in cases when such cashier or other officer happens to be a director. We think the rule is, in the absence of positive restrictions, that, when no salary is prescribed, one appointed to an executive office, like that of cashier, is entitled to reasonable compensation for his services, and that the directors have power to fix the salary after the expiration of the term of office, and this, though such appointee is also a director, and continues to be such while holding the independent office."

For *extra services* an officer receiving a salary is not entitled to compensation, unless there was an express agreement, or such circumstances as to raise a presumption, that the parties intended them to be paid for; and the mere fact that the services were rendered would not raise such presumption.¹ In *Santa, etc., Ass'n v. Meredith*,² on the contrary, the doctrine seems to be announced that in the absence of circumstances indicating a different understanding, merely rendering the services would raise an implied contract for compensation whenever that result would follow between private individuals.

Cincinnati, May, 1884.

J. C. HARPER.

¹Pew v. First Nat. Bank of Gloucester,
130 Mass. 391.

²49 Md. 389; S. C. 33 Amer. Rep. 284.

WELLS and another v. LANGBEIN and others.

(Circuit Court, N. D. Iowa, E. D. April 29, 1884.)

1. FRAUDULENT CONVEYANCE—CHATTEL MORTGAGE—RESERVATIONS IN FAVOR OF MORTGAGOR.

A chattel mortgage reserving to the mortgagor the right to dispose of the goods in the usual course of trade, provided the stock be kept up, is void with respect to the creditors of the mortgagor.

2. SAME—NOT CURED BY POSSESSION AFTERWARDS TAKEN.

Possession taken by the mortgagee under a chattel mortgage, originally void as in fraud of creditors, before its validity is attacked by them, is affected with the original fraud, and gives the mortgagee no rights against the mortgagor's creditors, who can at once attach the property.

At Law.

Henderson, Hurd & Daniels, for plaintiffs.

C. P. Brown and Robinson, Powers & Lacy, for garnishees.

SHIRAS, J. The defendants, C. H. Langbein & Bro., were engaged in the mercantile business at Ossian, Iowa, and on the twenty-eighth day of September, 1883, they executed a chattel mortgage on their entire stock of merchandise, together with their store fixtures and books of account, and all the additions to be made to the stock, to secure payment of a promissory note of \$916.70, due one Louisa Wight, payable September 28, 1884. And on the same day they executed a

second mortgage on the same property to one Ferdinand Langbein, to secure a promissory note of \$575, payable January 2, 1885. On the ninth of October, 1883, they executed a third mortgage on the same property to Davis & Madary to secure a note of \$248.19, payable October 9, 1884. Each of these mortgages contains the provision that the "grantors have the right to dispose of the goods in the usual course of trade, provided they keep up the stock."

Between the twenty-sixth of July and twenty-eighth of September, 1883, the plaintiffs sold on credit to C. H. Langbein & Bro. goods to the amount of \$518.34, and on the fifteenth of October, 1883, this suit was brought to recover therefor, a writ of attachment being issued, which was served by garnishing M. J. Carter, Louisa Wight, F. Langbein, Davis & Co., and others, service being made October 16, 1883. By agreement, the answer given by M. J. Carter stands as the answer of all the garnishees, and from it it appears that on the tenth of October, 1883, M. J. Carter, as attorney and agent for the several mortgagees named, took possession of the mortgaged property, and has since converted the same into cash, and holds the money thus realized in his possession, claiming that it should be applied in payment of the mortgages above described.

The plaintiffs claim that the mortgages are void as against creditors, and the question for determination is as to the validity of the mortgages as against the attaching creditors. As the mortgages in express terms provide that the mortgagors should remain in possession, with the right to sell the mortgaged property in the usual course of trade, they come within the rule laid down in *Robinson v. Elliott*, 22 Wall. 513, and *Crooks v. Stuart*, 2 McCrary 13, S. C. 7 FED. REP. 801, wherein it is declared that the reservation of such rights to the mortgagor, upon the face of a mortgage, shows conclusively that it is intended as a shield and protection to the mortgagor, and operates as a fraud upon the rights of the creditors of the mortgagor, and is therefore void.

On behalf of the mortgagees it is claimed that, granting the correctness of the rule recognized in the cases cited, it is not applicable to the present case, for the reason that the mortgagees, through their agent, had taken possession of the property before the writ of attachment in favor of plaintiffs was served by garnishment of the mortgagees and their agent. As already stated, the answer of the garnishee shows that he received possession of the property under the mortgages as agent of the mortgagees. The facts do not present a case wherein all rights under the mortgages were abandoned, and the parties entered into a new and wholly independent arrangement, whereby the goods were placed in the hands of the garnishee as a pledge for the payment of the debts due the parties named as mortgagees. The possession of the goods was delivered to the mortgagees for the purpose of fulfilling the conditions of the mortgages, and the possession was held under the terms thereof, and not by virtue of any new con-

tract. The point to be decided, therefore, is whether the taking possession of the mortgaged property by the mortgagee in pursuance of the terms of the mortgage, before any creditor attacks the validity of the conveyance, will validate a mortgage which contains provisions showing that it is a fraud upon the rights of creditors. Counsel for the mortgagees cite in favor of the affirmative of the proposition the cases of *Congreve v. Evetts*, 10 Exch. 298; *Read v. Wilson*, 22 Ill. 379; *Brown v. Webb*, 20 Ohio, 389.

In *Congreve v. Evetts* the question was as to the effect of a bill of sale of future crops. It was held that the execution of the bill of sale did not create any lien, legal or equitable, upon the future crops, but that if, after the crops were growing, actual possession thereof was delivered to the creditor, he could hold the same against an execution creditor. The point decided was that an executory contract, which may be ineffectual at its date to create a lien upon property not then in existence, may be rendered binding and complete by delivery of possession after the property has been created or acquired.

In *Read v. Wilson* the decision is based upon the construction of a statute then in force in Illinois, by which it was provided that by the insertion of certain clauses in the mortgage the mortgagor might be authorized to remain in possession for two years. The court held that the provisions of the mortgage did not comply with the requirements of the statute, and did not therefore authorize the mortgagor to remain in possession, but that as the mortgagee took possession of the property before any other creditor obtained a lien thereon, such possession would cure the fraud, if any, imputed by reason of the fact that the mortgagor had continued in possession for a time contrary to the terms of the statute.

In *Brown v. Webb* it appeared that one Garnier, being insolvent, made a transfer of property to one Bour, which transfer was in fraud of his creditors. Brown & Co., creditors of Garnier, with knowledge of the fraud in the transfer from Garnier to Bour, procured, with Garnier's consent, a chattel mortgage from Bour upon the property transferred to him, to secure the debt due them from Garnier. The court held that the transfer from Garnier to Bour, though void as against creditors, was good as between them, and conveyed the legal title to Bour, and that Webb & Co. were justified in getting security for the debt due them from Garnier, by taking the mortgage from Bour, as thereby they got security on Garnier's property, the title of which was in Bour.

Of these cases, therefore, the only one that has any bearing upon the question at issue is that of *Read v. Wilson*, and in that case the court was ruling solely upon the fact that the mortgagee had not promptly taken possession under a mortgage which, by its terms, required him to take possession.

In *Robinson v. Elliott* and *Crooks v. Stuart*, *supra*, it appears from the statement of facts in each case that possession under the mort-

gage had been taken before the attaching creditors had obtained any lien upon the property, yet it was not held that this fact in any way affected the conclusion announced.

The supreme court of California, in *Chenery v. Paimer*, 6 Cal. 123; the supreme court of New York, in *Delaware v. Ensign*, 21 Barb. 85; and *Dutcher v. Swartwood*, 15 Hun, 31; the court of appeals of New York, in *Parshall v. Eggert*, 54 N. Y. 18; the supreme court of Wisconsin, in *Blukeslee v. Rossman*, 43 Wis. 116; and the supreme court of Minnesota, in *Stein v. Munch*, 24 Minn. 390,—all hold that where the mortgage is void for fraud as to creditors, taking possession thereunder, before a lien is obtained on the property in favor of a creditor, will not render it valid. The fraud existing in the mortgage itself vitiates all steps taken under it.

Without citing further authorities upon the proposition, it seems to me clear that the cases last named announce the true rule. If the mortgage under which possession is taken is fraudulent and void as to creditors, then the effort to enforce it by taking possession under it cannot purge it of the existing fraud, nor render valid as against creditors that which the law, on grounds of public policy, declares to be fraudulent and therefore void. When a chattel mortgage, bill of sale, or other like instrument is imperfect through insufficient description, or because the property is not then in existence, or because the mortgagee did not promptly take possession, or record the mortgage, or for any reason not bottomed on fraud, then taking possession may render complete and valid that which was before incomplete; but when the invalidity of the conveyance is caused by the fact that it is a fraud upon the rights of third parties, upon what principle can it be held that enforcing the fraudulent mortgage, by taking possession under it, shall have the effect of validating it? The title and rights of the mortgagee are based upon the mortgage. He enters into possession under and by virtue of the mortgage. If the mortgage is void as to creditors by reason of fraud, the title and possession based thereon must, if attacked by creditors, fall with the foundation on which they rest. Any other rule would in most cases enable the parties to the fraud to reap the benefits of their fraudulent practices, as in that case a debtor could give a chattel mortgage upon his property to a favored creditor or friend, remain in possession, continue to sell in the usual course of trade, use the proceeds for his own purposes, and still protect the mortgage from successful attack by being sufficiently on the alert to hand over possession to the mortgagee just before the injured creditors make a levy upon the property.

As the mortgages to Louisa Wight, F. Langbein, and Davis & Madary are void as to creditors by reason of the stipulations therein contained, the property passing into the possession of the mortgagees was the property of C. H. Langbein & Bro., for the value of which the garnishees must respond to the plaintiffs, so far as the same may be needed to pay the judgment in favor of plaintiffs.

GARTSIDE COAL Co. v. MAXWELL and others.¹*(Circuit Court, E. D. Missouri. April 22, 1884.)*

1. DEPOSITIONS—PLACE OF TAKING.

Depositions will not be suppressed because taken at a different place from the one named in the notice, if taken in the presence of both parties or their representatives.

2. SAME—CERTIFICATE—INTEREST.

The certificate of the officer before whom depositions have been taken should state that he is disinterested, and is not the attorney or counsel of either party to the suit.

3. SAME—AMENDMENT.

Where the certificate fails to state these facts, leave will be given to withdraw the depositions in order that the certificate may be amended.

At Law. Motion by defendant to suppress depositions taken in behalf of the plaintiff.

Hiram J. Grover, for plaintiff.

Henry Hitchcock, Lucien Eaton, and Walker & Walker, for defendants.

BREWER, J. This is a motion to suppress the deposition of a witness taken on behalf of the plaintiff. The first ground of the motion is that there is a defect in this, that the notice named the office of ———, No. 24 Gay street, Knoxville, Tenn., as the place of taking the deposition, while the certificate states that it was taken at the office of ———, No. 124 Gay street, Knoxville, Tenn.; but as the counsel and parties on both sides were represented, I cannot think that that defect is immaterial. The description, though partially incorrect, was sufficient. It named correctly the person at whose office the deposition was taken, and the only defect was in the street number of the office. Besides, the party served appeared, and the sole object of notice is to give an opportunity to appear. The other ground of the motion is, that the certificate does not set forth that the officer taking the deposition was not of counsel or attorney for either of the parties, and that he was not interested in the event of the cause. I think that is a defect. It should appear affirmatively on the face of the certificate that the officer taking the deposition was disinterested, just as much as it should appear that the officer was one of the class of officers authorized to take depositions. The mere signature of A. B., without any designation of his office, or any description of his capacity to take the deposition, would be insufficient; and so the fact that he is disinterested should appear affirmatively somewhere in the certificate. It was affirmed and denied by the respective counsel on the argument that a different ruling had been made by my predecessor, but no case was cited. It is true that there are a couple of cases in 2 Cranch which seem to differ from this view, yet I think the

¹ Reported by Benj. F. Rex, Esq., of the St. Louis bar.

rule is that it should appear affirmatively on the face of the certificate that the officer was one authorized by the statute to take depositions.

It was suggested, during the argument on this motion, that if the ruling should be in this direction an application would be made for leave to withdraw the deposition, and have that defect corrected by the officer taking it. I think, under the circumstances, that would be perfectly fair. The order, therefore, will be that the motion be continued, and leave given to plaintiff to withdraw the deposition for the purpose of having that defect corrected by the officer. Of course, this does not open the deposition for further testimony, or for any other change than simply to correct that defect in the certificate.

CITY AND COUNTY OF SAN FRANCISCO v. JONES.

(*Circuit Court, D. California. May 5, 1884.*)

1. ACTION FOR DELINQUENT TAXES—STATUTE OF LIMITATIONS—CITY AND COUNTY PART OF STATE—SECTION 345, CODE CIVIL PROC.

In an action by a city and a county for delinquent taxes, a part of which is for the benefit of a state, the city and the county will be treated as a part of the state, as to their share, and the statute of limitations will run against the action, under section 345, Code Civil Proc.

2. DELINQUENT TAXES—ACTION FOR, BY CITY AND COUNTY—STATUTE OF LIMITATIONS BARS—SECTIONS 312, 338, 339, 343, 345, CODE CIVIL PROC.

An action for delinquent taxes brought by a city and a county, and in part for the benefit of a state, eight years after they became delinquent, is barred by the statute of limitations, under sections 312, 338, 339, 343, and 345 of the Code of Civil Procedure.

3. ACTION TO COLLECT TAX UNNECESSARY—SECTIONS 3716, 3717, POL. CODE—STATUTE OF LIMITATIONS RUNS AGAINST DELINQUENT TAXES.

No action is necessary to collect a valid tax, under sections 3716, 3717 of the Political Code. These sections do not take an action for delinquent taxes out of the statute of limitations.

4. LIEN FOR TAXES—WHEN BARRED—DELINQUENT TAX CASES.

A lien for taxes is an incident to the tax, and when an action to recover the debt is barred, the lien is also barred. This applies in delinquent tax cases as well as to mortgages.

Demurrer to an Action to Collect Delinquent Taxes.

B. C. Whitman, for defendant.

John P. Bell and *Louis H. Sharp*, for plaintiff.

Before SAWYER and SABIN, JJ.

This is an action brought under the act of 1878, and supplementary act of the same year, (St. 1877-78, pp. 338, 962,) to recover city and county, and state taxes, for the fiscal year 1875-76, ending June

30, 1876, with 5 per cent. penalty, and 2 per cent. per month interest on the city and county's portion from August 2, 1875, and on the state's portion, from January 3, 1876. The complaint was filed October 5, 1883,—eight years or more after the city and county taxes became delinquent. Defendant demurs on the ground, among others, that the action is barred by the statute of limitations, and we think the objection good. The provisions of the Code of Civil Procedure relied on are as follows:

Sec. 312. "Civil actions can only be commenced within the periods prescribed in this title, after the cause of action shall have accrued, except where, in special cases, a different limitation is prescribed by statute."

Sec. 338. "Within three years: (1) An action upon a liability created by statute, other than a penalty or forfeiture."

Sec. 339. "Within two years: (1) An action upon a contract, obligation, or liability, not founded upon an instrument of writing."

Sec. 343. "An action for relief not hereinbefore provided for, must be commenced within four years after the cause of action shall have accrued."

Sec. 845. "The limitations prescribed in this chapter apply to actions brought in the name of the state, *or for the benefit of the state*, in the same manner as to actions by private parties."

Part of the amount claimed is for the benefit of the state, and, for the purposes of the action, the most favorable aspect of the case is that the city and county, as to its own share of the taxes sued for, must be treated as a part of the state; for if the plaintiff, with respect to its share, is to be regarded as a mere corporation, then the statute of limitations applies without reference to the provisions of section 345. The statute, then, by its express terms applies to this action. We think the three-years limitation of clause 1, § 338, applicable at least as to the tax,—the principal thing sued for,—and the incident doubtless follows the principal thing claimed. It is a liability created by statute, within the meaning of the Code. If not, then it is an "obligation or liability not founded upon an instrument in writing," and the two-years limitation applies. If neither of these provisions is applicable, then certainly the action is "for relief not hereinbefore provided for," and under this general residuary clause is barred in four years. In either event the time has run twice over. We think the three-years limitation applies, in which case the statute has run nearly three times the prescribed limitation. No decision of the courts of the state of California determining this point has been cited, and we are aware of none upon the question. The supreme court of Nevada has decided the precise point upon the statute of that state, which is entirely similar in its provisions, and the statute was held to apply, and to bar the action. *State v. Y. J. S. M. Co.* 14 Nev. 226.

Sections 3716 and 3717 of the Political Code are as follows:

Sec. 3716. "Every tax has the effect of a judgment against the person, and every lien created by this title has the force and effect of an execution duly levied against all property of the delinquent. The judgment is not satisfied

nor the lien removed until the taxes are paid, or the property sold for the payment thereof."

Sec. 8717. "Every tax due upon personal property is a lien upon the real property of the owner thereof, from and after 12 o'clock M. of the first Monday in March in each year."

Under these and other provisions of the Political Code no action is necessary to collect a valid tax. But it is claimed that these provisions take the case of an action under the statute to recover a tax out of the statute of limitations. In the case already cited the supreme court of Nevada, on a similar statute, decided otherwise, and, we think, correctly. Id. 230.

The statute of Nevada is as follows:

"Sec. 3127. Every tax levied under the provisions or authority of this act is hereby made a lien against the property assessed, and a lien shall attach upon the real property for the tax levied upon the personal property of the owner of such real estate, on all the property then in this state, and on all other property whenever it reaches the state, and shall not be satisfied or removed until all the taxes are paid, or the property has absolutely vested in a purchaser under a sale for taxes." 2 Comp. Laws Nev. 178.

The lien is but an incident to the tax—the money due—and, like the case of a mortgage, when an action to recover the debt is barred, the suit to enforce the lien is also barred. This has long been the settled doctrine in this state in relation to a mortgage. Neither the debt nor the lien is extinguished in the case of a mortgage, in any other sense than in the case of a tax, and the statutory lien incident to it. The remedy by action is barred, whatever the case may be as to other remedies. Besides, this is not a suit to enforce a lien at all. It is a statutory action, and just what the statute makes it. It says nothing about a lien, and authorizes no suit to enforce a lien. It simply authorizes the recovery of a personal judgment against the party charged with the tax, and that is all that is sought in the complaint, and all that the statute provides for. The suit is an additional statutory remedy, and the remedy is measured by the statute. All suits, whether by the state, by corporations, or natural persons, without other exceptions than those expressly made by the statute, are barred within the prescribed period. We are not only satisfied that this action is barred by the statute, but we think the policy of the statute, limiting the time within which the state can sue, a good policy. We see no good reason, at this day, and under our laws, for the levy and collection of taxes, for allowing the state to vex parties with suits for taxes after a lapse of many years, that is not equally applicable to private parties. The state has officers specially appointed to attend to these particular duties, and no others, and if they neglect their duties, the state which appoints them, if any one, should be the party to suffer. To permit the state, after a lapse of many years, to recover by suit taxes allowed to run uncollected, with 5 per cent. penalty, and, in the language of Mr. Justice SWAYNE, the

"most devouring rate" of 2 per cent per month interest, would be to inflict unendurable oppression.

The demurrer must be sustained upon this ground, and it is unnecessary to consider the other grounds relied on. It is so ordered.

MUNDY v. LIDGERWOOD MANUF'G CO.

(Circuit Court, S. D. New York. May 5, 1884.)

PATENT LAW—DENIAL OF COSTS UNDER ST. § 4922.

St. § 4922, applies to patentees without original right, and not to such as have had their rights impaired by their neglect.

In Equity.

Ernest Webb, for complainant.

L. Gifford, for defendant company.

WHEELER, J. The statute, (section 4922,) denying costs in patent cases unless disclaimer is entered at the patent-office before commencement of the suit, is, by its terms, applicable only to patents in which the patentee has, in his specification, claimed to be the original and first inventor of substantial parts of the thing patented, of which he was not such inventor. The orator did not abandon the new and expanded claims of his reissue on that ground, but because of his laches in applying for the reissue. The statute, therefore, does not apply to this case. And, as no hearing was had upon the abandoned claims, no other ground for denying costs is made apparent. The decree is therefore signed, without requiring a disclaimer or denying costs.

BATE REFRIGERATING CO. v. GILLETT and others.

(Circuit Court, D. New Jersey. March 25, 1884.)

1. FOREIGN STATUTES IN A UNITED STATES COURT—CONSTRUCTION.

A statute of another country, when considered by our courts, carries the construction given it by the courts of that country.

2. PATENT LAW—CONSTRUCTION OF SECTION 4887, REV. ST.

A patent issued successively by Canada and the United States, and afterwards declared void *ab initio* by a Canadian court, does not by that fact expire in this country, but will be regarded as if it had never existed in Canada at all.

On Motion to Vacate Order, etc.

Dickerson & Dickerson, for the motion.

John R. Bennett, contra.

NIXON, J. After the validity of complainant's patent was sustained by a decree of the court entered November 14, 1881, the defendants filed a petition setting forth that the letters patent, for the infringement of which the suit had been brought, were letters patent of the United States, numbered 197,314, granted to John J. Bate, of New York, on the twentieth of November, 1877, for the full term of 17 years; that prior thereto, to-wit, January 19, 1877, letters patent of the dominion of Canada, No. 6,938, had been issued to said Bate for the same invention, for the term of five years from that date; that the term of the foreign patent had expired on January 9, 1882, by reason whereof the United States letters patent had terminated at the same time as the Canadian patent, under section 4887 of the Revised Statutes. The petition further alleged that, the invention of Bate having been previously patented by him in Canada, the United States letters patent should have been so limited on their face as to expire at the same time as the foreign patent; and that the granting of the patent in the United States for the full term of 17 years was in direct violation of said section of the patent act, by reason thereof the same was null and void *ab initio*. The petition prayed that the injunction before ordered and issued should be dissolved. After consideration of the case, the court held that the domestic patent expired at the end of the life of the foreign patent, and dissolved the injunction. See *Bate Ref. Co. v. Gillett*, 13 FED. REP. 553. As it did not seem necessary to the decision of the case, no opinion was expressed upon the second allegation of the petition, that the American patent was void *ab initio* because the term was not limited upon its face to the life of the foreign patent.

A motion has now been made and heard to vacate the order dissolving the injunction and to reinstate the same upon two grounds: (1) Because the superior court for Lower Canada, in the province of Quebec, on a *scire facias* issued by the attorney general (Sir Archibald Campbell) in and for the dominion of Canada, had decided that said letters patent No. 6,938, issued to said Bate, January 9, 1877,

and the several extensions thereof, were void *ab initio*, and had ordered the same to be canceled and annulled as illegally granted; (2) because the parliament of the dominion of Canada, by an act assented to May 25, 1883, had declared that section 17 of the Canadian patent act of 1872 conferred a term of 15 years upon all patents issued under its provisions, and that this had been the meaning of said law from its first enactment.

It appears that the question has been raised in the Canadian courts in regard to the validity of the patent granted to Bate in Canada, the existence of which determined the life of his American patent. The fifteenth section of the Canadian act requires that every applicant for letters patent shall deliver to the commissioner, unless specially dispensed from so doing for some good reason, a neat working model of his invention, on a convenient scale, and exhibiting its several parts in due proportion, whenever the invention admits of such a model. In the proceedings by *scire facias* the cause alleged for annulling the patent was that when the letters were issued to the applicant no neat working model had been delivered to the commissioner, nor had there been any dispensation granted or asked for; and the judgment of the court was invoked on the question whether a working model, subsequently furnished, cured the defect or failure of the non-delivery of one in the first instance. The twenty-ninth section of the act gave jurisdiction to the superior court for the province of Quebec over all patents granted by the patent-office, and its construction of the statute must be accepted as its true meaning, even in those cases where other courts, if left to the exercise of their own judgment, would be inclined to a different view. It has long been accepted as a universal principle that the judicial department of every government, where such department exists, is the appropriate organ for construing the legislative acts of that government. In *Elmendorf v. Taylor*, 10 Wheat. 159, Chief Justice MARSHALL emphasized this doctrine by asserting broadly that "no court in the universe, which professed to be governed by principle, would undertake to say that the courts of Great Britain or of France, or of any other nation, had misunderstood their own statutes, and therefore erect itself into a tribunal which should correct such misunderstanding."

We have before us the record, and the final judgment of the court on the proceedings instituted by the attorney general, entered July 9, 1883, the material part of which is in these words:

"The court, having heard the parties upon the merits of the cause, examined the proceedings and proof of record; heard the witness for plaintiff, and having deliberated, * * * doth overrule defendant's plea, and grant the conclusions of the information in this cause filed, and doth in consequence declare that the patent of invention hereinafter described was improperly and illegally granted and issued, and registered without jurisdiction and without authority, and that the same was and is *ab initio* null and void, and insufficient to secure for the defendant any monopoly such as therein purports to be granted to him, * * * and doth further cancel and annul the same."
v.20,no.8—13

nul, *ab initio*, said patent for invention, and the renewals thereof, and the transfer thereof, and the registrations thereof, with costs," etc.

We have also an exemplified copy of the certificate of said judgment, entered on the margin of the enrollment of the patent in the office of the commissioner, as authorized and directed by section 80 of the Canadian patent act, bearing date July 13, 1883, after which entry, according to the provisions of said section, "the patent shall be, and be held to have been, void, and of no effect, unless and until the judgment be reversed on appeal." It is the legal consequence of such a judgment that the foreign patent never had in fact any existence, and that, hence, it can have no effect in shortening the term of the American patent. The latter stands for 17 years, as if no attempt had been made to take out the foreign letters. In this new state of facts the order dissolving the injunction must be vacated, and the injunction restored in its former vigor and force, unless the allegation of the defendants that the judgment was obtained by collusion deprives it of its legal effect. The charge of collusion arises from the fact that the patentee used the machinery, which was the only machinery accessible to him, to get before the court the question of the validity of his grant. The Canadian statute allows the writ of *scire facias* in the name of the attorney general of the dominion, at the instance of any private person, to test the validity of letters patent issued by the sovereign to an inventor. A proceeding was first instituted by the attorney general of the province of Quebec, but the court held that he was not the person contemplated in the act. A new writ was issued, and the information filed by the attorney general of the dominion. All the facts involved seem to have been fairly presented in the information and pleas, and the judgment of the court was the conclusion of the law upon the facts. The decision must be regarded as binding until set aside by proper proceedings.

This view renders it unnecessary to consider the other questions raised and discussed in the case.

Let an order be entered vacating the former order dissolving the injunction, and let the injunction be reinstated.

PENNINGTON and another v. HUNT.

(Circuit Court, D. New Jersey. April 5, 1884.)

PATENT LAW—RIGHTS OF ASSIGNEE CONCLUDED BY DECREE AGAINST ASSIGNOR.
Assignee of a patent is subject to the limitations which affected the title of his assignor. If the latter is estopped by a decree the former is.

On Plea, etc.

F. H. Angier, for complainants.

Carrol D. Wright and *A. E. Dennison*, (of counsel,) for defendants.

NIXON, J. This case is now before the court on the defendants' plea in bar to the bill of complaint. These defendants filed their bill in the circuit court of the United States for the district of Massachusetts, on the fifth of December, 1879, against one Charles W. King, of Boston, for the infringement of letters patent No. 203,069, bearing date April 30, 1878, and issued to the said Beggs and Aaron S. Pennington, assignee of the other complainant. The defendants answered the bill, denying the infringement, and setting up, among other things, that the complainant's patent was void, being anticipated by letters patent numbered 148,596, dated March 17, 1874, and granted to one Nathaniel D. Clark for garden or lawn sprinklers. The proofs were duly taken, and the case went to hearing, and on May 26, 1881, the court decided that the defendant had infringed, and that the complainant's letters patent were valid as against the older patent of Clark. On June 16, 1881, Clark assigned his patent to King, and on May 29, 1882, King assigned it to the complainant in this suit, Harry Hunt, who filed his bill in this court against the said Pennington and Beggs, complaining of infringement of the Clark patent in their use of their own patent. The defendants plead the decree in the above suit against King as a bar to the present action. The complainant was not a party to the former suit, and he is not estopped by the result of that controversy, unless he is in privity with some one who was a party. The evidence shows that after the interlocutory, but before the final decree, the defendant King purchased the Clark patent of the patentee. After the final decree was entered against King, to-wit, May 29, 1882, instead of taking an appeal, he acquiesced in the decision, and assigned his interest in the Clark patent, which had been decreed not to anticipate the Pennington and Beggs invention, to the said Hunt, who has filed this bill to have a readjudication of the question that was decided by Judge LOWELL in the other suit.

The counsel for the complainant insists that the plea is bad because Clark has never had his day in court, or an opportunity to defend or sustain his patent. There would be force in the suggestion if he had retained the ownership of the patent, and was the complainant in the

present suit. But he sold the patent to King, the defendant in the former action, *pendente lite*, who kept it until after the termination of the litigation, and then transferred the title to Hunt, who was his principal witness in the suit, and had at least sufficient knowledge of the controversy to put him upon inquiry. Hunt's title, then, is subject to the limitations which affected the title of his assignor, King. If the latter is estopped by the decree, the former is. Greenleaf, in his first volume of the Law of Evidence, § 523, says:

"But to give full effect to the principle by which parties are held bound by a judgment, all persons who are represented by the parties and claim under them, or in privity with them, are equally concluded by the same proceedings. We have already seen that the term 'privity' denotes mutual or successive relationship to the same rights of property. The ground, therefore, upon which persons standing in this relation to the litigating party are bound by the proceedings to which he was a party, is that they are identified with him in interest, and wherever this identity is found to exist, all are alike concluded."

The complainant stands before the court as King would have stood if he had commenced the action.

We think the plea in bar must be sustained; and it is so ordered.

SIMON v. NEUMANN and others.

(Circuit Court, S. D. New York. May 10, 1884.)

PATENT—ADOPTION OF OLD PORTION OF IMPROVED DEVICE NO INFRINGEMENT.

A certain patent being found to be an infringement upon an old invention, it is no infringement to imitate the old portion of it, so long as there is no interference with the new.

In Equity.

Frederic H. Betts and *J. S. Hindon Hyde*, for orator.

W. C. Hauff and *John Van Santvoord*, for defendant.

WHEELER, J. This suit rests upon reissued letters patent No. 9,772, dated June 21, 1881, the original of which was No. 177,020, dated May 2, 1876, and granted to the orator for an improvement in traveling-bags. The improvement consisted in making the lock-plate long enough to support not only the lock itself and its fastenings, but also ring-loops for the handle attached to raised portions of the plate, and having creases under the ends of the plate for rings or other devices for a carrying-strap, so that attaching the plate to the frame would attach all these parts to the bag. There were three claims in the original patent,—one for the lock-plate having secured to it the lock, fastening, and ring-loops; one for the lock-plate having the recesses

formed by the raised portions for receiving the ring-loops; and one for the combination of the plate, the lock, and the fastening device, secured together and adapted to be fastened to the frame. The ring-loops, and the mode of attaching them to an extended plate, and the creases under the ends of the plate for the rings of a carrying-strap, appear to have been new. A lock and fastening secured to a plate, adapted to be attached to a bag-frame, appear to have been old. The first two claims would therefore be valid, but the defendants do not have the ring-loops, nor their mode of attachment to the plate, and do not infringe those claims. The third claim, not calling for anything peculiar about the plate more than it should be combined with the lock and fastening device, and adapted to be attached to the frame, by its terms covered nothing that was new, and appears to be invalid. Nothing in respect to the creases under the ends of the plate was claimed. The reissue has two new and additional claims,—one for a lock provided with means whereby the rings of the carrying-strap can be attached directly thereto, substantially as specified; and one for a lock having its bottom plate provided with creases for the rings for the handles. These claims have reference to the creases for the rings of the carrying-strap or handle under the ends of the extended lock-plate. They are extended to cover this feature. The defendants have the extended plate and this feature. There is no claim anywhere for the extended plate by itself, and none that is infringed except these expanded claims made to cover the infringement by the expansion. The expansion was nearly five years after the original, and does not seem to be warranted, according to the recent decision upon this subject. Therefore the defendants do not infringe any valid claim, and the bill must be dismissed.

Let a decree be entered accordingly, with costs.

ROEMER v. SIMON and others.

(Circuit Court, S. D. New York. May 10, 1884.)

PATENT—ADOPTION OF INVENTION FOR PURPOSE OF ADDING TO IT, AN INFRINGEMENT.

The taking of an invention for the purpose of adding to it is as much an infringement as would be the taking and using it without the addition.

In Equity.

A. v. Briesen, for orator.

Frederic H. Betts, for defendant.

WHEELER, J. This suit is brought upon letters patent No. 195, 233, dated September 18, 1877, and granted to the orator for an im-

provement in combined lock and handle for traveling-bags. The improvement consists in having the case for the lock long enough to fasten the handle to at each end by rings through the upright walls of the case. The handle is thus attached to the lock and by that to the bag; and the extended perpendicular walls of the case stiffen and strengthen the whole. If the invention had been of an attachment of the lock directly to the handles only, or of the extension of the top plate of the lock-case along the frame to receive the handle-rings, it would have been anticipated; but the substance of it is understood to be the single attachment of the lock and handle to the frame, and taking advantage of the walls of the case to strengthen the frame at the handles. None of the devices relied upon by the defense meet these qualities. The patent, therefore, seems to be valid.

The structure shown for an infringement appears to have all the elements of the patented invention, with the addition of a bottom plate to the lock extending beyond and fitting over the handle-rings. This adds to, but does not take the place of, the orator's arrangement. The attachment of the handles to the lock-case, and the support of the whole by the walls of the case, are retained. This taking of the invention for the purpose of adding to it is as much an infringement as if taken and used without the addition. The orator, therefore, seems to be entitled to a decree.

Let a decree be entered for the orator for an injunction and an account, with costs.

THE GOLDEN RULE.¹

(Circuit Court, E. D. Louisiana. March 29, 1884.)

1. COLLISION.

Although the evidence shows that there was no actual collision, there is no doubt that the Golden Rule fouled in the hawser of the Arthur and broke it, and probably, in doing so, broke the ship's martingale. It was an accident likely to occur in a crowded port, and the offending vessel was liable for the damages.

2. SURVEY.

The costs of a survey held on the injured vessel, without order of court, or by contract between the parties, in the absence of any proof that it was a necessary result of the collision, cannot be charged as part of the damages.

Admiralty Appeal.

James McConnell and Horace E. Upton, for libelants.

H. H. Walsh, for claimants.

¹ Reported by Joseph P. Hornor, Esq., of the New Orleans bar.

PARDEE, J. It appears that the bark Prince Arthur was moored in the Mississippi river at First street, in this city, and that the stern-wheel steam-boat Golden Rule attempted to land ahead, and in doing so her wheel fouled in the large hawser leading from the head of the Arthur ashore, chafing and breaking the hawser, and starting the ship's figure-head and breaking her martingale. The captain of the Prince Arthur called a board of survey, repaired his ship's figure-head and martingale, purchased a new hawser, and presented his claim to the Golden Rule for \$262.33 for payment, which was refused, but \$30 tendered in full payment of damages. Thereupon the owners of the Prince Arthur libeled the Golden Rule, alleging collision and damages. Thereafter the claimant tendered in court \$50 and costs accrued. On reference to a commissioner to report damages the following items and sums were allowed:

For hawser,	-	-	-	-	-	-	-	-	\$194 70
For martingale,	-	-	-	-	-	-	-	-	3 76
For survey,	-	-	-	-	-	-	-	-	30 00
Total,	-	-	-	-	-	-	-	-	<u>\$228 46</u>

The district court, considering that a deduction on account of new for old should be allowed on the hawser, reduced the amount by one-third of the cost, and then confirmed the master's report, leaving the account for damages standing thus:

For hawser,	-	-	-	-	-	-	-	-	\$152 36
For martingale,	-	-	-	-	-	-	-	-	3 76
For survey,	-	-	-	-	-	-	-	-	30 00
Total,	-	-	-	-	-	-	-	-	<u>\$186 12</u>
Deduct value of old hawser left on ship and proved,	-	-	-	-	-	-	-	-	<u>33 86</u>
Total damages,	-	-	-	-	-	-	-	-	<u>\$152 26</u>

For which amount judgment was given, subject to the tender of \$89.25 made by claimant and paid into court.

In this court the claimant strenuously contends that there was no collision; that the hawser was rotten; that it could have been spliced; and that \$30, the original tender, covered all the damages. The evidence shows no actual collision of ships, but it is immaterial. There is no doubt, under the evidence, that the Golden Rule fouled in the hawser of the Arthur and broke it, and probably, in doing so, broke the ship's martingale. It was an accident likely to occur in a crowded port, and there is nothing to determine about it except the actual damages. The evidence that the hawser was rotten is wholly inferential, based on the fact that it broke, and I think is fully met by the facts and direct evidence on the part of libelants. The evidence also shows that it could not have been spliced without weakening and shortening it, so as to render it useless to the Prince Arthur. A new

one cost in this market \$228.56, and when from that amount was deducted one-third, new for old, and the proven value of the old hawser, \$33.86, there ought to be no question that the damage on account of the hawser was correctly ascertained. The small amount allowed for the martingale was proved, and is not questioned. The survey does not appear to have been questioned in the district court, either in the record or in argument. No exception was taken to the master's report, except the objections that may have been urged orally before the district judge. Proctors for libelants in this court have not shown on what authority or principle such charge for damages is allowable.

The survey was not by order of any court, nor by contract between the parties. It was *ex parte*, although the agent of the Golden Rule had notice. It was not admissible in evidence, and determined no fact in the case. It was not necessary in the light of actual facts of the alleged collision or of the injuries resulting. If the survey was a necessary result of the injuries inflicted on the Prince Arthur, such fact should have been proved in the case. As the record stands, the expense of holding it ought not to be charged to the claimant, and I think the judgment of the district court should be reduced by that amount. If the claimant had objected to that item in any of the proceedings before reaching this court, I have no doubt it would have been either established by proof and authority, or been disallowed by the court; and for this reason, while I reduce the amount of the decree given by the district court, I do not think all the costs of appeal should be thrown on the libelants.

A decree will be entered in favor of libelants for \$122.56, with 5 per cent. interest thereon from March 13, 1880, and for costs of the district court, subject to the tender of \$9.25 made June 14, 1882; the costs of this court, including cost of transcript, to be equally paid by the parties.

FISH V. ONE HUNDRED AND FIFTY TONS OF BROWN STONE.

(District Court, S. D. New York. April 16, 1884.)

1 DEMURRAGE—REASONABLE TIME—USAGE.

Where goods are taken on freight consigned to a consignee at a particular wharf, and there is either no bill of lading, or the time for delivery is not specified, and there is no contract on the subject, *held*, that the obligation in respect to delivery is that each party shall use reasonable diligence in performing his part to effect the delivery; and that in the absence of any special usage of the port or of the trade neither will be liable to the other for any detention of the vessel arising from any cause over which he has no control, and for which he is not in fault.

2. SAME—STIPULATION TO PROTECT VESSEL.

If the vessel would guard against detentions not arising from the fault of the consignee, she must protect herself by stipulating for a given period for the discharge after arrival, or for dispatch. Where no such precautions are taken the consignee is not liable for detention, if not in fault.

3. SAME—CASE STATED.

Where the canal-boat J. B. A. took on board, at a port in Connecticut, a cargo of brown stone, deliverable at Sixty-third street pier, New York, and on arrival there was obliged to wait seven days for her turn to get a berth to deliver the cargo, through the accumulation of other vessels arriving before her, and Sixty-third street pier was known to the libellant to be usually crowded and a bad place, and the usage in the brown-stone trade was for the carrier to take the risk of such detention, *held*, that the consignee was not in fault, and that the libellant was not entitled to recover demurrage, both on that ground and on the ground of the usages of the trade.

Demurrage.

J. A. Hyland, for libellant.

Henry Gildersleeve, for claimants.

BROWN, J. This libel was filed to recover \$337 freight, \$40 extra charges, and 7 days' demurrage, at the rate of \$15 a day, on the delivery of 150 tons of brown stone, consigned to Morris & Cahill, at the Sixty-third street pier, this city. The stone was shipped by the Middlesex Quarry Company, at Portland, Connecticut, on board the libellant's canal-boat J. B. Arnold, deliverable to the consignees at the Sixty-third street pier, New York. The boat arrived near the pier on the sixth of December, 1881, and gave immediate notice to the consignees of her readiness to discharge. There were numerous other vessels waiting their turn to get to the pier, and the Arnold was not able to get near enough to commence discharging until the 13th, when her discharge was commenced across another boat, which lay inside of her, and was finished on the noon of the 16th. The consignees, Morris & Cahill, are stone cutters, who had a yard near Sixty-third street pier. On the arrival of the Arnold they desired her captain to unload the stone directly upon their trucks, instead of upon the docks, agreeing to pay him for doing so \$10 per day—the customary extra price. The claimants do not dispute the items claimed for freight and four days' extra pay; the claim for demurrage is the only matter litigated in this suit.

The captain testified that two days would be a reasonable time to unload the boat directly upon the dock after commencing her discharge, and that one day's additional time would cover the further delay incident to loading upon trucks. The evidence shows that the time actually occupied after the delivery was commenced was only three full days; namely, the whole of the 13th and 14th, one-half of the 15th,—the other half of the day being stormy and unfit for work,—and one-half of the 16th. No unreasonable delay, therefore, is chargeable upon the claimants after the discharge was commenced; the additional day beyond two full days which would be required to unload upon the pier, must be deemed covered by the extra price agreed to be paid for unloading upon the trucks, since there was no unreasonable delay in receiving the cargo upon trucks as agreed. The only question remaining relates to the period between December 6th, when the vessel arrived, and the 13th, when she was able to commence her discharge.

There was no proper bill of lading in this case, but a mere direction where to unload, with a draft for the freight upon the consignees. Neither this paper nor the oral contract between the parties provided any time within which the delivery should be completed. The law in such case requires only that the consignee shall use reasonable diligence in the discharge of the cargo after arrival, and proceed in accordance with any established custom of the port or of the particular business, if any there be. A discharge according to such usage will be regarded as a discharge with reasonable diligence. *Houge v. Woodruff*, 19 FED. REP. 136, 137; *Aylward v. Smith*, 2 Low. 192.

Where the bill of lading is silent as respects the time in which the cargo is to be delivered, the only ground for holding the consignee liable is some fault on his part in the acceptance of the cargo. *Rodgers v. Forresters*, 2 Camp. 483; *Burmester v. Hodgson*, Id. 488. If, on the other hand, the bill of lading limits the time within which the delivery is to be made, that limitation is construed in maritime law as a stipulation for the benefit of the ship, designed to cast upon the consignee all risk of detention beyond the stipulated period; and no custom of the port would be allowed to override such a stipulation. *Randall v. Lynch*, 2 Camp. 352; *Philadelphia & R. R. Co. v. Northam*, 2 Ben. 1; *Gronstadt v. Witthoff*, 15 FED REP. 265, 271. It is in the power of the vessel always to provide against any loss on her part through detention from accidental causes at the place of discharge, if such be the intention of the parties, by inserting in the bill of lading the time within which the cargo must be received, or by other familiar provisions, such as that the vessel shall have "dispatch" or "quick dispatch," either of which would cast the risk of delay upon the consignee, (*Smith v. 60,000 Feet of Yellow Pine Lumber*, 2 FED. REP. 396; *Thacher v. Boston Gas-light Co.* 2 Low. 361; *Davis v. Wallace*, 3 Cliff. 123; *Kearon v. Pearson*, 7 Hurl. & N. 386; *1,100 Tons of Coal*, 12 FED. REP. 185; *Choate v. Meredith*, 1 Holmes,

500; *Bjorkquist v. Steel Rail*, 3 FED. REP. 717;) but if none of these precautions are taken by the carrier, I see no ground upon which the carrier can charge the consignee with a breach of duty where the detention has arisen from causes of which neither has any control.

In the case of *Ford v. Cotesworth*, L. R. 4 Q. B. 127, BLACKBURN, J., says, (page 133:)

"Where the act to be done is one in which both parties to the contract are to concur, and both bind themselves to the performance of it, there is no principle on which, in the absence of a stipulation to that effect, either expressed by the parties or to be collected from what they have expressed, the damage arising from an unforeseen impediment is to be cast by law on the one party more than on the other; and, consequently, we think that what is implied by law, in such a case, is not that either party contracts that it shall be done within either a fixed or a reasonable *time*, but each contracts that he shall use reasonable *diligence* in performing his part. * * * We think that the contract which the law implies is only that the merchant and ship-owner should each use reasonable dispatch in performing his part. * * * The delay having happened without fault on either side, and neither having undertaken by contract, express or implied, that there should be no delay, the loss must remain where it falls."

CLIFFORD, J., in the case of *Davis v. Wallace*, *supra*, intimates the same opinion. "Delay beyond that," he says, (*i. e.*, the time necessary for unloading,) "if occasioned by natural cause over which the defendant has no control, may, perhaps, be excused in a case where there is no express contract as to time." See *Carsanego v. Wheeler*, 16 FED. REP. 248; *Cross v. Beard*, 26 N. Y. 85.

The libellant in this case claims demurrage from the moment of arrival. But even had the boat obtained a berth at once and been ready to discharge immediately, in the absence of stipulated lay-days, one day's time after notice is ordinarily allowed to the consignee to prepare for delivery of the cargo, which shows that the general obligation of the consignee is not to discharge immediately, but only an obligation to use diligence in doing so. If a vessel were entitled to demurrage, as claimed by the libellant, in the absence of any stipulated time to discharge, when consigned to a particular dock, notwithstanding the fact that the detention arose from the accumulation of other vessels, or some other cause wholly beyond the consignee's control, the use of the special stipulations to which I have referred, such as "customary dispatch," or "quick dispatch," or a stipulated time for delivery, would be superfluous; and every such shipment, in effect, would become equivalent to an agreement for "quick dispatch." Such a claim, it seems to me, is clearly untenable. The obvious usages in shipping are to the contrary. If there be no fault or unreasonable delay in the consignee's receiving the cargo, he cannot, in such cases, in reason or justice, be charged for detentions through causes for which he is in no way responsible; because the carrier has not taken the precaution to throw the risks of such detentions upon him, and because he has not undertaken to answer for them. And where the carrier has undertaken to deliver the cargo at a particular dock, and

the place of delivery is known to be material to the consignee, as in this case, the latter is not required to accept a delivery at a different place, to his own loss, for the mere convenience of the carrier. The latter knowing the facts, and the liability to detention, must bear the risk, if he has not stipulated to the contrary.

The evidence, moreover, in this case satisfies me that it is the well-established custom in the brown-stone trade that the carriers take all risks of detention at the docks to which they are consigned. The stone-cutters, who are the customers and consignees of the quarry companies, have their stone-yards near the docks to which the stone is to be consigned. It is a matter of pecuniary importance to them that the stone be delivered at the dock specified, and not elsewhere. The shippers contract to deliver it there, and there the carriers agree to take and deliver it. Although these docks are known to be often crowded, causing serious detention of the vessels, yet in a long course of years no claims of demurrage have been made where there was no fault in the consignee, because such has been the general understanding in the trade, and frequently reiterated in the parol contracts when the stone is shipped. The evidence by the libelant as to the payment of demurrage in one or two instances shows that this arose through a difficulty between a consignee and a purchaser, and in reality confirms the usual custom. Sixty-third street, where this stone was to be delivered, was known to be specially liable to detentions; and this was known also to the libelant. This vessel was discharged in her turn; that, by the custom of the trade, was all that the libelant was entitled to demand, in the absence of any special provisions, either for dispatch or a limited number of days for delivery.

In both points of view, therefore, the claim for demurrage must be disallowed. The defendant's set-off for wharfage paid, at the rate of four dollars per day, on account of the vessel, cannot be sustained. The statute allows but fifty cents per day against canal-boats; and the answer expressly describes this boat as a canal-boat. The libelant is therefore entitled to the freight and extra charges, less two dollars wharfage, with interest and costs.

THE HERCULES.

PHILADELPHIA & R. R. Co. v. WARREN FOUNDRY & MACHINE Co.

SAME v. PERKINS and others.

(Circuit Court, D. Massachusetts. April 29, 1884.)

1. ADMIRALTY—DIVISION OF DAMAGES—RECOUPMENT.

Where a schooner was lost in a collision with a steamer, occasioned by the fault of both, and the damages were to be divided equally between the owners of the two, *held* that, from the damages otherwise due to the owners of the schooner, the owners of the steamer might recoup half of the damages recovered against the steamer by the owners of the cargo that was lost with the schooner.

2. SAME—DIVISION OF COSTS.

Decree that costs be equally divided, in a case where damages were equally divided, even though the libellant's vessel was wholly lost. The particular circumstances of each case must govern.

In Admiralty.

Morse & Stone, for appellants.

John C. Dodge & Sons and John Lathrop, for libelants.

LOWELL, J. I adhere to a remark which I made incidentally in *The Mary Patten*, 2 Low. 196, 199, that the general rule, so far as there can be one, should, in the absence of particular circumstances, give a libellant in a cause of collision his costs, though he recover but half his damages, where the loss is all on one side. Such has been the practice in the first and second circuits of late years. *The Austin*, 3 Ben. 11; *The Baltic*, Id. 195; *The Paterson*, Id. 299; *The City of Hartford*, 7 Ben. 510; *The William Cox*, 3 FED. REP. 645; *The Excelsior*, 12 FED. REP. 195; *The Eleonora*, 17 Blatchf. 88; *The Mary Patten*, 2 Low. 196, 199. This practice is approved in a considered *dictum* of STRONG, J., in the supreme court, where he says: "Doubtless they [costs] generally follow the decree, but circumstances of equity, of hardship, of oppression, or of negligence, induce the court to depart from the rule in a great variety of cases." *The Sapphire*, 18 Wall. 51, 57. That *dictum* states the law of admiralty and of equity as well as it has ever been stated. In the third circuit, the practice is to divide costs as well as damages, where but one party has suffered, as well as in the more common case of loss on both sides, when the practice in all three circuits is to divide costs as well as damages. See *The Pennsylvania*, 15 FED. REP. 814. Judge BUTLER, in that case, relies very much on the form of decree in *The America*, 92 U. S. 432, 438, made in 1875, which, he thinks, should have more weight than the remarks of STRONG, J., in *The Sapphire*, *supra*. I cannot see the two cases in that light. Mr. Justice STRONG was speaking deliberately upon a point which had been argued; and Mr. Justice CLIFFORD simply entered a decree in the usual form, and

there is no reason to suppose that his attention was called to any distinction between that case and those in which both parties recover damages. Perhaps the opinion of the supreme court is left in doubt by those cases, as is intimated by Judge BLATCHFORD in *Vanderbilt v. Reynolds*, 16 Blatchf. 80, 91; but the chief justice appears to have followed the usual practice of the second circuit in 1879. *The Eleonora*, *supra*. The point is not one of great importance, because all admit the full power of the court to regulate each case according to its special merits. I wish to say, however, that Judge BUTLER misunderstands my argument in supposing it to rest upon the practice of courts of law. What I said was, "all courts" were accustomed to give costs to the prevailing party. That remark is as true of courts proceeding according to the course of the civil law, as of others. "It was the rule of the civil law that *victus victori in expensis condemnatus est*. This is the general rule adopted by the court of chancery, and the unsuccessful party must show the existence of circumstances sufficient to displace the *prima facie* claim to costs given by success to the party who prevails." Daniell, Ch. Pr. (4th Am. Ed.) 1381. In the note to this passage are many decisions in which learned chancellors have set forth the essential justice of the general rule. And the same general rule prevails in the admiralty. Why collision cases should be held to differ essentially from all others in which a defendant reduces the plaintiff's demand, I am not able to discover. In this particular case I think I ought to follow the decree in *The A. Denike*, 3 Cliff. 117, and divide the costs, the claimants having succeeded, in part, in this court.

Two libels were filed against the steamer *Hercules* for the total loss of the schooner and her cargo, by the respective owners of each; both vessels were found to be in fault. The claimants now ask that, from the damages which would otherwise be due the owners of the schooner, they should be permitted to deduct or recoup one-half the value of the cargo, because each party is liable for that loss, according to *The Atlas*, 93 U. S. 302. A recoupment of this sort has been allowed in several cases. See *The Eleonora*, *supra*; *Leonard v. Whitwill*, 10 Ben. 638; *The C. H. Foster*, 1 FED. REP. 733; *In re Leonard*, 14 FED. REP. 53; *Atlantic Ins. Co. v. Alexandre*, 16 FED. REP. 279; *The Canima*, 17 FED. REP. 271. That one vessel was wholly lost, does not prevent a contribution in case of mutual fault. *The North Star*, 106 U. S. 17; 8. C. 1 Sup. Ct. Rep. 41. It is true that the question whether the schooner is excused from liability to the owners of the cargo shipped on board of her, has not been brought into the case; and therefore, if there is any ground for relieving the owners of this liability, they may show it by supplementary proceedings in the cause. If they shall make no move in that direction within 30 days, the decree will be that the claimants have the right to recoup from the damage found against them, and in behalf of the owners of the schooner, one-half of the amount found due the owners of the cargo.

THE PROTECTOR.

BRICKLEY, Adm'r, etc. v. CITY OF BOSTON.

(Circuit Court, D. Massachusetts. April 29, 1884.)

1. ADMIRALTY—LIBEL IN REM—POLICE BOAT EXEMPT.

A police boat owned and used by a city for public purposes cannot be subjected to a libel *in rem* without the consent of the city.

2. SAME—REIMBURSEMENT OF EXPENSES NOT PROFITS.

The indirect profit which the city may derive from the use of the vessel by reason of the law requiring masters of vessels to pay the expense of their removal when ordered by the harbor-master does not render it subject to attachment as a piece of property earning money for the city.

In Admiralty.

Paul West and John W. Low, for libellant.

T. M. Babson, Asst. City Sol., for claimant.

LOWELL, J. The libel propounds that Thomas Brickley, the plaintiff's intestate, late of Boston, was, on Tuesday, July 4, 1882, in good health, and was standing on a float stage engaged in painting the outside of the brigantine *Rapid*, then lying in the dock on the south side of Long wharf, in the harbor of Boston, when the steamer *Protector*, lying higher up the dock, began to move under steam in order to leave the dock, and was so negligently navigated that she was backed upon the float stage, which was submerged, and Brickley was precipitated into the water and suffered severe bodily injury, from which he died on the third of August, 1882. The city of Boston, owners of the steamer, appeared as claimants, and gave a stipulation to the action, and afterwards filed an answer in the nature of a plea to the jurisdiction, averring that the *Protector* is now, and was at the time of the injury to the libellant's intestate, "a public vessel engaged in exercising a function of government, viz., the preservation of the public peace, the enforcement of the laws, and other similar powers and duties, and was in the control, under the custody of, and entirely managed by, police officers appointed under the laws of the commonwealth of Massachusetts, and servants and agents of said commonwealth." An answer to the merits was afterwards filed, upon which the case was tried and decided against the libellant; but on this appeal it has not been argued or suggested that there was a waiver of the exception to the jurisdiction; and Judge NELSON recollects that there was not. The point of this exception is that, by admiralty rule 15 of the supreme court, the libellant may proceed against the ship alone, or against ship and master, or against the owner alone, but not against the ship and the owner together; and therefore, to sustain this suit, which is against the ship, the libellant cannot aver that the owner is a party defendant, but must show a right to arrest the ship in order to give the court jurisdiction of the thing; though, as it has jurisdiction of the subject-matter, this point might be waived.

The Protector was employed by the city of Boston, solely for public purposes, as a police boat, for patrolling the harbor and other similar duties, and it might be a serious and irreparable damage to the public service if it were liable to seizure for the debts of the city, whether the form of claim imports a lien or privilege, or is an ordinary attachment. Judge DILLON, in his work on Municipal Corporations, § 446, says that, on principle, the private property of such a corporation ought to be liable to seizure; but not property owned and used for public purposes, such as (among other things) fire-engines. And so all the judges agreed in *Meriwether v. Garrett*, 102 U. S. 472. See *Foster v. Fowler*, 60 Pa. St. 27, and cases cited; *Davenport v. Peoria Ins. Co.* 17 Iowa, 276. A police boat seems very like a fire-engine, as a piece of property dedicated to public uses, which may need its services at any time. A witness testified that this vessel was the harbor-master's boat, as well as the police boat. I do not see that this changes the situation. By the statutes of Massachusetts, the harbor-master has important public duties to perform, some of which may require him to make use at times of the police boat. Pub. St. c. 69, §§ 29 and 30, are cited to show that the city may make a profit, indirectly, by the use of this boat. These sections require the masters and owners of vessels to pay the expense of their removal from one part of the harbor to another, when ordered by the harbor-master, and if they neglect to pay, the expense may be recovered for the use of the city. A reimbursement of expenses is not profit, and if the Protector should be used by the harbor-master to notify an owner to remove his vessel, or even used to tow it, the steamer would not thereby become a piece of property earning money for the city, like a shop which they had let to hire. I am constrained to decide, therefore, that an action *in rem* against this vessel cannot be enforced without the consent of the city.

Libel dismissed, without costs.

CARRICK, Surviving Partner, etc., v. LANDMAN

(Circuit Court, N. D. Alabama. April Term, 1884.)

1. REMOVAL OF CAUSES UNDER SECTION 639, REV. ST.—AMOUNT IN DISPUTE.

In order that a cause may be removed from the state courts to the United States courts, under section 639, Rev. St., the sum in dispute, exclusive of costs, must exceed \$500 at the time of the commencement of the action in the state courts.

2. SAME—ACT OF 1875—CITIZENSHIP.

A suit cannot be removed from a state court to the United States courts, under the act of 1875, unless the requisite citizenship of the parties existed, both when the action was begun and the petition for removal filed.

Motion to Remand Cause to the state court.

L. P. Walker and *R. W. Walker*, for motion.

Humes, Gordon & Sheffey, contra.

BRUCE, J. This suit was originally brought in the circuit court of Madison county, Alabama. The summons was executed on the defendant on the twenty-sixth of September, 1871. The suit was upon a draft or order of Landman, defendant, on Sample, Williams & Co., of Nashville, Tennessee, to order of W. J. Carter, for \$350.57, dated Huntsville, Alabama, May 6, 1871, and indorsed by W. J. Carter. The petition to remove the suit into this court was filed on the sixth day of February, 1883. Various grounds are alleged for the motion to remand, but in the view taken of the case it is only necessary to discuss one question, for upon that this case turns.

The position of the movent is that the amount in dispute in the cause is not sufficient to warrant the removal under the law. The removal is claimed under the act of March 2, 1867, which has been carried into the Revised Statutes of the United States, and is found in section 639, which provides:

"Any suit commenced in any state court wherein the amount in dispute, exclusive of costs, exceeds the sum or value of five hundred dollars, to be made to appear to the satisfaction of said court, may be removed for trial into the circuit court for the district where such suit is pending, next to be held after the filing of the petition for such removal hereinafter mentioned, in the cases and in the manner stated in this section."

It is thus seen that, in order to remove a suit under this section, the amount in dispute, exclusive of costs, must exceed \$500. At the time this suit was brought in the state court, September 21, 1871, the amount in dispute was less than the sum or value of \$500, but the litigation in the state court, or rather courts, for the case seems to have gone to the appellate court, was protracted, and the petition for removal was filed February 6, 1883, about 11 years after the suit was commenced. In the mean time, the interest accruing upon the draft sued on up to the time of the filing of the petition for removal, added to the principal, amounts to more than \$500, exclusive of costs.

The proposition of counsel for the removal of the cause to this

court is that when the amount in dispute at the time the removal is sought for exceeds, exclusive of costs, the sum of \$500, then the case falls within the law and is removable. On the other hand, it is claimed that the amount in dispute at the time of the commencement of the suit in the state court being less than \$500, the case does not fall within the removal statute. I do not find, nor am I referred to, any decided case where this question has been passed upon, except that the circuit court of Madison county, Alabama, has passed upon this question in this case by denying the petition for removal.

The language of the statute under which the removal is claimed is first to be noted. The words are: "Any suit commenced in any state court wherein the amount in dispute exceeds, etc. * * *". Now, when is it that the amount in dispute is to exceed the sum or value of \$500? The most natural answer is, at the commencement of the suit. The statute does not say so in so many words, but the amount in dispute is mentioned in such connection with the commencement of the suit that such would seem to be the most natural construction and meaning of the words used. It is something like the right to an appeal which depends upon the amount in dispute at the time the right to the appeal accrues, and if the condition as to the amount is not present when the right accrues, it does not thereafter arise by reason of interest accruing upon the judgment or decree from which the appeal is sought. So when the right to sue accrues, and the party invokes the jurisdiction of the court, the conditions present at that time would seem to be the conditions which should control upon the question as to whether the suit is removable from the state court to the circuit court of the United States.

In Spear on the Law of the Federal Judiciary, at page 462, speaking of the amount in dispute, the author says:

"The absence of this condition is fatal to the right of removal as given by the statute. The right depends upon a statute, and the facts as they existed when the suit was commenced in the state court in respect to the sum or value in dispute must determine whether this particular condition of the statute is present;" citing *Roberts v. Nelson*, 8 Blatchf. 74, 77.

This author adds:

"These general provisions of the statute apply to all the cases enumerated therein, and constitute a part of the legal requirements in the removal of these cases from state courts to the circuit courts of the United States."

An argument is made, based upon a line of authorities, to the proposition that where a suit may be removed from a state court to the circuit court of the United States, under the removal acts of congress, on account of diversity of citizenship of the parties to the suit, that such diversity of citizenship need not exist at the time the suit is commenced in the state court, but only when the removal is sought. And by analogy it is claimed the same rule should apply in reference to the jurisdictional condition as to the amount in dispute, that it is sufficient if the amount exceed \$500 when the removal is sought.

The argument would be pertinent and strong, were it conceded that, in order to render a suit removable, it is sufficient that the diversity of citizenship of the parties, plaintiff and defendant, exist at the time the suit is sought to be removed, and without reference to the citizenship of the parties at the time the suit was commenced in the state court. That proposition is maintained by a line of authorities cited in *Spear*, Fed. Jud. 501, 502, among which is *Jackson v. Ins. Co.* 8 Woods, 413, opinion by Judge Woods.

There is, however, a line of authorities to the proposition that the cause cannot be removed unless the required citizenship existed, not only when the petition for removal is filed, but also at the time the action is begun in the state court. The case of *Houser v. Clayton*, 3 Woods, 273, opinion by Justice BRADLEY, and the case of *Kaiser v. Illinois Cent. R. R.* 6 FED. REP. 1, opinion by Judge McCABY, of the Eighth circuit, are cited, and other authorities to the same proposition; *Spear*, Fed. Jud. 502, 503.

The supreme court of the United States, in the case of *Gibson v. Bruce*, 2 Sup. Ct. Rep. 873, hold that a suit cannot be removed from a state court, under the act of 1875, unless the requisite citizenship of the parties exists both when the suit was begun and when the petition for removal is filed. So that the argument based upon the proposition that the citizenship necessary to the removal of the cause need only to exist at the time the petition for removal is filed, is not maintained.

The conclusion then is, that, at the commencement of the suit in the state court, the sum or value in dispute, exclusive of costs, must exceed \$500 in order that the suit may be removed, and that the subsequent accrual of interest upon the matter or sum in dispute does not affect the right to remove the cause; and the motion to remand this cause to the state court is granted.

In re Accounts of the SHIPPING COMMISSIONER OF THE PORT OF NEW YORK.

(Circuit Court S. D. New York. May 5, 1884.)

SHIPPING COMMISSIONER—PAYMENT OF MONEY TO UNITED STATES—POWERS OF THE UNITED STATES COURT.

Court has no power to compel the shipping commissioner to pay over moneys to the government, its powers being supervisory rather than plenary.

Report of Master.

Elihu Root, U. S. Atty., for the United States.

Benedict & Taft, for commissioner.

WALLACE, J. The immediate question presented by the report of the master, and the motion made on behalf of the shipping commis-

sioner to confirm the report, is whether the salaries paid by the shipping commissioner to his deputies for the year 1882 were reasonable. Having filed his account of the receipts and expenses of his office for the year 1882, an order was made, pursuant to the established mode of procedure since the year 1876, by which the account was referred to a master for an examination, and report to the court, upon notice to the United States attorney. Pursuant to that order Mr. Gutman, the master, in February, 1883, filed his report, showing that the receipts of the office for the year 1882 were \$22,531.50, and the expenses for the year were \$22,531.50. Among the items of expenses in that account were three of \$3,648 each, paid by the shipping commissioner to his three sons for their salaries as deputy shipping commissioners. Upon the motion to confirm that report objection was made by the United States attorney that the salaries paid by the shipping commissioner to his deputies were excessive. Thereupon, and on the second day of October, 1883, this court made an order referring back the report to the master, and directing him to take such proof as might be produced by the shipping commissioner and by the United States attorney, and report explicitly upon the reasonableness of these salaries. Although since 1875 the accounts of the shipping commissioner have been returned annually, have been passed by a master, and on several occasions have been objected to by the United States attorney, and considered upon such objections by my predecessors in office, this is the first instance in which those accounts have been challenged by opposing proofs on the part of the United States attorney. There is no statute which makes it the duty of the district attorney to scrutinize or challenge these accounts, and it is doubtful if he has any authority in the premises, except such as is conferred upon him permissively by the order of the court; and for this reason probably the predecessors of the present United States attorney deemed it beyond their province to controvert the correctness of the accounts, beyond criticising items which seemed objectionable upon their face. The last occasion when the accounts were specially investigated was in 1878, when objections were filed by the United States attorney to the accounts for the year 1877. It then appeared that the commissioner had paid to each of his three sons, for their services as deputies during that year, a salary at the rate of \$3,800 per annum, two of them being paid for the whole year, and one of them for six months. Judge BLATCHFORD, in considering the objections and passing upon the account, examined with particularity the financial history of the office from its inception, and considered the principles and items of the accounts, and referring to the question of salaries paid by the commissioner to his sons, used the following language in his opinion:

"As to the allegation that, on the deposition of the shipping commissioner, the master should have reported that the salaries, at the rate of \$3,800 a year, paid to the three deputy commissioners, F. C. Duncan, G. F. Duncan, and

C. D. Duncan. were entirely too large for the work performed by them, there is nothing to show that any such point was taken by the district attorney before the master. Nor was any evidence introduced before the master by the district attorney to show that the salaries of the deputies were too large for the work performed by them. No witness expresses an opinion to that effect, nor was the shipping commissioner asked whether he could not have obtained competent persons to discharge the duties so performed for a less compensation, nor was any evidence given that he could. The arrangement made is testified to have had the sanction of each of my predecessors, Judges WOODRUFF and JOHNSON. The three deputies named were deputies from the beginning. The arrangement was one which sanctioned a salary of \$4,000 to each of them, if the fees of the office would pay it. It has never exceeded that sum. The commissioner and the deputies had a right to rely on the arrangement, until it should be shown, on notice and hearing, that the salaries ought to be reduced. These observations cover the above-named accounts. I do not intend to say, however, that the salaries of the deputies and of the subordinates ought not to be reduced and their number fixed for the future, nor do I intend to say that they ought."

As the objections to the account are now presented, I am relieved from any embarrassment arising from the decisions of my predecessors, inasmuch as they were called upon to consider such objections when there was no evidence to controvert the case made by the commissioner himself, and, practically, only his side of the controversy was exhibited. These decisions, while authoritative and perhaps conclusive as an auditing of past accounts, do not stand in the way of considering *de novo* the question of the reasonableness of the salaries paid in 1882, unless, as stated in the opinion of Judge BLATCHFORD, "the commissioner and the deputies had a right to rely on the arrangement (in the past) until it should be shown, on notice and hearing, that the salaries ought to be reduced."

The proofs taken before the master are voluminous, and embrace a wide range of investigation, notwithstanding the strenuous efforts on the part of the commissioner to narrow the field of investigation. It was quite impossible, however, to confine the proofs to the value of the deputies' services in 1882. Whether it was necessary that these deputies should be employed for that year, and what was a fair compensation for their services then, were questions which could not well be resolved without a comparison of the business and duties of the office in previous years, and the relative value of the services then and now. This led to an inquiry into the nature and extent of their services in the past, and finally to an extended examination into the business of the office generally, and into the duties of the commissioner, and of the deputies, and the various subordinates, during the whole period of its existence. This examination has been sufficiently comprehensive and thorough to possess the court, not only of the material facts respecting the primary subject, but also concerning the past administration of the office, which it is very much to be regretted were not brought to the attention of my predecessors. It will not be profitable to attempt a recapitulation of the evidence.

It is due to the shipping commissioner, however, to state that witnesses of high respectability and intelligence have commended his administration of the office generally, and approved as reasonable the salaries which he has paid his sons.

The reasons why I cannot concur in their opinion, and must disapprove the findings of the master, may be briefly stated, and rest upon a few salient but controlling considerations. The duties of the shipping commissioner are not intricate or arduous, but they are useful and various, and require good judgment and executive capacity. He is the responsible head of the office, and is charged with the supervision of its manifold operations, and incurs some financial risks because he is obliged to pay the expenses of maintaining the office and of conducting its business, including rent and the pay of employes, out of the receipts of the office. He must rely exclusively upon the fees of the office to meet the expenses, as well as his own salary. If these fees fall short he has no recourse upon the treasury of the United States. The statute that creates the office provides that the salary fees and emoluments of the commissioner shall in no case exceed \$5,000 per annum. This salary was deemed adequate by the legislative department of the government to compensate him for all his responsibilities and services, however onerous and exacting they might be.

The duties and responsibilities of the shipping commissioner are, of course, far more important and onerous than those of any of his subordinates. Their duties are either clerical, such as those of bookkeepers or accountants, or they are services of a lower grade. The law contemplates that these duties are to be discharged by the commissioner himself, with such clerical assistance as may be necessary. It enacts that "any shipping commissioner may engage clerks to assist him in the transaction of the business of the shipping office, and may, *in case of necessity*, depute such clerks to act for him in his official capacity." As appears by the proofs the services which the subordinates of the higher grades perform in the office are almost identically such as were rendered by clerks in private shipping offices in New York city. The commissioner recognized this by selecting all his principal assistants, exclusive of his own sons, from this class of employes,—persons who had been clerks in private shipping offices. Inasmuch as his own salary and emoluments were fixed by the law at \$5,000, and this standard of compensation was adopted by congress as a sufficient remuneration for his risks as well as his services, the action of the commissioner in appointing five deputies to discharge clerical duties as soon as he had occupied the office long enough to ascertain its probable income from fees,—three at a salary of \$3,500 each, and two at salaries of \$3,000 each,—starts the suggestion that he had gravely misconceived the spirit of the law under which he was to administer the office. But when it appears that in the ensuing year, 1874, these five deputies were salaried at \$3,900 each, that

four of them were his own sons, and that one of these sons was only 19 years old, with no more experience or qualifications for the place than his years would imply, a very cogent inference arises that he had conceived a scheme for administering his office which was not only illegitimate as a radical departure from that contemplated by law, but which was utterly repugnant to all notions of economy and decency, if it was not tainted with a corrupt motive. In 1875 these five deputies were salaried by him at \$4,000 each. In 1874, after paying his own salary and those of the deputies, and the other expenses of the office, there remained out of receipts of fees amounting to \$55,000, the sum of \$126, to be paid into the treasury of the United States. In 1875 the fees were \$51,000, and \$433 less than the expenses. From 1875 to the present time the expenses of each year have absorbed the receipts. The theory of the shipping commissioner is that with the concurrence of Judge Woodruff he made an arrangement with his deputies by which a salary of \$4,000 a year to each of them was to be allowed when the fees of the office would pay it; because the receipts of the office were fluctuating, and at times the salaries would therefore have to be much less. And it appears that in 1876 they were allowed only \$2,450 each, the receipts having fallen in that year to the sum of \$29,774. Yet, in 1877, when the receipts were still less, the deputies' salaries were allowed at \$3,800 each, and it is noticeable that in this year there were but four clerks employed in the office, and they were only paid in the aggregate the sum of \$2,587. In 1878 the number of deputies was reduced to four, the four sons of the shipping commissioner being retained, and they were paid \$3,800 each. Subsequently one of them retired, and since then three deputies have been retained, all of them the sons of the commissioner. In 1882, the year specially under consideration, these three deputies have been paid \$3,648 each, while the pay-roll shows that only two clerks were employed, one of whom was paid \$960, and one \$655, and the receipts of the office were \$22,531, which are just balanced by the expenses.

These figures standing alone are a sufficient commentary upon the extravagance and impropriety of the arrangement respecting deputies and their salaries which was made by the shipping commissioner, and which according to his statement was approved by Judge Woodruff. But it is now shown by the testimony that during all these years, until 1881, there were experienced and competent clerks employed in the office by the commissioner, who were not only fully qualified to perform the services of the deputies, but who actually did perform substantially the same services, at salaries of from \$20 to \$25 per week. And the proofs also show that such compensation is what is generally allowed for similar services in the private shipping offices of New York city. In view of this testimony there can be but one of two conclusions: either that the commissioner has been so blinded by parental interest that he could not exercise an intelligent judg-

ment respecting the economical and decorous administration of his office, or he has corruptly exercised his powers and opportunities to farm out its revenues as spoils for family distribution.

The idea that Judge Woodruff or either of my other predecessors in office would have sanctioned such a state of affairs as is now shown to have existed is not to be harbored for a moment. They were misled, undoubtedly, by a plausible presentation of the facts on the part of the shipping commissioner, and were called upon to decide upon an *ex parte* hearing, or upon proofs which did not exhibit any countervailing evidence.

The following general conclusions are reached, and, under the power of this court to regulate the mode of conducting the business of the shipping office, will, for the present, be adopted as rules for the regulation of the business of the office: (1) That the employment of one chief clerk, deputed in case of necessity to act for the shipping commissioner in his official capacity, and to be allowed a salary not to exceed \$2,500 per annum, may be justified by the demands of the office, and is authorized. (2) Three other clerks at salaries not to exceed \$1,200 each, or two at salaries not to exceed \$1,600 each, in the discretion of the commissioner, may also be employed. (3) All compensation received by the commissioner or his subordinates for services rendered during office hours to owners or masters of vessels, or to seamen, are to be accounted for and returned with the receipts of the office.

Although the master's report must be disapproved, the court has no power to compel the shipping commissioner to pay into the treasury of the United States any fees which he has not sufficiently accounted for. Although the court is empowered to regulate the mode of conducting the business of the office, and is invested with complete control of the same, its powers are supervisory, not plenary, and it acts in an administrative rather than in a judicial capacity. The receipts of the office belong to the United States. The government can claim them or relinquish them at its option. If they have been misappropriated the United States can sue for them and recover them. The court is not a competent party to such a controversy; nor should the court undertake to adjudicate upon the rights of the shipping commissioner or of the government, in a proceeding to which the United States is not a party, because its judgment would not conclude either. The government is not a party merely because the United States attorney has intervened in the proceeding at the direction of the court. He did not come into the proceeding by the authority of any statute which expressly, or by implication, makes it his duty or his privilege to represent the United States; nor did he appear upon the retainer or at the request of any department of the government which can be deemed to represent the United States. When a suit is brought to which the United States is a party to the record, all the questions of fact and law upon which the government and the shipping com-

missioner are entitled to be heard can be appropriately and conclusively determined. So far as the latter has acted conformably to regulations prescribed by this court he will be undoubtedly protected, because the administrative power to make the regulations is lodged with the court; and it may be well urged that it is immaterial whether his acts have received a subsequent sanction or were sanctioned in advance. It is not necessary, nor is it expedient, to express any opinion now as to whether the shipping commissioner was justified in assuming from the action of my predecessors, prior to 1882, that he was authorized to retain his sons as deputies and pay them the salaries he has paid them. If a suit shall be brought, it may become pertinent to inquire whether such action was induced by misrepresentations or suppressions of material facts on the part of the shipping commissioner which were intended and effectual to mislead. Neither is it intended by the present decision to preclude him from a full opportunity of reviewing and overturning the conclusions of fact which have been reached and expressed in the present proceeding.

The statute authorizes the court to remove from office any shipping commissioner "whom the court may have reason to believe does not properly perform his duties." The permissive language in such a statute is mandatory. Where power is devolved by statute upon a public body or officer to do an act which concerns the public interests, its exercise is an imperative duty whenever the occasion calls the power into activity. What my impression is respecting the official conduct of Mr. Duncan, upon the proofs and records used upon this motion, has been sufficiently indicated, but he is entitled to a full hearing, and should be given an opportunity, if he desires to retain the office, to show that he has properly performed its duties.

An order will be entered denying the motion to pass the accounts for 1882, and directing the shipping commissioner to show cause before me, on the tenth day of May next, at 10:30 A. M., why he should not be removed from office.

ATLANTIC MILLING CO. v. ROBINSON and others.

(Circuit Court, S. D. New York. May 6, 1884.)

1. TRADE-MARK—RIGHT TO THE SYMBOL INSEPARABLE FROM RIGHT TO SELL COMMODITY.

The right to the exclusive use of a word or symbol as a trade-mark is inseparable from the right to make and sell the commodity which it has been appropriated to designate.

2. SAME—MAY BE PECULIAR TO A FACTORY AND PASS WITH IT.

A trade-mark may be appropriated by a manufacturing company as well as an individual, and pass with the property to their successors.

3. SAME—MEASURE OF DAMAGES.

The measure of damages is limited by the extent to which the unlawful use of the design by the defendant has interfered with the sale of plaintiff's commodity.

In Equity.

Briesen & Steele, for complainant. *A. v. Briesen*, of counsel.

L. H. Arnold, Jr., for defendant Robinson.

Geo. H. Forster, for defendant Rowland.

WALLACE, J. The proofs show that in 1861 the firm of Alexander H. Smith & Co., then the proprietor of the Atlantic mills, at St. Louis, Missouri, adopted the word "Champion," and employed it to distinguish a particular quality of flour made and sold by them. From that time until the present it has been used as a trade-mark either by that firm or the several firms and corporations that became the proprietors of the property and business of the Atlantic mills. The flour to which it was applied was particularly adapted for the southern export trade, and became generally known and recognized as the production of the Atlantic mills by the word which was thus used to designate it.

The complainant has not made proof of any formal transfer by Alexander H. Smith & Co. to any of the succeeding proprietors of the Atlantic mills of the right to use the trade-mark; and if complainant has acquired that right it is because it passed upon the purchase of the mill property and business as an accessory thereof to each purchaser who became the proprietor of the premises, including the complainant, without any agreement respecting the trade-mark.

The right to the exclusive use of a word or symbol as a trade-mark is inseparable from the right to make and sell the commodity which it has been appropriated to designate as the production or article of the proprietor. It may be abandoned if the business of the proprietor is abandoned. It may become identified with the place or establishment where the article is manufactured or sold, to which it has been applied, so as to designate and characterize the article as the production of that place or establishment rather than of the proprietor. A trade-mark of this description is of no value to the original proprietor because he could not use it without deception, and therefore would not be protected in its exclusive enjoyment. Such a trade-mark would seem to be an incident to the business of the place or establishment to which it owes its origin, and without which it can have no independent existence. It should be deemed to pass with a transfer of the business because such an implication is consistent with the character of the transaction and the presumable intention of the parties. *Dixon Crucible Co. v. Guggenheim*, 3 Amer. Law T. 228; *Hudson v. Osborne*, 39 L. J. Ch. (N. S.) 79; *Shipwright v. Clements*, 19 Weekly Rep. 599.

The defendant controverts the right of the complainant to the exclusive use of the word "Champion" as a trade-mark by the testimony

of two witnesses, to the effect that they used it or saw it used as a brand upon flour before it was adopted by Alexander H. Smith & Co. The testimony of the witness Potter fails to show the use of the word, in the instances to which he refers, prior to 1867, and is therefore valueless. The witness Reamey testifies that he used it for branding the flour of nine different firms as long ago as 1857. None of the persons for whom it was so used have been produced, although many of them were accessible. If Reamey's statement is correct it could have been readily corroborated. The failure to do so is significant. His statement is not supported by any extrinsic evidence, and is not deemed sufficiently reliable to defeat the complainant's right.

Upon the accounting to ascertain damages, the fact is not to be overlooked that, in the instances in which the trade-mark has been used by the defendant in connection with the names of other manufacturers than the complainant's, damages are measured by the extent to which the unlawful use of the word "Champion" has interfered with the sale of their flour. Their right to an injunction is not affected because the appropriation of their trade-mark has been a limited one, and it is not incumbent on them to show that it has been copied in every particular. It is sufficient if his trade-mark has been copied to an extent calculated to mislead purchasers, and cause the article to which it has been applied pass as their article. The cases *Gillott v. Esterbrook*, 48 N. Y. 374; *Newman v. Alword*, 51 N. Y. 189; *Hier v. Abrahams*, 82 N. Y. 519; and *Walton v. Crowley*, 3 Blatchf. 440, are instructive upon this point.

A decree is ordered for complainant.

LAWLER v. BRETT and others.

(Circuit Court, S. D. Iowa, C. D. October 31, 1883.)

1. TAX SALE—ACTION TO SET ASIDE—PAYMENT OF TAXES—SECTION 897, IOWA CODE 1873.

In an action to set aside a tax sale, when a complainant fails to show that the taxes due on the property have been paid by him or his grantees, as required by section 897, Iowa Code 1873, he cannot recover.

2. SAME—TENDER EQUIVALENT TO PAYMENT.

A tender of the amount of a tax is equivalent to payment.

3. SAME—THE LAW DOES NOT REQUIRE AN IMPOSSIBLE THING.

Where the law requires that taxes shall be paid by a party before he can maintain an action to set aside a tax sale, but it is impossible for him to ascertain the amount of the taxes, he need not make payment or tender before bringing his action, as the law will not require an impossible thing.

4. SAME—CONDITION PRECEDENT—PERFORMANCE.

Where both a statute and the rule of law require the payment of taxes due as a condition precedent to an attack upon a tax title, and the record discloses that the amount due can be readily ascertained, an action to set aside a tax sale cannot be maintained without performance of the condition.

Bill in Equity to set aside certain tax sales and deeds, upon the ground that the sales were not made in accordance with law, and for the further reason that no sufficient expiration notices were given, as required by the statute.

Geo. E. Clarke, for complainant.

Wright, Cummins & Wright, for respondents.

MCCRARY, J. Section 897 of the Code of Iowa, (1873,) among other things, provides that, in all controversies and suits involving the title to real property claimed and held under a tax deed executed substantially as the statute requires, no person shall be permitted to question the title acquired by a treasurer's deed without first showing that "all taxes due upon the property have been paid by such person or the person under whom he claims title." The complainant has failed to make the showing required by this provision of the statute. It is not averred that he or the party under whom he claims has ever paid the taxes for which the property was confessedly liable, or any part of it. We are therefore required to determine whether he has placed himself in a position to question the respondents' title. Is he not seeking equity without doing equity? The complainant has attempted to relieve himself from the necessity of paying or tendering the amount of the delinquent taxes by certain averments of his bill. He avers that the tax deeds in question were void, and adds that "the plaintiff is entitled to redeem therefrom, but is unable to determine what sum is necessary therefor." And he prays "that the court ascertain and determine what amount, if anything, is due defendants for and on account of taxes paid on said real estate and necessary for the plaintiffs to pay in order to redeem therefrom, and plaintiffs hereby offers and tenders the same and consents that said sum, when ascertained, may be decreed a lien on said real estate respectively until so paid." Although the statute requires payment of the taxes a condition precedent to an attack upon the purchaser's title, I am of the opinion that a tender of the sum due is equivalent to payment. And I think it may also be admitted that, if for any reason the amount cannot be ascertained by the complainant, he may ask the court to ascertain and determine it, averring his readiness to pay when the amount is so ascertained. But in the present case no reason appears, either in the pleading or the proof, why the amount cannot be ascertained by the complainant and paid or tendered. It is sufficient to aver that complainant is unable to ascertain the amount due, without stating any facts showing such inability, and without offering any proof upon the subject.

It has been held, under statutes similar to the one under consideration, that it is a sufficient excuse for not paying or tendering the delinquent tax due to show that the land in controversy was sold in gross, with other land, for one consideration. *Phillips v. Sherman*, 61 Me. 548; *Miller v. Montague*, 32 La. Ann. 1290; *Weber v. Harris*, Id. 1309. In such case the complainant has no means of ascertaining

the amount to be paid or tendered by him, and the law will not require an impossible thing. But where nothing appears to show that the complainant could not ascertain the sum due, and, *a fortiori*, where the record shows that he might readily have ascertained it, I am of the opinion that he cannot recover; and such is the case here. The amount of the taxes delinquent upon the property here in controversy appears upon the tax records, and is shown in the evidence. The amount of the interest and penalty is easily ascertained by a simple calculation. The two tracts were sold separately, for the tax due upon each respectively, and there was no confusion or commingling of the taxes upon this property with that upon other parcels. The dates upon which to calculate the amount due is furnished by the record and the statute, and is definite and certain. The court is therefore obliged to find not only that there is no proof to support the allegation that complainant could not determine the sum to be tendered in redemption, but also that the proof abundantly shows the contrary.

It has been repeatedly held by the supreme court of the United States that a court of equity will not entertain a bill to enjoin a tax sale until the complainant has first paid or tendered any sum justly due on account of the taxes in controversy. *State Railroad Tax Cases*, 92 U. S. 617; *Nat. Bank v. Kimball*, 103 U. S. 732. In the former case the court, speaking through Mr. Justice MILLER, said:

"It is not sufficient to say in the bill that they (complainants) are ready and willing to pay whatever may be found due. They must first pay what is conceded to be due, or what can be seen to be due on the face of the bill, or be shown by affidavits, whether conceded or not, before the preliminary injunction should be granted."

It can scarcely be maintained that a less stringent rule should prevail in cases like the present, brought under a statute requiring payment of taxes due as a condition precedent to an attack upon the tax title.

It is clear, therefore, that the complainant cannot recover in the present case, whatever his rights might have been if he had complied with the statute, and it is therefore not necessary to consider the other questions discussed by counsel.

As, however, the complainants may still be in time to make a tender and bring a new suit, he will be allowed to dismiss his bill without prejudice, and at his own costs.

HEUSSER v. CONTINENTAL LIFE INS. Co.

(Circuit Court, D. Connecticut. May 12, 1884.)

1. LIABILITY OF LIFE INSURANCE CORPORATION FOR DIVIDENDS.

Where annual dividends are declared by a life insurance company, in accordance with an established rule, and the acts of the officers show that they are payable on certain classes of policies, a subsequent attempt on its part to limit the meaning of the vote, and make it at variance with the contemporaneous written rules and the acts of the company, is vain, the attempt being evidenced by the erasure of the dividend indorsement from the premium notes, and the company will be liable for the amount of the dividends so erased.

2. POLICIES INCLUDED UNDER TERM "RENEWED."

The office of a renewal of a life insurance is to prevent discontinuance or forfeiture; and the word "renewed," in the vote of the directors of an insurance company granting dividends upon certain policies answering this description, includes participating, limited-payment policies, which have been prevented from forfeiture prior to the passage of the dividend.

At Law.

Charles J. Cole, for plaintiff.

Charles E. Perkins, for defendant.

SHIPMAN, J. This is an action at law, which was tried by the court, the parties having, by a duly-signed written stipulation, waived a trial by jury. The facts which are found to have been proved, and to be true, are the following:

On April 4, 1867, in consideration, among other things, of the annual premium of \$886.90 in hand paid and to be paid to the defendant by Susan Heusser, the wife of the plaintiff, on or before the fourth day of April in each and every year during the term of 15 years, the defendant, a life-insurance company duly incorporated and located in Hartford, Connecticut, made its policy of insurance in writing, and thereby assured the life of the plaintiff, now of Syracuse, New York, in the amount of \$5,000. In and by said policy of insurance, it was agreed that if, after the receipt by said company of not less than two annual premiums, default should be made in the payment of any subsequent premium, said policy should then be binding on said company for as many fifteenth parts of the sum originally insured as there should have been complete annual premiums paid, without subjecting the assured to any subsequent charge, and that if the plaintiff should survive until April 4, 1882, the amount insured should be paid to him, deducting therefrom all his indebtedness to the company, if any, then existing. Five consecutive annual premiums were paid by Susan Heusser to the defendant upon said policy. Said payments of premium ceased on April 4, 1871. On April 4, 1882, Henry Heusser was and still is living. One-half of each annual premium was paid in cash, and one-half was paid by note of Henry Heusser, the interest being paid in advance. On April 4, 1882, the defendant held and still holds four of said notes, each for \$193.45, and dated on April 4th, in the years 1867, 1868, 1869, and 1870, respectively, each payable 12 months after date to the order of the defendant, with interest, and each having been given for one-half of the premiums which were payable at the respective dates of said notes. On the first note the following indorsement had been made, dated April 4, 1872: "Received on the within note one hundred and thirty-five 75-100 dollars, dividend." On the second note the same indorsement had been made, dated April 4, 1873. On the third note the following indorsement had been made, dated April 4, 1874: "Received on the within note thirty 20-100 dol-

lars, dividend." Each one of said indorsements was, in 1880, erased by lines drawn through them, respectively, by the secretary of the company, who also added the words, "Error—no dividend." This was done with the knowledge and approval of the directors. These indorsements were made by the direction or under the instructions of the president or secretary of the company, in the usual course of business, and, as was supposed, by authority of the following votes of the directors of said company, the first having been passed February 6, 1871, the second on February 19, 1872, and the third on December 2, 1873:

"Voted, that a dividend from the surplus of the company of 50 per cent. upon life policies entitled to participate in the profits which were issued prior to January 1, 1869, and of 40 per cent. upon endowment policies of the same year, be declared and made payable, in accordance with the rules of the company, upon premiums paid in 1868, when renewed previous to January 1, 1873."

"Voted, that a dividend from the surplus of the company of 50 per cent. upon life policies entitled to participate in the profits which were issued prior to January 1, 1870, and of 40 per cent. upon endowment policies of the same year, be declared and made payable, in accordance with the rules of the company, upon premiums paid in 1869, when renewed previous to January 1, 1874."

"Voted, that a dividend be, and hereby is, declared to those policy-holders entitled to participate in the profits of the company, payable January 1st next, and thereafter during the year ending December 31, 1874, as the several policies may be renewed, in accordance with the contribution of each to the surplus, using the following assumption. * * *"

Indorsements like those made upon the notes in question were made, when the interest was paid, and not otherwise, upon all premium notes upon this class of endowment, non-forfeitable, participating policies, which had lapsed in part, but which were existing policies at the time the indorsements were made, and which in other respects were included within the provisions of said respective votes. If the interest was not paid upon a note, no indorsement was made. About 40 per cent. of such notes received the indorsement in 1872 and in 1873, and a much less proportion in 1874. There was no difference in the policies pertaining to the notes which received and which did not receive the indorsement, except that in the former case the interest had been paid upon the notes, and in the latter it had not been paid. Similar erasures were made by the secretary, after the year 1880, upon all similarly indorsed premium notes belonging to this class of policies, when the policies upon which the notes were given matured and became payable.

The following statement was contained in the prospectus of the defendant, which was prepared by the secretary of the company in 1868, and was circulated among the agents and policy-holders:

"On all participating policies dividends will be paid annually, commencing four years after the payment of the first premium, although when credit is given for part of the premium they are practically available in advance, lessening each annual payment. They will be paid in cash when the full premium is paid in cash, or applied to cancel the notes of those who elect to have credit for one-half; and, in the settlement of a policy, a dividend will be allowed on each premium which has been in possession of the company for a full year, and on which no dividend has been paid.

"Dividends based upon the rate paid will cease when they equal the payments in number; if based upon the ordinary life rate, they will continue during life; and if on the endowment rate, during the existence of the policy. If the annual premiums on limited-payment policies are discontinued before the

specified number have been paid, the dividends thereafter will be based on the continued rate for the same kind of insurance, and will continue until the number of dividends equals the number of annual premiums paid."

The first of said paragraphs was repeated in another circular, which was prepared by the company for distribution and was circulated. The dividends of 1872 and 1873 were computed according to the rule stated in the first part of the third paragraph. These three paragraphs contained the company's regulations or rules prescribed for the management of dividends, and the practice of the company continued to be in accordance therewith, at least until 1876. The amount of dividends which were paid during the years 1872, 1873, and 1874, and which included the indorsements in question, was annually reported to the stockholders of the company. It is admitted that one other and subsequent dividend of \$31.21 was properly indorsed upon the fourth note. The interest upon the amount of the notes, as they were diminished by all said indorsements, was demanded by the secretary after said erasure, the circular stating the amount of the notes to be \$440.86, and was paid to April 4, 1882. This fact is not material upon the construction of the said three votes, and was not admitted for that purpose.

The only question in the case is whether the amount of the three erased indorsements should be deducted from the amount claimed by the defendant to have been due upon said notes on April 4, 1882. This question depends upon the construction to be given to the word "renewed" in the three votes which have been quoted. For example, in the vote of February, 1871, the dividend is declared upon premiums paid in 1868, when the policies are "renewed" previous to January 1, 1873. The defendant says that this language can refer only to policies which are renewed or prevented from forfeiture by the payment of a premium, and, as a non-forfeitable endowment policy, which had lapsed *pro rata*, but which was a paid-up policy for a portion of the amount originally assured, was not continued in force or prevented from forfeiture by the payment of an annual premium; that the word "renewed" did not apply to such a policy. The plaintiff insists that no such literal meaning is to be given to the language, but that the vote is to be construed in harmony with the contemporaneous written rules of the company, and that the contemporaneous acts of the company, in accordance with the rules, should have an influence in determining what was meant by the votes.

It certainly appears from the printed prospectus that a dividend was promised to be allowed in the settlement of a policy upon each premium which had been in the possession of the company for a year; and that, notwithstanding annual premiums on limited-payment policies had been discontinued before the specified number had been paid, it was understood that dividends thereafter, based on the continued rate for that kind of insurance, would continue until the number of dividends equaled the number of annual premiums paid. This rule declares the intended practice of the company. If the vote is to be construed as confined to policies which are prevented from forfeiture by the prompt payment of an annual premium, such a construction would not be in harmony with the rule of the company, and would

also be contrary to its uniform practice when the interest upon the premium notes had been paid. Annual dividends were declared in accordance with the rule, and the officers showed by their acts that the intent of the votes was to make the dividends applicable to this policy and to all others in like circumstances. The attempt of the company in erasing these indorsements was to place, in 1860, for its own advantage, a limited meaning upon the language of the votes of 1871, 1872, and 1873, when such meaning was at variance with the contemporaneous written rules and with the contemporaneous acts of the company.

The office of a "renewal," as it is termed, of a life-policy is to prevent discontinuance or forfeiture, and, by the word "renewed," the respective votes meant to include, and did include, participating, limited-payment policies which had been prevented from forfeiture prior to the dates respectively mentioned.

Let judgment be entered for the plaintiff for \$1,225.80, with interest from April 4, 1882.

MOLEOD v. FOURTH NAT. BANK OF ST. LOUIS.¹

(Circuit Court, E. D. Missouri. April 5, 1894.)

FRAUD—AGENCY—FALSE BILLS OF LADING.

A., the owner of a large number of bales of cotton of merchantable weight, pledged the cotton notes therefor to B., a bank, and afterwards, without B.'s knowledge or consent, had them rebaled at a cotton pickery so as to make three new bales out of two of the old ones, thus reducing the average weight to about 343 pounds. A. then attached the tags which had been attached to the original bales to an equal number of the new ones, so as to make it appear that the cotton notes were for those bales, returned the bales to which the tags were attached to the warehouse, and retained the balance. C., B.'s cashier, was thereafter informed that some of the cotton held in pledge had been manipulated, and upon investigation found five bales, to which his attention had been directed, short weight. C. then inquired of A. about the matter, and A. gave him a list of 40 bales which were short weight and only averaged about 390 pounds each, but informed him that there were only a comparatively short number in that condition, and C. testified that he believed the statement. He requested A., however, to put up an additional margin of \$4 per bale, which was done. D., a foreigner, thereafter agreed to accept A.'s draft for a specified amount, if drawn against a shipment of 600 bales of said cotton, which A. represented to D. would average about 500 pounds each. E., a New York firm, agreed with A. to purchase A.'s draft on D. A. informed B. of the arrangement, and B. gave A. possession of cotton notes for 600 of said bales, in order that A. might make the shipment and get a bill of lading therefor. The real weight of the cotton shipped was 206,043 pounds, but A. fraudulently inserted 276,815 pounds as the weight in the bill of lading. A. then drew a draft on D., and a draft on E. for the agreed price of the draft on D., attached the bill of lading to the draft on D., and turned the whole over to B., which discounted the draft on E., applied the proceeds on its claim against A., and forwarded the draft discounted, together with the draft on D. and the bill of

¹Reported by Benj. F. Rex, Esq., of the St. Louis bar.

lading thereto attached, for collection. D. accepted A.'s draft on the faith of the bill of lading thereto attached, supposing the weight therein stated to be correct, and when the cotton was received and the fraud discovered, brought this suit against B. to recover the difference between the value of the cotton shipped and the amount of the draft. If the weight stated in the bill of lading had been correct, the draft would have been fully secured. The above facts being proved at the trial, it was *held*:

- (1) That the knowledge of B.'s cashier was B.'s knowledge.
- (2) That if B. had known of the short weights, and, with intent to secure payment of A.'s indebtedness to it, had caused said bills of lading, together with the bill of exchange connected therewith, to be forwarded, it would have been responsible for D.'s loss.
- (3) That there was no evidence tending to show any fraudulent intent on B.'s part.

At Law.

The petition states, in substance, that the firm of Norvell, Canfield & Co. pledged cotton notes for 1,200 merchantable bales of cotton, belonging to them, to the defendant, and afterwards, without the defendant's knowledge, got possession of the cotton and had it rebaled, so as to make three new bales out of two of the old ones, and returned 1,200 of the rebaled bales and retained the balance; that thereafter the defendant discovered the manner in which the cotton had been manipulated, and that it was in consequence not good security for the loan, and immediately demanded that said firm, which was known by it to be insolvent, should at once dispose of said cotton in foreign markets, and a member of said firm, who was abroad, induced the plaintiff to agree to accept said firm's 60-day draft for £6,000 upon a consignment of 600 bales of said cotton of merchantable weight of about 500 pounds per bale; that thereafter defendant, being apprised of said agreement of acceptance, and having said bales in its possession, did ship to plaintiff 600 of the rebaled bales in its possession upon a through bill of lading attached to a 60-day draft for £6,000, drawn upon plaintiffs by Norvell, Canfield & Co.; that upon the face of the bill of lading, by which defendant caused the said bales to be shipped, and which was attached to the said 60-day bill of exchange, was set forth for the purpose of delivering plaintiffs a false and fraudulent statement of the aggregate weight of said 600 bales, which did not exceed 192,381 pounds, and a certificate of insurance upon the 600 bales thus shipped, in which the value of the cotton shipped was falsely set forth at \$33,000, which was many thousand dollars in excess of its real value; that defendant did not itself discount the bill of exchange, but caused the drawers to sell it to certain brokers in New York for defendant's benefit, and, upon being informed that said brokers would purchase the bill, caused Norvell, Canfield & Co. to draw this sight draft upon said brokers for the proceeds of said bill, to-wit, \$29,000, and caused to be attached to it the bill of exchange drawn on the plaintiffs, together with the bill of lading and certificate of insurance, and all of said papers were forwarded to said brokers, and surrendered these to them upon their paying the draft; that, upon the payment of the

draft, the defendant at once applied the proceeds thereof to its reimbursement of the indebtedness of said firm to it, and paid in full, principal and interest, all amounts loaned on the cotton shipped; that said bill of exchange was thereafter presented, with bill of lading, etc., attached, to plaintiffs, and by them accepted while they were still in ignorance of said division of said bales; that the holders of the bill were innocent holders for value, and that the plaintiffs were compelled to pay the bill and did pay it; that the value of the cotton shipped was only £4,173, and was sold by plaintiffs for that sum, thus leaving a deficiency of \$9,000; and that defendant knew of the condition of the cotton shipped, and was the beneficiary of the fraud.

Judgment was asked for \$9,000, with interest.

The case was tried before a jury.

Evidence was introduced at the trial tending to prove that the cotton had been manipulated as alleged, and that the tags which had been attached to the original bales were attached by Norvell, Canfield & Co. to the rebaled bales returned to the warehouse by them, so as to make it appear that the cotton notes were for the bales returned; that the weight stated in the bill of lading attached to said firm's draft on the plaintiff was 276,815, which was 70,722 pounds in excess of the real weight of said cotton; that said firm had represented to plaintiff that the bales would weigh about 500 pounds apiece; that merchantable bales usually weigh from 450 to 460 pounds; that the bales shipped averaged 343 pounds; that said firm's draft was accepted on the faith of said bill of lading; that before plaintiff agreed to accept said draft, as alleged in the petition, the defendant's cashier had received information that said firm had had some of the defendant's cotton repicked, and had left a portion of it short weight; that the weights of fourteen bales were furnished to him by a friend, and were found to be light weight, but only five of them belonged to the lot pledged; that said cashier then inquired of a member of said firm about the rebaling of said cotton, and was told that most of it was all right and believed it; that said firm gave him the weights of 40 short-weight bales, averaging about 390 pounds each, and informed him that there was only a comparatively short number in that condition; that after making said inquiries said cashier requested said firm to put up an additional margin of four dollars a bale, and the margin was put up; that when said shipment was made to the plaintiff the defendant gave said firm possession of cotton notes for 600 bales of said cotton, in order that the firm might get a bill of lading therefor; that the false weight was inserted in the bill of lading without the defendant's direction; that a firm in New York had agreed to purchase Norvell, Canfield & Co.'s draft on the plaintiff, and that after procuring said bill of lading the latter firm drew their draft on the plaintiff and attached the bill of lading thereto, and also drew on said New York firm for the agreed price to be paid for the draft on the plaintiff; that both of said drafts and said

bill of lading were then turned over to the defendant, which discounted the draft on New York, applied the proceeds on its claim against Norvell, Canfield & Co., and then forwarded said draft, together with said draft on the plaintiff with the bill of lading attached, for collection.

Overall & Judson, for plaintiffs.

Finkelnburg & Rassieur and *George A. Madill*, for defendant.

TREAT, J., (*charging jury*.) There seems to be no dispute as to many of the facts in this case. The cotton in question went forward to the plaintiffs under the bill of lading and hypothecation, on which the plaintiffs had a right to rely. It also appears that the statements as to weights contained in the bill of lading were false, whereby a loss to the plaintiffs occurred, as stated in the petition. Who is responsible therefor? Unquestionably, Norvell, Canfield & Co. But is the defendant liable? It seems that the defendant had advanced on cotton notes pledged to it a sum of money, and intrusted the cotton notes to the pledgeor for the purpose of forwarding the same. The same were forwarded with the bill of lading and hypothecation, whereby the plaintiffs, as acceptors of the bill, received the same in the faith that said bill of lading was a true statement as to weight, etc. There seems to be no doubt that the plaintiffs, relying on the bill of lading, accepted the draft accompanying the same, and consequently had a right to trust to the correctness as to the weight which they indicated. That there was a fraud perpetrated the jury will probably have no difficulty in determining. But who is responsible therefor? There is no doubt where the ultimate responsibility rests. In this case it is to be determined whether there is an intermediate liability, to-wit, the connection of the defendant with the fraud perpetrated. If the defendant knew of the fraud, to-wit, the short weights, and with the *intent* to secure to itself payment of indebtedness by Norvell, Canfield & Co., caused said bill of lading, together with the bill of exchange connected therewith, the proceeds of which it was to receive, to be forwarded, then the defendant is responsible for the loss incurred; otherwise not.

The proposition seems to be narrowed down to this inquiry: Did the defendant *know* that the weights were false on the shipment; and if so, did it assent thereto with the intent to defraud the plaintiffs as acceptors or drawers of the bill? Whatever the cashier of the defendant bank did the defendant is liable for. Hence, the inquiry may be directed to the ascertainment of his knowledge and intent, and also the knowledge and intent of any other officer of the defendant. Did the defendant through its cashier or any other officer, *know* that there were false weights sent forward in the bill of lading, and *assent* to the forwarding of such false weights with the intent of defrauding the parties plaintiff? Is there any testimony of any such fraudulent knowledge or intent upon the part of the defendant? There is no testimony showing that there was any such fraudulent intent on the

part of the defendant. Therefore your verdict will be for the defendant.

The jury found a verdict for the defendant. Thereupon the plaintiffs filed a motion for a new trial, which, having been duly considered, was overruled.

LIABILITY FOR FRAUDS PERPETRATED BY MEANS OF FALSE OR FORGED BILLS OF LADING. Several questions are involved in the principal case, and among others, the question of whether or not a principal is liable for a fraud perpetrated for his benefit by his agent, in the course of his service, but without his express command or privity, where he has enjoyed its fruits? That question has been answered in the affirmative by high authorities.¹ It will not be discussed, however, in this note, which will be devoted to a presentation of the English and American cases in which frauds have been perpetrated by means of false or forged bills of lading. In deciding such cases the courts have frequently been called upon to define the nature of bills of lading. The following definition was given by Mr. Justice MILLER, in delivering the opinion of the court in *Pollard v. Vinton*:² "A bill of lading is an instrument of a twofold character. It is at once a receipt and a contract. In the former character it is an acknowledgment of the receipt of property on board his vessel by the owner of the vessel. In the latter it is a contract to carry safely and deliver."

It has frequently been contended that bills of lading are negotiable, like bills of exchange, but it is now well settled that they are not. "The indorsement of a bill of lading, under the most liberal decisions made anywhere, is no more than an assignment of the shipper's obligation, and of the property called for by the bill. It involves no promise on the part of the indorser to do anything towards forwarding the property to its destination. If the instrument is fictitious, or if there is any fraud practiced in transferring it, any remedy that the transferee would be entitled to would be for that special wrong, and not by importing into the indorsement a promise to perform what the carrier has agreed to do."³ And it has been held that the rule as to a *bona fide* purchaser of a lost bill of exchange, indorsed in blank payable to bearer, has no application to the case of a lost bill of lading.⁴

Of all the cases in the English and American reports, the one most closely resembling the principal case is *March v. First Nat. Bank of Mobile*.⁵ In that case the defendant had discounted a draft with a bill of lading attached, and had discovered afterwards, but before the draft was presented for acceptance, that the property described in the bill of lading was claimed by the factors who had sold it to the shipper, and that the bill of lading was probably not security of any value in its hands, and had, immediately after making the discovery, hurried up the presentation for acceptance, and the drawee had accepted the draft upon the faith of the bill of lading, which he supposed good security. The defendant had then immediately transferred the draft, without recourse, to a *bona fide* holder for value without notice. The action was by the acceptor for the amount of the bill. In delivering the opinion of the court, affirming a judgment for the plaintiff, DAVIS, P. J., said: "Doubtless, if a bill of exchange had been sent alone, and accepted by plaintiffs, they would have

¹ Mackay v. Com. Bank of New Brunswick, 5 Priv. Council, (Eng.) 394; Mitchell v. Donahey, 17, N. W. Rep. 641.

² 105 U. S. 7.

³ Opinion of Campbell, J., in Maybee v.

Tregent, 47 Mich. 495; S. C. 11 N. W. Rep. 287.

⁴ Shaw v. Railroad Co. 101 U. S. 537

⁵ 4 Hun, (N. Y.) 466.

had no redress against the defendant, however well the failure of the bill of lading as security might have been known to them. The defendants were under no obligations to make any disclosures of facts to the plaintiffs to prevent their acceptance of the bill, but they were under obligation to do nothing and say nothing, with knowledge of the real facts, which would operate to secure an acceptance by an expression of falsehood or a suppression of truth. Knowing that the bill of lading was of no value, the defendants had no right to induce the acceptance of the bill of exchange, by presenting the bill of lading as one of value, concealing their knowledge of its true character." But though it is a fraud for a party, who has notice that a bill of lading attached to a bill of exchange is valueless or of less value than it purports to be, to induce the drawee to accept, by presenting the bill of exchange for acceptance with the bill of lading attached, and without explanation, yet the fact that a bill of exchange has been accepted on the faith of a forged bill of lading is no defense in an action by a *bona fide* holder for value and without notice.¹ And where a bill of exchange, with a forged bill of lading attached, is presented for acceptance by, and afterwards paid to, a party who has no notice of any defect in the bill of lading, the acceptor cannot recover his money back again.²

So where a bank is requested by a customer to accept the draft of a third person, if accompanied by a bill of lading, and accepts a draft with a forged bill of lading attached, the customer will have to bear the loss.³

SUITS AGAINST COMMON CARRIERS. The majority of the cases of this kind have been against common carriers who have issued bills of lading receipting for merchandise in good condition, when in bad condition, or for property never received at all.

It is well settled that where the master of a vessel issues a false bill of lading, and money is advanced upon the faith of it, or it is transferred for value to a party having no notice of its falsity, the master himself is estopped from contradicting its recitals, as against the party who has made the advances, or to whom it has been assigned.⁴ And where the owner of a vessel issues a false bill of lading the doctrine of estoppel is equally applicable.⁵ There is some conflict of authority, however, in this country as to whether or not a principal is liable for false statements in a bill of lading issued without his knowledge by an agent. In England it seems that he is not, as a general rule, though it was held in the case of *Howard v. Tucker*⁶ (1831) that a ship-owner is estopped, as against a *bona fide* holder for value of a bill of lading issued by the master of his vessel, from contradicting the statement therein that freight has been paid by the consignor.

The leading English case is *Grant v. Norway*,⁷ (1851,) which was an action on the case by the indorsees of a bill of lading, against the owner of a vessel, to recover the amount of advances made by the former upon the bills of lading, the goods never having, in fact, been shipped. The court held that the master of a ship signing a bill of lading for goods which have never been shipped cannot be considered as the agent of the owner in that behalf, inasmuch as a general authority to sign bills of lading only extends to cases where actual shipments are made, and that a party taking a bill of lading, either originally or by indorsement, for goods which have never been put on board, is bound, in order to hold the ship-owner liable, to show some particular authority given to the master to sign it, and that, as no such au-

¹ *Robinson v. Reynolds*, 2 Adol. & E. (Eng.) 634; *Kelly v. Lynch*, 22 Cal. 661; *Thiedemann v. Goldschmidt*, 1 De Gex, F. & J. (Eng.) 4.

² *Leather v. Simpson*, 40 L. J. Eq. 177; S. C. 11 Eq. 398.

³ *Woods v. Thiedemann*, 1 Hurl. & C. (Eng.) 478.

⁴ *Valleri v. Boyland*, 12 Jur. 596; *Relyra v. N. H. R. M. Co.* 42 Conn. 579; *Bradstreet v. Heron*, 2 Blatchf. 116.

⁵ *Relyra v. N. H. R. M. Co.* 42 Conn. 579; *Schooner Freeman v. Buckingham*, 18 How. 182.

⁶ *Barn. & Adol.* 712.

⁷ 10 C. B. 664.

thority was shown in that case, the plaintiff could not recover. In *Hubersty v. Ward*,¹ (1858,) which was an action in trover for wheat by the indorsees of a bill of lading therefor, the court of exchequer placed its decision upon the same ground. The same doctrine was applied, in *Coleman v. Riches*,² (1855,) to a case where the agent of a wharfinger had fraudulently given a receipt for goods which had not been delivered to him. And in *Brown v. P. D. S. C. Co.*,³ (1875,) it was applied in a case where the master had receipted for more coal than he had received.

In America, *Grant v. Norway* has been followed in Louisiana,⁴ Maryland,⁵ Massachusetts,⁶ Missouri,⁷ and the federal courts;⁸ but the doctrine of that case has been rejected in New York,⁹ Kansas,¹⁰ and Nebraska.¹¹ The Massachusetts and Missouri cases are cases of shortage. *Lehman v. Cent. R. & B. Co.* is a case in which the bill of lading in question was written by the shipper in such a way that it was easy to raise it, and was signed by the defendant's agent in that form, and afterwards raised by the shipper and transferred for value. In the other cases cited, which follow *Grant v. Norway*, the bills of lading were issued without any goods having been received. In Pennsylvania,¹² and the district court for the Southern district of New York,¹³ it has been held that carriers are estopped as against indorsees for value, and parties who have advanced money upon the faith of bills of lading issued by their agents, from contradicting the statement therein, that the goods receipted for were received in good condition. But where, though the bill of lading contains a statement in writing as to the condition¹⁴ or weight¹⁵ or nature¹⁶ of the property receipted for, it nevertheless states, in print or otherwise, that the condition or weight or nature, as the case may be, is unknown, then the statement, if as to condition, must be understood as referring to the external condition; and if the statement is as to weight or nature, it should be taken as a statement of what the shipper has represented it to be.

The cases referred to, in which the doctrine of *Grant v. Norway* has been rejected, hold that though a general authority to issue bills of lading gives no power to issue them for goods not received, yet if an agent having power to issue bills of lading for goods delivered to him for transportation issues a bill of lading for goods which have not been delivered, and an innocent third party purchases it, or advances money upon the faith of it, in the regular and ordinary course of business, then the carrier should be held liable for the loss sustained through the negligence or fraud of its agent, and should be estopped from contradicting the receipt of the goods, upon the principle that "where one of two innocent persons must suffer by reason of the fraud or misconduct of a third, he by whose act, omission, or negligence such third party was enabled to consummate the fraud ought to bear the loss." That principle seems to have been recognized in *Howard v. Tucker*, *supra*, but to have been entirely overlooked in *Grant v. Norway* and the cases following it.

St. Louis, Mo.

BENJAMIN F. REX.

¹ 18 Eng. Law & Eq. 551.

² 29 Eng. Law & Eq. 325.

³ 10 C. P. 562.

⁴ Hunt v. M. C. R. Co. 29 La. Ann. 446.

⁵ B. & O. R. Co. v. Wilkins, 44 Md. 11.

⁶ Sears v. Wingate, 3 Allen. 103.

⁷ Nat. Bank v. Lavielle, 52 Mo. 580.

⁸ Schooner Freeman v. Buckingham, 13 How. 182; Vandewater v. Mills, 60 U. S. 90; Pollard v. Vinton, 105 U. S. 7; The Loon, 7 Blatchf. 244; The Joseph Grant, 1 Biss. 193; Lehman v. Cent. R., etc., Co. 12 Fed. Rep. 595; Robinson v. M. & C. R. R. Co. 9 Fed. Rep. 129.

⁹ Dickerson v. Seelye, 12 Barb. 99; Armour v. Railroad Co. 65 N. Y. 111.

¹⁰ Wichita Savings Bank v. A., T. & S. F. R. Co. 20 Kan. 519.

¹¹ S. C. & P. R. Co. v. First Nat. Bank, 10 Neb. 556; S. C. 7 N. W. Rep. 311.

¹² Warden v. Green, 6 Watts, 424.

¹³ Bradstreet v. Heron, 1 Abb. Adm. 206.

¹⁴ Clock v. Barnwell, 58 U. S. 272.

¹⁵ Ismaele, 14 Fed. Rep. 491; Jessei v. Bath, 2 Exch. 267.

¹⁶ Miller v. H. & St. Jo. R. Co. 90 N. Y. 430.

BALL & SAGE WAGON Co. v. AURORA FIRE & MARINE INS. Co.

(Circuit Court, D. Indiana. February 19, 1884.)

1. AUTHORITY OF FIRE INSURANCE AGENTS—POWER TO WAIVE PAYMENT OF PREMIUM.

Where the authority of agents of a fire insurance company consists of full power to receive proposals for insurance, to receive moneys, and to counter-sign, issue, and renew policies, subject to such rules and regulations as may be adopted by the company, and such instructions as may, from time to time, be given by the management, they have authority to waive the immediate payment of premiums.

2. FIRE INSURANCE—EVIDENCE OF WAIVER OF PAYMENT OF PREMIUM.

Evidence considered, and *held* that the acts of insurance agents amounted to a waiver of the immediate payment of a premium on a policy.

3. FIRE INSURANCE COMPANY—WAIVER OF IMMEDIATE PROOF OF LOSS.

Where an insurance company asserts that a policy has been canceled previous to a fire, it waives all right to insist that the policy has been forfeited because the proofs of loss came too late.

Jury Waived, and Trial by Court.

Baker & Mitchell, for complainants.

Duncan, Smith & Wilson, for defendants.

WOODS, J. The action is upon a policy of fire insurance. The defenses pleaded are—*First*, that, by reason of non-payment of the premium, the policy had never been in force; *second*, that the policy had been canceled before the loss occurred; and, *third*, that the assured had forfeited all right of recovery by failure to give notice to the company, and to make proof of the loss, as required by a condition of the policy.

The plaintiff, a corporation at Elkhart, Indiana, authorized Defrees & Meader, of Goshen, to procure a stated amount of insurance on the property of the company. Defrees & Meader applied for the insurance to Grubb, Paxton & Co., of Indianapolis, who were then agents of the defendant, a corporation located at Cincinnati, Ohio, for Indiana north of the Ohio & Mississippi Railroad. On the ninth day of May, 1881, Grubb, Paxton & Co. prepared and sent by mail to Defrees & Meader, for the plaintiff, three policies, (of as many different companies,) including that sued upon. By its terms, this policy was made to take effect at noon of May 9th, the date of the policy. It was received by Defrees & Meader in due course of mail, but, on account of the premium charged being less than the established local rate at Elkhart, they returned it, with the other policies, to Grubb, Paxton & Co., with a request that corrected policies of the same date be sent instead. The same policies were corrected by Grubb, Paxton & Co. in respect to the charges of premium, and, without other change, remailed on May 12th to Defrees & Meader, who received and delivered them on or before May 17th to the treasurer of the plaintiff, and received of him the premium named. In their letter of May 9th, with which the policies were first sent, Grubb,

Paxton & Co., after naming the respective policies and their amounts, one each being in the Aurora, Indiana, and Home, say to Defrees & Meader: "To your credit 15 per cent. on Aurora and Indiana; 12½ per cent. on Home policy." On May 13th, upon receipt of a memorandum showing the issue of this policy, the defendant, by its secretary at Cincinnati, notified Grubb, Paxton & Co. to cancel the policy immediately; but, instead of obedience, and without notifying the plaintiff or Defrees & Meader of this order, they wrote to Defrees & Meader for "printed forms, Ball & Sage Wagon Co.'s paper-mill;" their intention being to place an equal amount of insurance upon the property in another company, before canceling the policy in suit. On the 17th, Defrees & Meader answered, sending blanks as requested, and asking the placing of \$2,000 more insurance on the property, in some good company. On the 19th, Grubb, Paxton & Co. replied, promising to forward a policy for \$2,000 more on the paper mill, either by to-morrow or day after. On May 20th, the property insured burned, and on the 23d, Defrees & Meader, acting for the plaintiff, wrote Grubb, Paxton & Co. to the effect that a total loss had occurred, naming the policies and amount of each, including the one in suit, and on the same day sent them a telegram asking if they had placed insurance on the paper-mill, and if so, when and in what company. This had reference to the additional insurance which had been applied for. On the same day, May 23d, Grubb, Paxton & Co. wrote to Defrees & Meader, saying:

"Herewith find policy No. —, Atlas Ins. Co. \$2,000, Ball & Sage Wagon Co. The Aurora Insurance Co. ordered their policy canceled about a week ago, and we have put said amount, \$1,500, in Rochester German Ins. Co. Please advise if the mill which burned at Elkhart is this mill we just insured, (Ball & Sage.) If so, we want you to consider Aurora policy canceled, and hold the Rochester German liable for it. We have policy in office here. The reason why we held Rochester German policy here is because we did not wish to trouble you more than we could possibly help in exchanging policies, and first wished to find if the R. G. policy would stick. Very truly," etc.

On May 24th they telegraphed Defrees & Meader:

"Has that mill burned? Return the canceled policies. Answer."

To this, on the same day, Defrees & Meader answered:

"Yes, totally. Answer our telegram."

And to this Grubb, Paxton & Co. replied by telegraph also:

"We have placed only Indiana, Home, and Atlas. You had notice of cancellation of Aurora and Rochester German. Return these two policies at once. You have our letter. Deliver no policies now to parties."

On the 25th they wrote Defrees & Meader, saying:

"We are sorry you did not answer the requirements of the business (if you had delivered the Indiana and Home policies to the assured) by giving notice at once of the fire. You will please return the Aurora policy and the Atlas, as they are plainly not in force,—the one being canceled on the thirteenth inst., the other written on the 23d. Please do this promptly, as you cannot help but acknowledge the justice of this."

This Defrees & Meader answered on the 26th, exonerating themselves of all blame; and on the 28th wrote again, inclosing a draft for \$75.01, stated to be "in full of our account with you for insurance in Indiana, Home, and Aurora, as per statement appended." To this Grubb, Paxton & Co. replied by letter of the 30th, saying:

"Your favor of twenty-eighth inst. received, inclosing check in payment of premium on paper-mill, \$75.01 net. We will endeavor to get the matter straightened up; will write the Rochester German and Aurora the facts, and let you know, so as to get proofs made right, if we can get it settled between the two companies. We used our best efforts to get the line placed."

And on June 4th again wrote, saying:

"We return to you herewith the premium (you included in your remittance of balance due us) for Aurora policy, canceled, as we wrote you. Find inclosed \$31.88. The policies we placed are the Home and Indiana. Please return the Aurora policy as requested. We, as brokers, use our best efforts to place lines for our customers, but cannot bind longer than until such time as they can accept or decline."

This was sent as a registered letter. On June 8th, Defrees & Meader answered by a registered letter, in which they returned the letter of Grubb, Paxton & Co. unopened. This letter Grubb, Paxton & Co. refused to take from the post-office, where it lay until August, when it was returned to Defrees & Meader, at Goshen, where they held it unopened at the time when this action was commenced in the Elkhart circuit court, and continued to hold it until on the hearing it was produced in this court, and by order of the court opened, and the money delivered to the clerk of this court for final disposition, according to the order of the court. Neither the defendant nor its agents, Grubb, Paxton & Co., ever gave notice to or made any request of the plaintiff to furnish proof of loss, in accordance with the suggestion or promise contained in the letter of May 30th.

On September 4, 1881, before the commencement of this action, the plaintiff sent to the defendant at Cincinnati proof of the loss, to which no objection is or has been made, except that it came too late. In respect to proof of loss the policy provides that—

"Persons having a claim under this policy shall give notice to the company immediately after the fire, and, as soon as possible, render a particular account and proof thereof," etc.

This policy also contains the following:

"It is further agreed that, if this policy has been procured by any person or persons other than the duly appointed and authorized agent of this company, such person or persons shall be deemed to be the agent of the assured, and this company shall not be liable, by virtue of this policy, or any renewal thereof, until the premium therefor be actually paid to the company."

The authority of Grubb, Paxton & Co., as agents of this company within their territory, is shown to have been—

"Full power to receive proposals for insurance, to receive moneys, and to countersign, issue, and renew policies of insurance of the company, subject to such rules and regulations as are or may be adopted by the company, and

such instructions as may from time to time be given by the manager of the company at Cincinnati."

In respect to the defense of cancellation, counsel for the defendant admit that there is a failure of proof, but strenuously insist that the policy never became operative, because the premium had not been paid to the company before the fire; that there was in fact no waiver of this payment by the company, or by their agents, Grubb, Paxton & Co., and that if the agents did intend a waiver they had no power to bind the company thereby; that the provision quoted from the policy constituted a restriction upon the power of all agents, whether general or special, of which the receiver of the policy was bound to take notice; that this restriction was a part of the agreement, which could not be effected by any contemporary parol agreements or understandings, especially when had with an agent only of the company. In support of this view, counsel cite the following authorities: *Com. Mut. M. Ins. Co. v. Union Mut. Co.* 19 How. 318; *Grace v. Amer. Cent. Ins. Co.* (U. S. Sup. Ct.) 17 Reporter, 1; S. C. 3 Sup. Ct. Rep. 207; *Thompson v. Ins. Co.* 104 U. S. 252; *Ins. Cos. v. Wright*, 1 Wall. 456; *Partridge v. Ins. Co.* 15 Wall. 573; *Bush v. Ins. Co.* 63 N. Y. 531; *Mersebau v. Ins. Co.* 66 N. Y. 274; *Bradley v. Potomac Ins. Co.* 32 Md. 108; *Catoir v. Amer. Ins. Co.* 83 N. J. Law, 487; *Western Assurance, etc., v. P. Ins. Co.* 5 U. C. App. Rep. 190; *Buffum v. Fayette Ins. Co.* 3 Allen, 360; *Bouton v. Amer. Ins. Co.* 25 Conn. 542; *Security Ins. Co. v. Fay*, 22 Mich. 467; *Ins. Co. v. Norton*, 96 U. S. 234; *Bennecke v. Ins. Co.* 105 U. S. 355; 20 Eng. Rep. 816.

Counsel for the plaintiff contend that the power of the agent to issue the policy included the power to fix the time when the insurance should begin and end; that this was done in this instance by writing in the blank spaces left in the printed forms provided by the company, the words and figures, "9—May;" that, when there is inconsistency between written parts of an instrument and printed parts, the former must prevail; that the delivery of the policy in this shape, and the subsequent conduct of Grubb, Paxton & Co., showed clearly an intent on their part to give Defrees & Meader a short credit for the premium, and that the policy should take immediate effect; and that this, in law as well as in fact, constituted a waiver of the stipulation for payment before the policy should be in force. In support of this view the following authorities are cited: *Miller v. Life Ins. Co.* 12 Wall. 303; *Sheldon v. Atlantic Ins. Co.* 26 N. Y. 460; *Wood v. Poughkeepsie Ins. Co.* 32 N. Y. 619; *Boehen v. Williamsburgh Ins. Co.* 35 N. Y. 181; *Bowman v. Ins. Co.* 59 N. Y. 521; *Marcus v. Ins. Co.* 68 N. Y. 625; *Goodwin v. Ins. Co.* 73 N. Y. 480, 491; *Bouton v. Amer. Ins. Co.* 25 Conn. 542; *Behler v. German Ins. Co.* 68 Ind. 350; May, Ins. p. 434, § 136.

Without entering upon a review of the authorities, it is enough to say here that in the judgment of the court the agents of the company

who issued the policy in suit had authority to waive the immediate payment of the premium; and that they did so in this instance is, in the light of the evidence, too clear for reasonable dispute.

In respect to the proofs of loss it is probably true, as claimed by counsel for the plaintiff, that, by asserting a cancellation of the policy, the defendant waived the right to insist upon these proofs. *Portsmouth Ins. Co. v. Reynolds*, 32 Grat. 613; *Allegre v. Maryland Ins. Co.* 6 Har. & J. 408; *Graves v. Ins. Co.* 12 Allen, 391; *Nor. & N. Y. Transp. Co. v. Ins. Co.* 34 Conn. 561; *Girard Co. v. Ins. Co. of N. Y.* 97 Pa. St. 15; *Bennett v. Ins. Co.* 14 Blatchf. 422; 9 How. (U. S.) 196; May, Ins. § 469. But whether there was, in this case, a complete waiver or not, it is quite clear, under the circumstances in proof, that the plaintiff should be held to be excused for the neglect, if neglect it was, to forward the proofs sooner.

Other points have been suggested in behalf of the defense, but if good in law they have no sufficient support in the evidence. There is due the plaintiff \$1,730, for which let judgment go.

In re SIGNER, Bankrupt.

(District Court, S. D. New York. April 29, 1884.)

BANKRUPTCY—SECTION 5110, SUBD. 5—LOSS OF MONEY BY GAMING.

Under subdivision 5 of section 5110, Rev. St., it is competent for objecting creditors to prove, in opposition of the bankrupt's discharge, his loss of money by gaming at any time since the bankrupt act, and within the period at which any of his debts arose, or within which it may affirmatively appear or be reasonably supposed that his assets which ought to and would have come into the assignee's hands were affected through such loss.

Bankrupt's Discharge.

BROWN, J. The discharge of the bankrupt is resisted in this case upon the ground, among others, that he had lost part of his property in gaming, contrary to subdivision 5, § 5110. The question has been certified to the court whether any evidence should be admitted in support of the specification of the loss of money by gaming prior to the time when the objecting creditors' debt arose, as shown by the proof of debt, which was in 1878. The evidence cannot be restricted to the period since the objecting creditors' debt accrued; it must, at least, extend to the whole period covered by any debts from which the bankrupt is sought to be discharged. The clause of the statute which makes the loss of any part of the bankrupt's property by gaming a bar, is not limited as to time; nor is it qualified by the preceding language of the section, requiring an intent to defraud creditors. The reasoning in the *Case of Burk*, 3 N. B. R. 296, 300, is not, therefore, applicable. In the *Case of Jones*, 13 N. B. R. 286,

LOWELL, J., considered that an objection under this subdivision might be valid "if the acts were at a time so recent that they would affect any of the creditors who can come in under the bankruptcy." Further on he observes that "the fraudulent payments, conveyance, or loss by gaming do not appear to be thus limited, and seem to include all such payments, conveyances, and losses as have diminished the assets which otherwise would have come to the assignee."

The tenth subdivision of section 5110 provides that conviction of a misdemeanor under the bankrupt law shall prevent a discharge. Could it be held that such a conviction, to be a valid objection, must have occurred after the creditors' debt was contracted? It seems to me not, but that any such conviction since the passage of the bankrupt act would debar the bankrupt of any discharge under it, though the debt were contracted afterwards; and I am inclined to think that the same extended reach might be given to the other parts of section 5110, which are not limited in time, or to their effect upon specific creditors. It is by no means clear that it was not the purpose of the bankruptcy act to deny its privilege of discharge to all persons who, subsequent to its passage, should by their own acts violate its conditions. *In re Cretieu*, 5 N. B. R. 423; *In re Keefer*, 4 N. B. R. 389; *Peterson v. Speer*, 29 Pa. St. 478. If the act were regarded as a permanent law instead of a temporary one, it might seem an unreasonable construction, and not within its presumed intention, to hold a discharge barred through loss by gaming, where the loss was so long anterior to the bankruptcy as to have no actual relation to the debts or assets involved in the bankruptcy. But if a division of time since the act were attempted, it would often be difficult to fix any certain rule.

It is not necessary to determine the whole question at this time. The evidence as to when the bankrupt lost any of his property by gaming, must, however, be admitted as far back as the origin of any of the debts of the bankrupt; and also to such anterior period, since the passage of the act, in which it may affirmatively appear, or be reasonably supposed, that the assets of the bankrupt which ought to and would have come into the assignee's hands were depleted through such losses.

UNITED STATES v. GOODWIN.

(Circuit Court, D. New Hampshire. May 13, 1884.)

1. CRIMINAL LAW—INDICTMENT.

An indictment need not set out the law upon which the offense was founded.

2. SAME—STATUTORY OFFENSE—STATUTE REPEALED—ARREST OF JUDGMENT.

If the indictment contains allegations, recitals, or averments that make it evident that the grand jury acted in finding it upon a statute which had been repealed, the judgment must be arrested.

3. SAME—~~SURPLUSAGE~~—ALLEGATIONS.

Such allegations cannot, though unnecessary, be rejected as surplusage, so as to allow judgment to be rendered under another statute enacted in place of the one repealed.

Motion in Arrest of Judgment.

Mr. Burns, U. S. Atty., for the United States.

H. S. Clark, Sulloway, Topliff & O'Connor, for defendant.

CLARK, J. The indictment in this case contains three counts with the same averments and allegations, so far as necessary to be considered here. It was evidently drawn and found by the grand jury upon sections 4786 and 5485 of the Revised Statutes. The first of these sections provides that "in all cases where the application is made for pension or bounty land, and no agreement is filed with and approved by the commissioner as herein provided, the fee shall be ten dollars and no more." That is, the fee of the agent or attorney assisting the application. The other section (5485) declares that "any agent or attorney or other person instrumental in prosecuting any claim for pension or bounty land, who shall directly or indirectly contract for, demand, or receive or retain any greater compensation for his services or instrumentality in prosecuting a claim for pension or bounty land than is provided in the title pertaining to pensions, * * * shall be deemed guilty of a high misdemeanor, and upon conviction thereof shall for every such offense be fined," etc.

The indictment alleges that one Roy was an applicant for a pension, and that the respondent was his attorney; "that no articles of agreement setting forth any fee agreed to be paid to said Richard J. P. Goodwin by said Francis Roy were ever filed with the commissioner of pensions;" "that under the laws of the United States, and the provisions contained in the Revised Statutes of the United States in the title pertaining to pensions, no greater fee than ten dollars could lawfully be received by said Richard J. P. Goodwin for his services in prosecuting the said application of said Francis Roy as aforesaid;" and that "the said Richard J. P. Goodwin unlawfully received from said Roy, for his services in prosecuting said application for a pension as attorney, aforesaid, a sum greater than ten dollars, to-wit, the sum of sixty dollars."

By the act of June 20, 1878, (Supp. Rev. St. 386,) section 4786 of the Revised Statutes, "in the title pertaining to pensions," was repealed, and no provision of law was left in that title to prevent any attorney from taking a larger fee than \$10 for services rendered in prosecuting a pension claim. But by the act of June 20, 1878, which repealed section 4786, in the Revised Statutes, title "Pensions," it was again provided that "it shall be unlawful for any attorney, agent, or other person to demand or receive for his services in a pension case a greater sum than ten dollars."

By the repeal of section 4786, section 5485 was rendered inoperative, because there was left no provision in the title relating to pen-

sions to which it could apply, nor could it apply without further legislation to the act of June 20, 1878; which further legislation was supplied by the act of March 3, 1881, (1 Supp. Rev. St. 602.)

The question then is, can this indictment, found at the October term of this court in 1882, be sustained under the allegations in the indictment; section 4786 of the Revised Statutes, in the title pertaining to pensions, having been repealed by act of June 20, 1878? The district attorney contends that it can, under section 1 of the act of June 20, 1878, which provides that "it shall be unlawful for any attorney, agent, or other person to demand or receive for his services in a pension case a greater sum than ten dollars;" and under the act of March 3, 1881, which makes section 5485 of the Revised Statutes apply and extend to the act of the twentieth of June, 1878. But the difficulty is, that the indictment alleges that "under the laws of the United States, and the provisions contained in the Revised Statutes of the said United States in the title pertaining to pensions, no greater fee than ten dollars" could lawfully be received by said Richard J. P. Goodwin for his services, and the act of June 20, 1878, does not answer this allegation of the indictment. It is neither in the Revised Statutes nor in the title pertaining to pensions. It is a pretty decisive answer to the position to say that the grand jury in this indictment have charged the respondent with violating the law of the United States as contained in the title "Pensions" in the Revised Statutes, and not otherwise.

Again, it is argued that the act of June 20, 1878, may be regarded as one of the provisions of the title "Pensions" because it relates to pensions, and it was so held in *U. S. v. Jessup*, 15 FED. REP. 790, and in *U. S. v. Dowdell*, 8 FED. REP. 881; while the contrary opinion was held in *U. S. v. Mason*, 8 FED. REP. 412; *U. S. v. Hewitt*, 11 FED. REP. 243; and *U. S. v. Jenson*, 15 FED. REP. 138.

The weight of authority and argument, it seems to me, is against such contention or construction of the law.

The act of June 20, 1878, is neither in the title "Pensions" nor in the Revised Statutes.

Again, it is maintained that the offense charged in this indictment is, as alleged, against the laws of the United States, if not against the provisions contained in the Revised Statutes in the title pertaining to pensions, and that the words "and in the provisions contained in the Revised Statutes of said United States, in the title pertaining to pensions," may be rejected as surplusage. But that cannot well be. These last words proposed to be rejected limit the extent of the expression "laws of the United States" to the laws of the United States contained in the Revised Statutes, in the provisions in the title "Pensions," and point out particularly the law on which this indictment was found by the grand jury.

It is never necessary to set forth matters of law in a criminal proceeding. *U. S. v. Rhodes*, 1 Abb. (U. S.) 28. But if the indictment

set out the offense with greater particularity than is required, the proof must correspond with the averment; nothing connected with the offense is regarded as surplusage. *U. S. v. Brown*, 3 McLean, 233. And it must be that if the law supposed to govern the offense be set out in the indictment, and the grand jury present it to the court as their finding, it cannot be rejected, if erroneous, because it was the ground of their action.

In *Builer v. State*, 3 McCord, 383, it was held that an indictment need not recite the statute on which it is founded; but if an indictment professes to do so, a material variance will be fatal; or, if the statute does not support the verdict, it must fail. If there had been no allegations in the indictment as to the law, the indictment might have been sustained; but as these allegations make it quite evident that the finding of the grand jury was upon a law which had been repealed, I think that judgment must be arrested.

The act of June 20, 1878, is a penal statute, and must be construed strictly, and it cannot be held to be a part of the Revised Statutes, title "Pensions," so as to found the judgment in this case upon it.

POTTER, Trustee, v. BERTHELET and another.

(Circuit Court, E. D. Wisconsin. May 8, 1884.)

1. RULE FOR THE INTERPRETATION OF A CONTRACT.

A contract is to be construed according to the intent of the parties thereto, and by looking at all the provisions of the instrument, and not one alone. But, if the language of the contract is plain and unambiguous, interpretation is not allowable to ascertain the intent of the parties thereto. If it admits of more senses than one, it is to be interpreted in the sense in which the promisor had reason to suppose it was understood by the promisee.

2. THE WORD "EACH" CONSTRUED.

The word "each" occurring in the phrase "and each of them," in a contract, construed to mean "every."

3. DEMURRER OVERRULED.

A complaint based upon the breach of a contract examined, and *held* to state a cause of action, and that a demurrer must be overruled.

Demurrer to Complaint.

Davis, Riess & Shepard, for plaintiff.

Jenkins, Winkler & Smith, for defendants.

DYER, J. In an agreement of date April 11, 1870, made between Edward L. Baker, Henry Knight, and Edwin Dayton, of the first part, and the defendants, Henry and Joseph R. Berthelet, of the second part, it was, among other things, recited that—

"Whereas, the following specified letters patent of the United States, granted to secure certain inventions therein set forth, of machines and of improvements in machines, and in mechanical devices for moulding or forming hydraulic sewer and drain pipes, of cement or of other plastic material,—

namely, number 11,440, dated August 1, 1854; number 26,614, dated December 27, 1859; number 2,137 or 33,161, dated August 27, 1861; number 1,277, dated February 25, 1862; number 34,890, dated April 8, 1862; number 35,243, dated May 13, 1862; number 35,692, dated June 24, 1862; number 45,229, dated November 29, 1864; and number 3,413, dated April 27, 1869,—have all been assigned and transferred unto the said Baker, Knight, and Dayton, to hold upon certain trusts recited in the written agreement made and executed by them and James L. Woodward, of the city of New York, on the eleventh day of April, 1870, whereby they, the said trustees, were fully empowered, among other things, to grant licenses under said letters patent: Now, therefore the said trustees, in consideration of twenty-five hundred dollars to them paid, the receipt whereof is hereby acknowledged, do hereby lease unto the said Henry Berthelet and Joseph R. Berthelet the following specified machinery and apparatus, embodying in their construction the inventions patented as aforesaid, or some of them, namely, complete machinery for manufacturing all sizes of pipes or other articles to be made thereon, to be held and used by the said lessees during the continuance of the terms, whether original or extended, for which the said letters patent *and each of them* have been or may hereafter be granted and secured, by assignment or otherwise, to the said trustees, or to their successors in the said trust, unless otherwise sooner determined by the conditions or limitations hereinafter specified."

The agreement then proceeds to prescribe various conditions further declaratory of the rights of the parties, the lessees obligating themselves by covenant to keep the machinery and apparatus leased to them in good working order and thorough repair, and to pay to the trustees, or to their assigns or successors in trust, during the continuance of the lease, license fees for all pipe or similar articles of manufacture operated upon, or moulded or shaped, wholly or partially, by means of the said machinery or apparatus, or any part thereof, upon each and every lineal foot of such pipe or similar articles, one quarter of one cent for each inch in diameter of the bore thereof, such royalty to be paid on sales. It was also further provided—

"That at the expiration of *all the letters patent aforesaid, and of all extensions and renewals thereof*, in which are set forth and claimed the inventions and improvements, and each of them, contained and embodied in the said machinery and apparatus, the said lessees, if they shall have fully complied with the terms and conditions of this lease, shall have the privilege of purchasing the said machinery and apparatus hereby leased, by the further payment of one dollar."

This suit is brought by the plaintiff, Potter, as successor in interest in said agreement, to recover royalties alleged to be due on account of hydraulic and other pipe, and material manufactured by the defendants by means of said machinery, and sold by them between January 1, 1880, and November 29, 1881. The complaint is demurred to on the ground that it does not state facts constituting a cause of action. It appears from the allegations of the complaint that the various letters patent enumerated in the agreement, and the renewals of such of them as were extended, expired, from time to time, between April, 1879, and November, 1881, the first expiration

v.20,no.4—16

occurring April 8, 1879, and the last, November 29, 1881. It is also alleged that the defendants paid all royalties that accrued prior to January 1, 1880, in quarterly installments, as they fell due, according to the terms of the agreement, but have refused to pay the royalties accruing between that date and November 29, 1881, when the last patent expired.

The decision of the demurrer turns upon the construction of the clause of the agreement which provides that the machinery shall be "held and used by the said lessees during the continuance of the terms, whether original or extended, for which the said letters patent, and each of them, have been or may hereafter be granted and secured, by assignment or otherwise, to the said trustees," etc. The contention of counsel for the defendants is that the contract was not in force at the time the alleged breach occurred; that it ceased to be in force April 8, 1879, when the first expiration of one of the series of patents occurred; that it did not continue in operation until the expiration of all the patents, but fell with the patent which first expired. This view of the case is based upon the construction which counsel give to the words "and each of them," in the clause of the agreement last above quoted. It is said that these words are not equivalent to the expression "and any of them," it being conceded that if those words had been used, the contract would have continued in force until the last of the series of patents expired. It is a cardinal rule that a contract is to be construed according to the intent of the parties to the instrument; that in ascertaining that intent we are to look to the language in which they have spoken, and if that language is plain and unambiguous, interpretation is not allowable. *Ogden v. Glidden*, 9 Wis. 52.

But it is also true that in construing a contract like this, and in arriving at its meaning and the intent of the parties, all the provisions of the instrument are to be looked at, and not single clauses alone. Thus examining this agreement, it seems to me quite obvious that counsel make the question too strictly one of purely grammatical construction. If the literal construction of the words "and each of them" would manifestly violate the intent of the parties, as such intent may be gathered from the whole instrument, it ought not to prevail. It is to be observed that the *habendum* clause begins with the language "to be held and used by the said lessees during the continuance of the terms, whether original or extended, for which the said letters patent," etc.; thus, in the beginning, evincing an intention to make the term of the lease co-extensive with the life of all the patents. Then follow the words "and each of them;" the word "each," as a distributive adjective pronoun, denoting every one of the several letters patent composing a whole, considered separately from the rest. *Webst. Dict.* Upon the argument this case was put: Suppose an estate is granted to one, to be held during the lives of several persons, and each of them, would not the estate lapse on the ter-

mination of either of the specified lives? Admitting that it would, is the case supposed precisely analogous to the case presented by the language of this lease? I hardly think it is. In other words, in the connection and sense in which the words "and each of them" stand in the *habendum* clause, and considering what precedes those words, are they not equivalent to the expression "and every of them," or the expression "and any of them?"

As illustrative of the application of certain principles of legal construction, the case of *Hayden v. Snell*, 9 Gray, 865, is perhaps germane to the question we are considering. There was a promise to pay J. S., or his wife, A. S., an annuity during their natural lives. The plaintiff, in her declaration, set forth the promise, the death of her husband, and the subsequent refusal of the defendant to pay the annuity to her. The defendant demurred, and contended that the words "during their natural lives" should be construed according to grammatical rules; that "during their natural lives" meant the same as "during their joint lives," and not the same as "during their lives and the life of the survivor of them." But the court held that the contract declared on was, in legal effect, an agreement to pay the stipulated sum yearly to both of the persons named, as promisees, and so long as both survived an action might have been maintained in their names jointly. Upon the death of either, the right of action would remain in the survivor. It was, therefore, a promise to pay both, and the survivor of them, so long as they or either of them should live.

However, conceding that the construction which counsel, in support of the demurrer, place upon that part of the *habendum* clause of the agreement referred to, is literally and grammatically correct, it seems to me manifest that its adoption would defeat the true intention of the parties as fairly to be collected from the whole agreement. *Tuller v. Davis*, 4 Duer, 191. Where the terms of a promise admit of more senses than one, it is to be interpreted in the sense in which the promisor had reason to suppose it was understood by the promisee. *White v. Hoyt*, 73 N. Y. 505. In the first place, all the letters patent are enumerated in the agreement. At the date of the agreement, a pecuniary consideration, considerable in amount, (\$2,500,) was paid by the defendants for the right to use the patented machinery, and it is evident, from the various provisions of the lease, that it was expected an extensive business would be done. The lessees were to keep books of account, which were to be open to the inspection of the lessors, and were to render to the lessors, and their assigns and successors, quarterly accounts, showing the quantities and kinds of articles manufactured by them during the continuance of the lease. They agreed, among other things, that they would not employ nor operate any other machinery or apparatus for making or moulding cement or other plastic pipe, or similar articles of manufacture, than that so leased; that they would preserve upon the machinery the titles and dates of the letters patent, as placed thereon.

by the lessors, their assigns or successors in the trust; and that they would not violate or infringe any or either of said letters patent, nor dispute or contest the validity of the same, or the title thereto of the lessors. The lessors on their part bound themselves not to grant to any other person or persons any lease of such machinery, or right to make, sell, or use the same within the limits of the territory granted to the defendants.

Then, of still more persuasive force, as evincing the understanding of the parties with reference to the term of the lease, it was provided, as we have seen, that *at the expiration of all the letters patent, and of all extensions and renewals thereof*, the lessees, if they had fully complied with the terms and conditions of the agreement, were to have the privilege of purchasing the machinery and apparatus by the payment of one dollar. By this provision it could not have been understood or intended that at the first expiration of one of the patents the lease should cease to be operative, and then at the expiration of all the patents the lessees should have the right to purchase the leased machinery by the payment of one dollar. Such a construction of this provision would involve a manifest absurdity; because, in that case, at the first expiration of one of the patents and the consequent termination of the lease, the leased machinery would, of necessity, pass back into the possession of the lessors, who would be obliged to hold it until the expiration of all the letters patent, and then sell it to the lessees for one dollar, if they elected to purchase it, which election could only be declared after all the patents had expired. It seems very clear, when we give proper force to this clause of the lease,—which is a very important one,—and when we consider all the other provisions which have been adverted to, that it was the intention of the parties to make the term of the lease co-extensive in duration with the life of all the patents, and that no violence is done to rules of legal construction when we construe the words “and each of them,” in the *habendum* clause, in accordance with such intention, rather than by rules of strict grammatical construction applicable to those words alone.

Demurrer overruled.

CARLL and others v. THE ERASTUS WIMAN.

SMITH and others v. SAME.

HALLOOK, as Adm'r, v. ANDERSON.

ANDERSON and others v. CARLL and others.

In re CARLL, Petitioner.

(District Court, S. D. New York. April 28, 1884.)

1. COLLISION—SAILING VESSELS—LOOKOUT—PRESUMPTION.

Where a collision happens between two sailing vessels, the one sailing close-hauled, the other with the wind free, the night being clear and the lights of both vessels seen, the legal presumption is *prima facie* that the fault was in the vessel sailing free. This presumption is increased by proof of the absence in the latter of any lookout other than the captain standing near the wheel.

2. SAME—PREPONDERANCE OF PROOF.

The evidence of neither of the persons on deck of the latter being obtained,—the captain having been knocked overboard and drowned at the time of the collision, and the wheelsman having died before the trial,—and the only evidence in her behalf being that of the captain of another schooner about half a mile ahead, sailing in the same direction, who testified that the schooner, sailing close-hauled, just before she was reached luffed up into the wind so that her sails shook, and then, paying off, ran down on the other schooner, and several witnesses from the schooner close-hauled contradicting the alleged luff, and giving a consistent and probable narrative involving no fault on their part: *held*, that the luff alleged was improbable under the circumstances, and not sustained by the weight of proof; that the libelants had not overcome the presumption against them by any preponderance of proof; and that the libel must be dismissed.

In Admiralty.

Scudder & Carter and Geo. A. Black, for Carll, etc.

Benedict, Taft & Benedict, for the Wiman.

BROWN, J. The above five cases grow out of a collision which happened in Long Island sound, near Little Gull island, at about 11 o'clock of the night of October 26, 1881, between the schooner P. H. Wheaton, bound to the eastward, and the schooner Erastus Wiman, bound westward, whereby the former was immediately sunk. The captain of the Wheaton was knocked overboard by the collision and drowned. The third libel above named was brought by his administratrix to recover damages on account of his death. The two libels first named were brought by the owners of the Wheaton and her cargo, respectively; the fourth was brought by the owners of the Wiman to recover their damages; and the fifth is a proceeding by the owners of the Wheaton to limit their liability. During the day preceding the collision it had been blowing a gale from the north-west, and the Wiman had been at anchor in the sound. She was a three-masted, center-board schooner, of 597 tons register. At about 6 p. m., the

gale having somewhat abated, she resumed her voyage to the westward, and about 11 o'clock was near Little Gull island and Fisher's island. The wind was blowing fresh from the north-west, slightly variable, and the sea was rough. Some 10 or 15 minutes before the collision, the Wiman had made a short tack to the northward, and was then put upon her course, W. $\frac{1}{2}$ S., sailing close-hauled, full and by. The Wheaton was a three-masted schooner of 242 tons register, and was sailing, probably, upon a course of about E., or E. by S. The only persons on deck at the time of the collision were her captain and the wheelsman. The captain stood by the wheel, and was the only lookout. She had no lookout forward. The wheelsman died before the case was tried, and his evidence was not taken. The other three who composed her crew were below, and did not come on deck until after the collision. The Wheaton had been sailing during the afternoon and evening in company with the schooner Witch Hazel, which was about half a mile ahead of the former. No direct evidence of importance being obtainable from those on board the Wheaton, the principal evidence on her part is from the captain of the Witch Hazel.

The contention of the libelants is that the Wheaton was considerably to leeward of the Witch Hazel; that when the captain of the latter observed the two colored lights of the Wiman, and that the two vessels were approaching each other nearly head and head, he starboarded his wheel in order to pass to windward; and that had the Wiman kept her course she would have passed easily between the Witch Hazel and the Wheaton, namely, to leeward of the former; but that just before reaching the Witch Hazel the Wiman luffed up into the wind, crossing the bows of the Witch Hazel and compelling the latter to pass to leeward of the Wiman under a sudden port wheel; and that the Wiman, by this luff, came up into the wind so that her sails shook, her headway was lost, and, in getting upon her course again, she paid off so much to leeward as to run into the Wheaton.

The captain of the Witch Hazel, in substance, gives this account of the matter: He says that he first saw the two colored lights of the Wiman about a half point on his starboard bow, a half mile or more ahead; that his previous course was E. by S., $\frac{1}{2}$ S.; that he then put his vessel to port a point and a half, so that she was sailing about E.; but as he found that the Wiman was coming too close to him, he put his vessel to port another half point, and that very shortly afterwards the green light of the Wiman was shut in, and she shot across his bows with her sails shaking; that he immediately ported and passed within a few feet of her to leeward; and that in getting on her course again the Wiman paid off broadly, as above stated.

Three witnesses from the Wiman, on the contrary, testify that they were sailing W. $\frac{1}{2}$ S., full and by, after the short tack to the northward above referred to; that they saw the two lights of the Witch

Hazel from half a mile to a mile distant, a little on their port bow; that she remained so all the time until she passed to leeward of them, and that there was no luff or change in the course of the Wiman whatever, until after passing the Witch Hazel, a few moments before the collision, when the wheel of the Wiman was put hard a-port, *in extremis*, to avoid the collision; that shortly after seeing the two lights of the Witch Hazel, the green light of the Wheaton was seen nearly ahead, or a little on the starboard bow. Two of her witnesses say that the green light continued to broaden off on the starboard bow until it had reached, one witness says, one or two points, and the other says three points, on the Wiman's starboard bow, after she had passed the Witch Hazel; that not long before the collision the Wheaton suddenly changed her course, under a port wheel, so as to pass to port of the Wiman; showed her two lights for a few seconds, then shut in her green light and showed her red light; that the Wiman then put her helm hard a-port; and that the collision happened a few seconds afterwards, the port bow of the Wiman striking the port quarter of the Wheaton.

From the lights of the Wiman it was manifest to both the other vessels, from the first, that the Wiman was sailing close-hauled; and the others were bound to keep out of her way. A collision having happened, the presumption is against the Wheaton. The burden of proof is upon her to show by a preponderance of evidence some fault of the Wiman. The presumption against the Wheaton is increased in this case by the absence of any proper lookout on deck. The only evidence upon which she can rely is that of Capt. Arnold, of the Witch Hazel. It is impossible for me to hold that his evidence alone is sufficient to overcome the direct and positive evidence of the three persons who were on board the Wiman, who testify that there was no such luff as supposed. The testimony of these three persons, though varying somewhat, does not differ more than might be expected from the different time or manner of observing by witnesses who are not swearing to a concerted story.

Upon the courses given for the Wiman and the Witch Hazel, the positions in which it is testified that their lights were first seen to each other, respectively, are not strictly reconcilable with each other. Their courses as given varied two points from opposite. If this were so, the two lights of the Wiman could not have been seen half a point to starboard of the Witch Hazel, and the Witch Hazel's two lights at the same time have been seen a little on the port side of the Wiman. It would require a variation of about two points by one of the vessels, or by both of them together, to make this possible. The Wiman alone could not vary so much to the northward, as the wind would not have permitted it; the Witch Hazel, on the other hand, with the wind nearly aft, and yawing easily, might have been going considerably to the windward of her supposed course at the moment when the Wiman was first seen, as her captain says, half a point on

the Witch Hazel's starboard bow. If the latter were at that moment thus yawing to the northward, that would explain why, when the captain ordered her course due east, that supposed change did not shortly cause the red light of the Wiman to be shut in, or the green light only of the Witch Hazel to be seen on the Wiman, as he intended. The evidence from the Wiman, however, is unanimous that the two lights of the Witch Hazel continued to be seen all the time until she passed to port. Not only is it improbable that the Wiman, sailing close-hauled, should have luffed up into the wind, if the Witch Hazel were passing to windward of her; but if, as Capt. Arnold supposed, he had changed his course so as to show his green light only, it would be utterly incredible that the captain of the Wiman, seeing only the green light, and seeing that to windward also, should have luffed so as to go apparently directly into her. The rule so often applied in such cases should therefore be applied in this: that superior credit must be given, in regard to a vessel's own movements, to the testimony of those on board of her, where it is probable and consistent, and not overborne by any decided weight of other testimony. The appearances testified to by Capt. Arnold I have no doubt were caused mainly by the changes in his own position.

The testimony of Capt. Arnold is altogether insufficient to establish how far the Wheaton was to leeward of his own course. In one place he estimates it to be a quarter of a mile; in another place he calls it a short distance to leeward; but the precise course that the Wheaton was keeping is not known. Capt. Arnold says that she was going somewhat more to the northward than he. Whatever her distance to leeward was at some previous time, according to his testimony, therefore, it must have been constantly lessening; and nothing trustworthy can be gathered from his general estimate under such circumstances. Counsel for the libelants claim that if the Wheaton were to leeward of the Witch Hazel her lights could not have been seen from the Wiman, as testified to by the witnesses on the Wiman, to the windward of the Witch Hazel, so as to be more upon the Wiman's starboard bow than the Witch Hazel's lights. Considering, however, that the Wheaton was half a mile astern of the Witch Hazel, and that the courses of the latter and the Wiman varied two points from opposite, it will be found by placing models on a chart that the Wheaton might be some considerable distance to leeward of the course of the Witch Hazel, and yet, as seen from the Wiman, be more on the latter's starboard hand than the Witch Hazel, precisely as the Wiman's witnesses testify. The testimony of Capt. Arnold, moreover, that the Wheaton was sailing more northerly than he, accords with the testimony of the witnesses from the Wiman, that they saw only the green light of the Wheaton; and if her green light only were visible, and her course was more northerly than that of the Witch Hazel, the Wheaton would naturally and necessarily broaden off more to starboard, as two of the witnesses from the Wiman state. So that

the account given by the latter seems to me confirmed in part by Capt. Arnold.

What may have been the particular cause which induced the Wheaton to port her wheel, when she was to starboard of the Wiman, cannot be known, in the absence of all testimony on that subject. That she did port is testified to by all the witnesses, including Capt. Arnold; the libel also alleges it.

Without adverting to the testimony as to the amount which the Wiman would pay off before she could regain her course, after luffing up into the wind and losing her headway, it is sufficient to say that I cannot regard such a luff as established. In any case, it would be almost incredible that a schooner sailing on the wind, and having the right of way, should without apparent necessity have luffed so as to lose all headway. But if she had, the vessel would have been a very poor sailer, or very badly handled, that would not have regained her course in far less distance than the half mile which separated the Witch Hazel and the Wheaton.

The evidence on behalf of the Wheaton seems to me totally insufficient to overcome the presumptions which are against her; and the libels on her behalf must therefore be dismissed, with costs. *The E. H. Webster*, 18 FED. REP. 724; *The City of Chester*, Id. 603; *The Albert Mason*, 8 FED. REP. 768; S. C. 2 FED. REP. 821.

The cross-libel in favor of the Wiman is rendered unavailing through the loss on the Wheaton. The proceeding to limit liability, which has been instituted by her owners, is sufficient to prevent any decree against them in this case.

SUMNER and others v. CASWELL and others.

(District Court, S. D. New York. May 9, 1884.)

1. COMMON CARRIER—PARTICULAR VOYAGE—CHARTER-PARTY—BILL OF LADING.

Where a ship is chartered to carry the goods of a single freighter only upon a particular voyage, *semble*, she is not a common carrier, but is subject only to the express and implied obligations of the charter-party and bill of lading.

2. SAME—WARRANTY—SEAWORTHINESS.

The implied terms of such a charter, and the ordinary bills of lading given in pursuance of it, as well as the covenant in the charter that the ship shall be "tight, stanch, strong, and every way fitted for the voyage," include an implied warranty of the seaworthiness of the vessel at the time she sails for the particular voyage, and in respect to the cargo laden on board.

3. SAME—BALLAST.

The proper ballasting of the ship, and the amount and arrangement of the cargo so as to make her sufficiently steady, are included in seaworthiness.

4. SAME—JETTISON—LIMITED LIABILITY—REV. ST. § 4213—PENDING FREIGHT—AMENDMENT.

Where the libelants agreed to take a cargo of petroleum in low-top 10-gallon cases from Philadelphia to Japan, and the owners superintended the loading

and ballasting of the ship, and determined the amount of cargo they would receive, and on starting from Philadelphia the ship was found unsteady, and, immediately on getting to sea, showed great crankness, so that, notwithstanding all efforts to diminish it, the ship, on the fourteenth day out, in a storm of no unusual character, was nearly on her beam ends, and it was found necessary to jettison 3,000 of the cases, *held*, that the jettison was made necessary, not by perils of the seas, but because the ship was top-heavy from want of sufficient ballast in connection with the loading, and that these defects were at the risk of the ship-owners, and within their express and implied warranty of seaworthiness. *Held, therefore*, that the ship-owners were liable on their bond given in this proceeding to limit their liability for the loss by jettison. *Held, further*, that section 4283, Rev. St., requires the surrender of pending freight, which includes, at least, the freight earned up to the time of the loss; and liberty was given to the libelants to amend their proceedings by paying the amount of such freight into court, or giving a further bond therefor.

This libel was filed by the owners of the ship *Castine* to limit their liability under sections 4283, 4284, of the Revised Statutes. At the same time they contest their liability. The ship was chartered by a contract of affreightment, to carry a "full and complete cargo of refined petroleum in the customary low-top, ten-gallon cases, at forty-seven and a half cents per case," from Philadelphia to Yokohama, Hiogo, or Nagasaki, Japan. On the part of the owners, the charter-party provided that the vessel should be "tight, staunch, strong, and every way fitted for such voyage, and to receive on board the said merchandise." She was loaded at Philadelphia under the direction of the owners, and 37,000 cases put on board. She left Philadelphia on the twenty-eighth day of November, 1878. From the first it was perceived that she was unsteady. On getting out to sea she was found to be quite crank, which increased with rough weather. On the fourteenth day out, in a storm, she was nearly on her beam ends; and two days after it was found necessary to jettison 3,000 cases, of the value of about \$13,000. The necessity of the jettison is not disputed, and everything was done by the captain that could be done to avert it. She subsequently reached Hiogo with the remainder of the cargo. A claim being made on the owners of the cargo jettisoned, on the ground that the ship was unseaworthy and top-heavy for the want of sufficient ballast, and the loss being greater than the value of the ship, the owners filed this libel to limit their liability as above stated, and have bonded the vessel in the sum of \$10,000; while they contest their liability for any damage, alleging that there was no fault or want of care on their part to cause the loss.

Scudder & Carter and *Geo. A. Black*, for libelants.

Treadwell Cleveland, for respondents.

BROWN, J. The libelants have proved, so far as affirmative testimony in such cases can prove, that there was no intentional failure in any respect to make the ship seaworthy by means of proper loading, stowage, dunnage, and the use of all the ballast which, from the previous trips of the ship, they supposed would be required. The ship had not carried petroleum in cases before; but she had carried it in

barrels, which would seem to be not less compact and steady than the cases; and 90 tons of ballast were used, which was all that had been before found necessary. On the ground that they used all such care and diligence as could reasonably have been expected in the stowage and ballasting of the ship, the owners insist that no liability attaches to them; contending that, under a charter of the character described, they are not responsible as common carriers, but only for reasonable diligence as bailees for hire.

The charter appears to have contemplated carrying the goods of the freighters only. She was in no sense, therefore, a general ship; but only a ship hired for a specific voyage, to carry a particular cargo for the charterers. Such a contract does not seem to be within the definition of a common carrier. In the case of *The Niagara v. Cordes*, 21 How. 7, a common carrier is defined as "one who undertakes for hire to transport the goods of those who may choose to employ him from place to place. He is, in general, bound to take the goods of all who offer, unless his complement for the trip is full, or the goods be of such a kind as to be liable to extraordinary danger, or such as he is unaccustomed to convey." None of these conditions attach to a contract of affreightment in charter-parties like the present. In *Lamb v. Parkman*, 1 Spr. 353, it is stated by SPRAGUE, J., that such contracts "are not those of a common carrier, but of bailees for hire, bound to the use of ordinary care and skill." And such is the view taken in *Pars. Shipp. & Adm.* vol. 1, pp. 245, 248. The most recent discussion of the subject is in the case of *Nugent v. Smith*, 1 C. P. Div. 19, in which a liability like that of a common carrier was upheld by BRETT, J., but was subsequently overruled in the court of appeal by COCKBURN, C. J. 1 C. P. Div. 423, (1876.)

It is not necessary, however, to pursue this inquiry further, as the liability of the ship-owners in this case does not seem to me to rest upon this distinction, but rather upon the provisions of the charter itself. I can have no doubt from the testimony that the jettison was made necessary mainly, if not wholly, in consequence of the ship's being top-heavy through the want of sufficient ballast. She was not, probably, too deeply loaded, had there been sufficient ballast at the bottom. A suggestion is made of insufficient dunnage; but it is not clear how this could have contributed to the difficulty. There was some leakage of oil from the time the vessel got to sea, which was shown in all the pumpings. The evidence of the captain, however, is to the effect that this was not an important element in requiring the jettison of part of the cargo. There was some rough weather; one storm was encountered; but the log gives no indication that it was of an extraordinary character, while the entries from the first contain almost daily mention of the great crankness of the ship. I can have no doubt, therefore, that the cause of the loss was not perils of the sea, since no unusual weather was encountered, (*Hubert v. Recknagel*, 13 FED. REP.

912,) but the unseaworthiness of the ship, through her mode of lading, in connection with the want of sufficient ballast to prevent her being dangerously top-heavy.

The owners in this case, or their agents, undertook the supervision of the loading of the vessel in person. Mr. Currier, one of the part owners, procured the stevedore and the dunnage; and he determined the amount of ballast to be used. The captain did not arrive until the vessel was loaded and nearly ready to sail. The charter-party provided that the vessel should be in every way fitted for the voyage. This includes the furnishing of necessary ballast, since it is the duty of the owner to find proper ballast for the ship in order to make her trim for the voyage. *Irving v. Clegg*, 1 Bing. N. C. 53. The covenant that the ship shall be in every way fitted for such a voyage, in my judgment, covers the proper ballasting of the vessel, as it does her proper equipment in all other respects. The owners must be held legally chargeable with knowledge of the amount of ballast required by their own vessel, and of the cargo they had undertaken to carry. It is not to be supposed that freighters who have no knowledge of the ship or control of the lading, either in the manner of stowage or ballasting, or the amount of cargo to be taken on board, are intended to be charged with the risks of any unseaworthiness occasioned by such causes. It was the clear duty of the owners to take notice, and to know, whether the vessel was in proper trim to proceed to sea. They took such cargo as they saw fit to put aboard; no amount was specified in the charter; it was left at the option of the owners. One of the witnesses says: "The people that loaded the ship ordered the vessel to be loaded, and they ought to know how she should be loaded; it lays with them. They loaded her just as they thought proper; they can fill her half full, or full. Of course, we give them all the cases they want; all that they required."

In taking as many cases as they chose to take, and loading the vessel as they saw fit, the libelants were bound to take so much cargo only, and to stow it in such a manner as that the ship should be fit for such a voyage; and they, and not the shippers, took the risk, therefore, of any imperfect knowledge they may have had, from whatever cause, as to the proper adjustment of the cargo and the amount of ballast to make her seaworthy.

Bills of lading, moreover, in the usual form, in pursuance of a provision to that effect in the charter-party, were given for the goods received on board. Besides the express contract that the vessel should be fitted for the voyage, there was also the warranty implied by law under the bills of lading, as well as incident to the charter and a part of every such contract, that the ship, at the time she sailed, was in all respects seaworthy, and fit and competent for the sort of cargo and the particular service for which she was engaged. 3 Kent, *205; *Macl. Shipp.* 406; *Work v. Leathers*, 97 U. S. 379; *The Rebecca*, 1

Ware, 192; *The Titania*, 19 FED. REP. 101, 107; *The Lizzie W. Vir-den*, 19 Blatchf. 340; S. C. 11 FED. REP. 903; *Cohn v. Davidson*, 2 Q. B. Div. 455.

The two cases last cited are not, in principle, distinguishable from the present. In both cases the vessel sailed under a charter. In the former, almonds were injured by the fumes of petroleum carried upon a former voyage. BLATCHFORD, J., says, (p. 344:) "The owner's contract, in this case, was to provide a vessel fit to carry this cargo. She was not fit. The shipper took no risks but the perils of the sea, and the damage in this case was not a peril of the sea." At page 354 he says, again: "The ship-owners, not the charterers, took, under this contract, the risk of the condition of the vessel,—the risk of there not being heat and steam, and the risk of so cleansing the vessel as to take the cargo safe from petroleum damage, notwithstanding heat and steam." In *Cohn v. Davidson*, the ship, though apparently seaworthy when she sailed, foundered at sea from some unknown cause. The ground of the shipper's liability is there fully discussed by the court; and the owners were held liable because, "by the nature of the contract, they impliedly and necessarily warrant that the ship is good, and in a condition to perform the voyage then about to be undertaken, or, in ordinary language, is seaworthy; that is, fit to meet and undergo the perils of the sea and other incidental risks to which she must, of necessity, be exposed in the course of the voyage, (*Kopitoff v. Wilson*, 1 Q. B. Div. 380;) and this implied warranty attaches and has reference to all the conditions of the ship at the time she enters upon her voyage."

However unexpected the crankness of this ship may have been, the evidence clearly shows that from the moment she got to sea she was in an unseaworthy condition, and unfit to encounter the ordinary perils of a sea voyage. The jettison was made necessary, not from any unusual stress of weather she met, for there was none such, but from her unseaworthy condition when she sailed.

The libelants must therefore be held responsible for the loss, upon the express as well as implied terms of the contract, as in the cases above cited, and in *Hubert v. Recknagel*, *ut supra*, and the case of *The Regulus*, 18 FED. REP. 380. The grounds upon which the case of *The Titania* was decided (19 FED. REP. 101, 107) are not applicable here; and in the case of *Lamb v. Parkman*, *supra*, the mode of stowage in no way affected the seaworthiness of the ship, so as to constitute a breach of the express or implied warranty of the charter and bill of lading.

The libelants must therefore be held answerable upon the bond heretofore given in these proceedings.

Section 4283 requires not only the surrender of the ship, but also of the pending freight. No bond has been given on account of any pending freight. These terms must be held to include at least the freight accruing and earned up to the time of the loss. The libel-

ants may amend their proceedings by including the pending freight, and paying the amount into court, or giving bond therefor, in addition to the bond already given. If the proportion of net freight earned up to the time of the loss is not agreed on, a reference may be taken to ascertain it.

The defendant is entitled to the costs of this trial.

THE STATE OF TEXAS.

(District Court, S. D. New York. April 29, 1884.)

1. COLLISION—TURNING IN THE EAST RIVER—LOOKOUT—OVERTAKING VESSEL.

A steamer in the East river, having upon her own starboard hand another large steamer, evidently engaged in turning around in a way that must cross the course of the former, is bound to keep out of her way, and give room for her necessary path in turning. When that duty has attached, she cannot relieve herself of it by getting across the bows of the latter and claiming that the latter is then in the position of a following or overtaking vessel.

2. SAME—CASE STATED.

A large steamer, engaged in making a turn in the East river, is bound to special watchfulness and care to avoid contact with other vessels. The lookout having failed to continue his attention to a tug and tow on the opposite side of the river, and a collision having happened, which, by such attention, would have been avoided by the steamer's timely backing, *held*, that both were in fault,—the steamer for inattention, and the tug for steering across the steamer's path, instead of stopping, as she might have done.

The libel in this case was filed by the owners of the schooner Knight, to recover damages for a collision with the steam-ship State of Texas, on the twenty-first of March, 1882, about 7 A. M., near the middle of the East river, a short distance above the Brooklyn bridge. The schooner was in tow of the steam-tug Unit, on a hawser from 30 to 35 fathoms long. They were going from Wallabout down the East river, and, until coming near the bridge, had been going within a few rods of the Brooklyn shore, with the tide strong flood. The top of the mizzen-mast, including the flag-staff, was about 125 feet from the water, requiring her to pass nearly under the center of the bridge, and it was while going from her previous position near the shore, across, to pass near the center of the bridge, that the collision happened.

The state of Texas is a steamer of about 1,800 tons register, and 249 feet long. She had come in from sea that morning, bound for pier 20, East river, which is below the bridge; but she was prevented from landing there through the presence of another schooner, which was in the way. She accordingly drifted up, moving slowly, and gradually turning under a hard a-port wheel, designing to make a landing at the pier by returning heading against the tide. In making this turn, and going back and forth in the process, she drifted

somewhat above the bridge. When the schooner and tug were first seen from the State of Texas they were close to the Brooklyn shore, as above stated, while the State of Texas had her stern very near to one of the ferry slips above the bridge, on the New York side, and was pointing nearly across the river, but a little up, in the region of the Empire stores. The steamer moved ahead under a hard a-port wheel, gradually turning downwards. When the tug and schooner were seen coming across the river, the steamer's engines were reversed full speed, but not in time to avoid hitting the starboard bow of the schooner, from which the latter received some injury.

Owen & Gray, for libelants.

Butler, Stillman & Hubbard, for State of Texas.

Scudder & Carter and Geo. A. Black, for the Unit.

Brown, J. The pilot of the Unit saw the State of Texas when her stern was very near the New York shore, a little way above the bridge, when she was headed nearly across the river. He had no right to suppose at that time that she was merely drifting. Any proper observation of her previous movements, which were clearly visible, would have shown that she was engaged in turning round, and the Unit must therefore be held chargeable with knowledge that the steamer was engaged in that maneuver. The pilot of the Unit had the steamer at that time on his own starboard hand. He was bound to anticipate just what happened, that she would move out into the river for the purpose of turning. He was bound to keep out of her necessary way, and to leave her room reasonably sufficient to execute the maneuver in which the steamer was then engaged, precisely as he would have been bound to keep out of the way of a schooner beating downward, which had run out her tack and was in stays in coming about. This he might have done without difficulty or danger, by stopping before approaching the center of the bridge, as the tide was flood. Instead of doing so, he went on with unabated speed, veering to the westward to reach the central portion of the bridge, and while thus passing the necessary path of the steamer in executing her turn, he drew the schooner directly in the way of the steamer's course; and he must, therefore, be held chargeable with fault in bringing about the collision.

The steamer was not in the position of an overtaking vessel bound to keep out of the way; certainly not so before the tug had violated her duty of keeping out of the way of the necessary course of the steamer in making her turn. Where one steamer is bound to keep out of the way of another on her starboard hand, their courses being intersecting, she certainly does not relieve herself of that duty by crossing the path and getting under the bows of the latter. She cannot plead her own fault as a justification, and claim that the vessel thus wrongfully brought on the quarter or astern, is in the situation of an overtaking vessel, and thus reverse the original obligation on her own part to keep out of the way. If the courses are intersecting,

the rule is the same, though she be a little ahead. *The Cayuga*, 14 Wall. 270, 275. The steamer in this case was not two points aft of abeam, but on the Unit's starboard hand, when the latter began her sheer; and hence the steamer was not a following or overtaking vessel. *The Franconia*, 2 Prob. Div. 8; *The Cayuga*, *supra*. There was danger of collision from the very act of sheering to the westward, and the Unit was therefore bound to refrain from such a change. *The Nichols*, 7 Wall. 656; *The Free State*, 91 U. S. 200.

But the State of Texas cannot be excused from fault. The navigation of the steam-tug with the schooner upon a hawser, from the moment when they were first seen near the Brooklyn shore, was such as to require special watchfulness to avoid a collision. The high masts of the schooner evidently required her to approach the center of the bridge, if she continued on. The turning, moreover, of a steamer of such size as the State of Texas in so narrow a place as the vicinity of the bridge, required careful and continuous watchfulness. While the difficulties of handling the steamer are fully recognized, and while I am satisfied that the captain did the best he could, I think the testimony shows clearly that the lookout on the steamer was not as attentive to the course of the tug and tow, after he had first seen them, as the situation required. The evidence shows that after seeing them first, near the Brooklyn shore, he did not suppose they required particular attention; and that he did not observe them again until some little time after, when the tug was already crossing the steamer's path. Had the tug been noticed, as she ought to have been, when she commenced her sheer to the westward, there would not have been any difficulty in the steamer's reversing in time to prevent the collision. She was not noticed until too late, although the steamer's engines were put full speed astern. The previous fault of the tug did not relieve the steamer of her duty to keep constant watch for the purpose of avoiding injury. *The Maria Martin*, 12 Wall 31; *The Vim*, 12 Fed. Rep. 906; *The Pegasus*, 19 Fed. Rep. 46. In this respect I must hold the steamer also liable, and award a decree against both in favor of the libellant, with costs.

FLASH and others v. WILKERSON and others.

(Circuit Court, W. D. Tennessee. May 22, 1884.)

FRAUDULENT CONVEYANCE—RIGHTS OF CREDITORS IN EQUITY—SECURITY FOR ADVANCES BY FRAUDULENT VENDEE—EFFECT OF ATTACHMENT.

In setting aside a fraudulent conveyance the cardinal rule of equity is to restore the creditors to what they have lost by the transaction, and their rights are satisfied when they are placed *in statu quo*. The court does not seek to improve their condition by imposing forfeitures and penalties for the sake of punishing the fraud. Where, therefore, the goods are immediately attached, taken from the vendee before they have been lost, damaged, or depreciated in his hands, and have been sold by the court at a small advance over the price paid by the vendee, the money being in court for distribution, the court did not, on the facts of the case, charge the vendee with any additional sum to increase the value, and allowed the fund to stand as a security to the vendee for a *bona fide* debt paid by the debtor out of the price given by the vendee.

In Equity.

Wilkerson, a retail grocery merchant at Jackson, Tennessee, suddenly and secretly sold his stock of groceries to Hopper, a speculator, for 75 cents of the invoice price, the purchaser paying in cash \$6,100, of which the debtor paid to one Bond the sum of \$3,000, and to one Smith the sum of \$2,250, they being alleged creditors for borrowed money, and residing at Jackson, thereby preferring them to his commercial creditors, of whom he purchased the goods, and to whom he owed about \$11,000. The day after the sale the creditors filed this bill, attached the goods, which were sold by the receiver for a few hundred dollars advance over the Hopper purchase, and the fund is in court to abide the determination of this case. It was conceded on the proof that the Bond debt was an honest debt for borrowed money used in the business, but the Smith debt was attacked as one fraudulently fabricated to enable the debtor to conceal the money. The court stopped the concluding argument before it was entirely ended, and directed a decree for the plaintiffs.

McCorry & Bond, for plaintiffs.

Hayes & Bullock, for Hopper.

Caruthers & Mallony and Campbell & Brown, for Wilkerson.

HAMMOND, J., (*orally*.) The further consideration of this case would serve no useful purpose. The adjudications on the subject of fraudulent conveyances are so numerous, variable, and conflicting that no court can undertake the task of deciding any case according to strict precedents. The most it can hope to do is to gather together the principles that should control its action and apply them to the case in hand, leaving each case to be governed by its own peculiar circumstances. The doctrines that govern a court of equity are not difficult to understand, and are mostly familiar to all courts,—the only trouble being to properly apply them to each case.

That this was, on the facts proven, a fraudulent conveyance there can be no doubt, and the sale will be set aside. It is not necessary
v.20,no.5—17

to review the proof. The case has been thoroughly argued, and every fact and circumstance commented on, by counsel on either side, and it is enough to say that the court quite agrees with the view the plaintiffs take of the facts.

The Tennessee act of April 6, 1881, c. 121, forbidding preferences in assignments for the benefit of creditors as construed by the supreme court in *Ordway v. Montgomery*, 10 Lea, 514, does not seem to have any application to this case, and may be disregarded in determining it. It does not abolish preferences except in the manner denounced by the act, and the debtor had a right, therefore, to prefer his home creditors by a sale for the purpose. But in doing this he must act honestly and fairly by his other creditors. He cannot defraud them to make preferences by a hostile and ruinous sacrifice of his goods. Mere inadequacy will not avoid the sale, but it must be open, and there must be a fair and reasonable consideration. Here the sale was secretly conducted, the stock, at invoice prices, was taken on Sunday and Christmas, so as to conceal the transaction from those who might have stopped the sale by diligence of action to collect their debts by execution, and a comparatively new and fresh stock of goods, bought for the purpose of making a tempting offer, were sold for 25 per cent. off the invoice prices, without carriage added, to a speculator in such transactions, who borrowed the money at heavy interest to take the bargain offered him, without inquiring into the failing debtor's purposes or financial condition.

Hopper either knew of Wilkerson's fraudulent purpose to sacrifice the goods, or might have known it from the circumstances. Any reasonable man could have seen that the purpose was to keep off the creditors, by hindering and delaying their executions through a sudden sale in bulk at an inadequate price. Actual knowledge is not necessary. Mr. District Judge CALDWELL makes this plain in *Singer v. Jacobs*, 11 FED. REP. 559. Hopper cannot escape by any pretense of ignorance. But it does not follow from this that a court of equity will charge him with the full invoice value of the goods. The court would undoubtedly do so if the creditors had permitted him to keep them, and they were suing for their value, or if they had lost the goods by the fraudulent transaction, or if they had depreciated in his hands; but none of these things occurred. Almost immediately—the very next day—the creditors attached the goods, took them from him, and sold them at public sale for a slight advance on the price he gave. How have they been injured, then, by the sale to Hopper? If they had then and there had their judgments and executions, they could have done no more than they did do by the attachment, namely, sell the goods by process of law. True, the earliest and most diligent creditors might have secured preferences to themselves in the order of their action, and prevented the exercise by Wilkerson of his right to prefer Mrs. Bond; but a court of equity is not concerned about repairing such losses as these. Equality is equity here, and all the

court will do is to restore the creditors to what they have lost, by placing them, as far as possible, *in statu quo*. This they have done by their own action in suing out the attachment, and seizing and selling the very goods they could have seized and sold by judgments and executions, if they had not been hindered and delayed by the fraudulent conveyance.

The court does not proceed upon the theory of punishing the fraud, nor attempt to improve the situation of creditors by imposing penalties on the fraudulent vendee for his fraud. It is not concerned about protecting the fraudulent vendee, but it deals justly by him, and is satisfied by making the creditors whole as nearly as may be. The case of *Clements v. Moore*, 6 Wall. 299, furnishes our courts with a very satisfactory guide to the pure and just principle on which we deal with transactions like this, and we need not go through the mazes of adjudications to find precedents. The distinctions between fraud in fact and fraud in law are not satisfactory, and are more metaphysical or philosophical than practical in their use. Fraud is fraud in all cases, and while one case may be more flagrant than another, and a court inflicting punishment may consider the differences, a court of equity in all cases moulds its decrees on principles of equitable treatment to all concerned.

Now, Hopper, if the goods had remained with him, might have worked out his own salvation, and had in hand the greater value to answer this demand upon him for it. But he was not allowed by the creditors to have this benefit of his bargain, or to work out its possible benefits to them. He is shown by the proof to be abundantly solvent, and the creditors, by allowing him to remain in possession, could have received full value for the goods. But they chose to take away the goods, and apply them in their own way, just as they would have been able to do by judgment and execution if Hopper had never interfered with them. It seems inequitable, under the circumstances, to allow them to make a better sale to Hopper than they have made themselves, when they have chosen to set aside the sale to him and take the property. Each case must depend on its own circumstances, and all I hold now is that, on the facts of this case, the creditors cannot claim, in a court of equity, any greater value than they have demonstrated by their own sale the goods would have brought to them under execution if they had not been delayed. This bill is, in fact, a mere process of execution.

The same considerations precisely impel the court to allow Hopper to be reimbursed for the payment made out of his money to Mrs. Bond. Why should his money be taken to pay Wilkerson's just debt, except on the notion of punishing him for the fraud? Wilkerson had a right to prefer his creditor, and that much of his just debts has been paid by the sale. Mrs. Bond, by judgment and execution, might have accomplished the same result, or by taking that amount of the goods in payment, and the other creditors would not be injured.

There is no reason why a court of equity, acting on the rules suggested, should invade Hopper's money-box and take \$3,000 to pay Wilkerson's debt because he attempted to speculate in bargains offered him by Wilkerson, the speculation and all benefits from it being defeated by the prompt action of the creditors. Hopper did not conceal anything, or misappropriate the goods, or obstruct the creditors in getting them. He intended to carry on the business, and was doing so openly and regularly when his purchase was challenged and the goods seized. There is no element of active conduct to help Wilkerson secure benefits for himself or to impair the value of the property. He bought at a bargain, and paid the money for no other purpose except to make all he could by the bargain. He lost it, but there seems no reason for compelling him to pay Wilkerson's just debts and thereby improve the condition of other creditors who have got all they ever would have had if Hopper had not been so greedy for bargains.

The Smith debt, on the proof here, seems to be fabricated. It is not satisfactorily proved to have ever been an honest debt. If it were, the burden is on Hopper to show it, and he has failed. He cannot be allowed for that payment.

Let a decree be drawn as the court has indicated. The defendants must pay the costs.

Dow and others v. MEMPHIS & L. R. R. Co., (as reorganized.)

(Circuit Court, E. D. Arkansas. April Term, 1884.)

1. RAILROAD MORTGAGE—FORECLOSURE—RECEIVER.

Where a railroad company makes default in the payment of the interest on its mortgage indebtedness, and the mortgaged property, consisting of its road and other property, is inadequate security for the mortgage debt, and the company is insolvent and appropriating its earnings to its own use, a receiver will be appointed, during the pendency of a bill filed by the mortgagees, to be put in possession of the mortgaged property.

2. SAME—LEX REI SITE.

When not varied by contract, the law of the state where a mortgage is executed and the mortgaged property situated, furnishes the rule for determining the rights of the mortgagees after condition broken.

3. SAME—COMMON-LAW RULE—CONDITION BROKEN.

In Arkansas, the common-law rule on the subject of the rights of a mortgagee, after condition broken, prevails; and if the debtor fails to pay the mortgage debt at the law day, the mortgagee is entitled to the possession of the mortgaged property, and may maintain ejectment therefor.

4. SAME—SUBJECT-MATTER OF MORTGAGE—BILL IN EQUITY.

Where a railroad mortgage embraces the road, rolling stock, and other personal property of the company, the proper remedy of the mortgagee to obtain possession of the mortgaged property, after condition broken, is by bill in equity for specific enforcement of the mortgagee's rights.

5. SAME—STIPULATION AS TO SALE—REMEDY GIVEN BY LAW.

A stipulation in a railroad mortgage, that, in case of default in the payment of interest for 60 days, it should be obligatory on the trustees named in the mortgage, upon the written request of one-third in interest of the holders of

the bonds, to take possession, operate, and *sell* the road and other mortgaged property, as a remedy, is cumulative, and not exclusive of the remedies given by law.

6. SAME—DUTIES AND LIABILITIES OF RECEIVER.

The terms proper to be imposed, as a condition upon which a receiver of a railroad will be appointed at the suit of the trustees for the first mortgage bondholders, discussed, and *held*:

(1) That where the default in the payment of the mortgage debt occurred more than a year before the filing of the bill, the receiver should be required to pay all the debts and liabilities of the railroad company incurred in operating, repairing, and improving the road for the period of six months next before the filing of the bill.

(2) That a general license should be given to sue the receiver, in any court of competent jurisdiction, for liabilities incurred by him in operating the road.

(3) That the debts which the receiver is required to pay, and all debts and liabilities incurred by him in operating the road, should be made a first lien on the mortgaged property, which should not be released until such liabilities are discharged.

(4) That the plaintiffs should be required to prosecute their suit to a final decree with diligence, and, failing so to do, the receiver should be discharged by the court of its own motion.

In Equity.

U. M. & G. B. Rose, for plaintiffs.

J. C. Brown, B. C. Brown, and Dillon & Swayne, for defendant.

CALDWELL, J. On the first day of May, 1877, the defendant executed its mortgage deed of that date, by which it conveyed to the trustees therein named its railroad and other property, real, personal, and mixed, including its income and earnings, books of account, records, choses in action, and muniments of title. This mortgage was conditioned to secure the payment of 250 bonds, of \$1,000 each, of even date with the mortgage, with interest at the rate of 10 per cent. per annum, payable semi-annually. Fifty of said bonds matured on the first day of May, 1879, and a like number annually thereafter, until all were due. On the second day of May, 1877, the defendant executed a second mortgage to the same trustees on the same property, and on "the right or franchise to be a corporation," which it was authorized to mortgage by a provision in its charter to secure bonds to the amount of \$2,600,000, due and payable on the first day of July, 1907, and drawing interest at the rate of 4 per cent. per annum until the first day of July, 1882, and after that date at the rate of 8 per cent. per annum, payable semi-annually. The bill in this case is filed by the present trustees in the mortgages, and its prayer is that the mortgaged property may be decreed to be placed in their hands as such trustees, and that in the mean time a receiver may be appointed with the usual powers.

The case is now before the court on the motion for the appointment of a receiver. For interlocutory purposes the following allegations of the bill may be regarded as established: That the state of Arkansas held a mortgage lien on the railroad and property of the defendant, created when the property belonged to another corporation, of which the defendant is the successor, which was prior in point of time and paramount to the lien created by the mortgages set out in the plain-

tiff's bill; that a decree foreclosing the state mortgage was rendered by the supreme court of the state on the fourth day of March, 1882; that the defendant declined to pay the sum decreed to be due the state, and the property was about to be sold to satisfy said decree, when the plaintiffs, acting as trustees under the mortgage of May 2, 1877, were compelled to pay off said decree, amounting to \$239,672.71, in order to protect the rights of the holders of the bonds secured by that mortgage, and that the plaintiffs, as trustees, aforesaid, upon bill filed for that purpose, were by decree of this court subrogated to the rights of the state of Arkansas under the decree of the supreme court of the state; that the defendant paid the interest on the bonds secured by the mortgage of May 2, 1877, up to the first day of January, 1882, and has refused to pay the interest which has accrued since that time, and has refused to pay either principal or interest of the bonds secured by the mortgage of the first of May, 1877.

Since the bill in this case was filed, a decree has been rendered foreclosing the last-mentioned mortgage, under which the property will be sold at an early day, unless the decree is superseded or paid.

On the twenty-fourth day of June, 1877, and in anticipation of making a default in the payment of the interest coupons falling due July 1, 1882, the defendant confessed a judgment in this court in favor of Russell Sage, who is interested in the stock of the company for the sum of \$125,921.18, and immediately thereafter, acting in collusion with said Sage, procured the appointment in the state court of its general manager as a receiver of its road, with a view of hindering and delaying the payment of the interest accruing on its bonds. The cause in which the receiver was appointed was afterwards removed to this court, which, on its own motion, discharged the receiver, upon the ground that the suit was collusive, and to hinder and delay creditors, as shown by the record. *Sage v. Memphis & L. R. R. Co.* 18 Fed. Rep. 571.

A large number of the holders of overdue interest coupons have obtained judgments at law upon them, and have filed their bills praying that the liens of these judgments may be foreclosed, and that the property of the defendant may be sold for their payment. These judgments are not appealable, and the defendant offers no reason why it does not pay them.

In the suit in this court brought by the trustees to be subrogated to the rights of the state, whose decree they paid off, the defendant set up as a defense, in its answer and by cross-bill, that the bonds of May 2, 1877, and the mortgage securing the same, were without consideration, and void for want of corporate power in the defendant to issue the same. Exceptions to the answer and a demurrer to the cross-bill were sustained, the court holding the alleged defenses were without equity, and groundless.

The defendant filed a bill against the present plaintiffs, as trustees in the mortgage of the second day of May, 1877, in the circuit court

of the United States for the Southern district of New York, in which it sought to annul the bonds and mortgage of the second day of May, 1877, upon the same ground set up in the cross-bill in this court. Upon final hearing, that court dismissed the bill for want of equity, declaring the case to be "phenomenal in the audacity of the attempt to induce a court of equity to assist a corporation in repudiating its obligations to its creditors without offering to return the property it acquired by its unauthorized contract with them." *Memphis & L. R. R. Co. v. Dow*, 19 FED. REP. 388.

The defendant has admitted in its pleadings, filed in cases in this court to which it was a party, that "should it be decided that said bonds [of the second day of May, 1877] are valid, and that respondent is liable therefor, it admits its debts, obligations, and liabilities largely exceed the value of its property of every character." It has been decided that the defendant is liable on these bonds. That question is *res judicata* in this court, and for the purposes of this hearing the above admission must be treated as an unqualified confession by the defendant of its insolvency, and inability to pay its debts.

In its answer filed in this case the defendant says: "Respondent itself believes that its property is not worth the amount of overdue and unpaid interest upon said coupons, the principal of the \$2,600,000 of May 2, 1877, and the decree for money paid to the state of Arkansas. And it says that this load of indebtedness has been loaded upon it by the complainants themselves, and that if the defendant is in any default, such default has been caused by their action."

The defendant, upon its own confession, is insolvent, and unable to pay its debts; and it is apparent, from the records of the court and exhibits to the bill, that it is indisposed to do so to the extent that it might. The interest coupons of its mortgage bonds are long overdue, and a large amount of them in judgment. No payment of interest on its mortgage debt has been made since January 1, 1882, and it gives forth no intimation of its purpose ever to pay the same, or any part of it. It was the plain duty of the defendant to pay off the decree in favor of the state for the protection of its mortgage bondholders whose liens were junior to that of the state. It is not to be denied that it had the credit and ability to do so. The refusal to pay off this decree was for the very purpose of extinguishing the rights and lien of its own bondholders. And this would have been the result had not the trustees, on behalf of the bondholders, advanced the funds to pay the state decree. The income and earnings, as well as all its property, are mortgaged to secure the payment of the principal and interest of its bonds. Upon these facts it is futile for the defendant to contend that a court of equity ought to decree that it is still entitled to receive and appropriate to its own use the income and earnings of its road.

The law of this state furnishes the rule for determining the rights of the mortgagees under the mortgage, unless that rule has been changed

by the contract of the parties. In this state the common-law rule on the subject of the rights of a mortgagee, after condition broken, prevails, and if the debtor fails to pay the mortgage debt at the law day, the mortgagee is entitled to the possession of the mortgaged property, and may maintain ejectment therefor, (*Fitzgerald v. Beebe*, 7 Ark. 310; *Gilchrist v. Patterson*, 18 Ark. 575,) and, upon the facts of this case, to a receiver. *Price v. Dowdy*, 34 Ark. 285. This law is as much a part of the mortgage as if literally incorporated in it. In this case the remedy at law is not adequate. The mortgage embraces real, personal, and mixed property, and the appropriate remedy is in equity, when the contract rights of the mortgagee can be specifically enforced. *Shepley v. Atlantic R. Co.* 55 Me. 395; *Hall v. Sullivan R. Co.* 2 Redf. R. R. Cas. 621; *First Nat. Ins. Co. v. Salisbury*, 130 Mass. 303; and see *Warren v. Rising Fawn Iron Co.* 3 Woods, 514; *North Carolina R. Co. v. Drew*, Id. 713; *State v. Northern Cent. R. Co.* 18 Md. 193.

Ejectment will not lie for personal property, records, and choses in action. The railroad is an entity, composed of real estate and personal property. For railroad purposes its real estate would be valueless without the rolling stock and other personal property; and, on the other hand, the rolling stock and personal property would be of no utility for railroad purposes without the road-bed, track, and stations. The forms and processes of a court of law are not flexible enough to transfer the possession of the mortgaged property as a whole, and the mortgage does not contemplate its separation. It is not contended that an action at law for damages for non-delivery of the property against a mortgagee confessing itself insolvent would be an adequate remedy. But it is said what would otherwise be the legal rights of the parties in respect to the right of possession, on default of payment of interest, have been varied by the terms of the mortgage. The clauses of the mortgage bearing on this question are the first and the fifth, which read as follows:

"*First.* That as long as the said party of the first part shall not make a default in the payment of either principal or interest on any of the aforesaid bonds and coupons, as the same may respectively become due and payable, and shall faithfully perform the conditions of said bonds, and the stipulations and considerations of this indenture, said party of the first part shall be entitled to retain the possession of the railroad and other property hereby conveyed, and receive and enjoy the income thereof."

"*Fifth.* In case default for the space of sixty days shall be made in the payment of any of said interest coupons, or of the principal sum of any of said bonds, as they shall respectively fall due, the said party of the second part, their successor or successors, on the written request of one-third in interest of the holders of said bonds, may and shall enter in and upon, and take possession and operate, all and singular the said railroad and all other property, real, personal, or mixed, hereinbefore conveyed, or intended to be conveyed, and take and receive the income and profits thereof, and may and shall sell all and singular said railroad and lands, and all other property, real, personal, or mixed, with all the charters, rights, privileges, immunities, franchises, and choses in action of said railroad company."

It is further provided that the sale may be made in the city of Little Rock, or any town on the line of the railroad, and "with or without entry on said conveyed premises," and upon four weeks' notice published in newspapers.

In the first of these clauses the negative is implied, viz., that the railroad company shall not be entitled to retain possession after making default in the payment of either principal or interest of the bonds. This, probably, adds nothing to the rights of the mortgagees under the law. But it does show that the parties had no intention of varying the known legal rights of the mortgagee under the law. It is under that clause, and the conceded legal rights of a mortgagee under the laws of the state, that the plaintiffs seek the aid of the court to put them in possession of the mortgaged property.

The defendant's contention is that the fifth clause furnishes the rule by which the trustees are to obtain possession, and that it is exclusive of all other modes; and that as the bill does not allege that one-third in value of the bondholders have requested the trustees to take possession, it states no case. This clause contains a power of sale. Under it the trustees may sell the property upon four weeks' notice; and upon the written request of one-third in interest of the holders of the bonds, it is made the imperative duty of the trustees to take possession for the purpose of selling. The power of sale is the principal subject dealt with in this clause, and the possession there spoken of is an incident to the power of sale, and for the purpose of rendering that power effectual. When one-third in value of the bondholders come to a resolution to foreclose the mortgage by sale, they can make it the duty of the trustees to take possession of the property for that purpose, and receive the income and earnings of the road from the time the possession is taken until the sale. A most important consideration at the sale would be the power of the trustees to deliver the property to the purchaser; doubt on this point would have a depressing effect on bidders. If the trustees are in the actual possession of the property, all doubt is removed. The practical effect of a sale of the mortgaged property would be to extinguish the mortgage debt, whether the property sold for the amount of the debt or not, because the railroad company would be left without either property or a charter, and the obligations of a corporation in that plight would be of little worth. The trustees are not, therefore, to take possession of the property for the purpose of selling it, and thereby extinguishing the mortgage debt before its maturity, unless one-third of the bondholders request it. Although the provision is penal in its character, it operates alike for the protection of the bondholders and the company, (*Chicago, D. & V. R. Co. v. Fosdick*, 106 U. S. 47, S. C. 1 Sup. Ct. Rep. 10,) so far as relates to a sale of the property by the trustees, and possession taken for that purpose. But as a remedy it is cumulative, and not exclusive of the rights and remedies given by the law to mortgagees, in case of default in payment of the mortgage

debt according to the terms of the mortgage. *First Nat. Ins. Co. v. Salisbury, supra.*

The defendant's mortgage bonds draw 8 per cent. interest, payable semi-annually, and run until 1907. The value of such a bond, when the security is good and the interest paid, is appreciated by the holders, who insist they are entitled to the benefit of their contract, and decline to reduce the rate of interest. The bondholders allege that if the road is judiciously managed, its income and earnings will be sufficient to pay the running expenses, make all necessary repairs and betterments, and pay the interest on the mortgage debt, as well that due as that which is to accrue, and they ask to be put in possession of the mortgaged property for that purpose. However burdensome this high rate of interest may be to the defendant, it has no legal right to demand a reduction, nor can it compel a foreclosure and payment of the mortgage debt, before its maturity, by refusing to pay the interest according to the obligation of its contract, and appropriating its income and earnings to its own use. It cannot thus take advantage of its own wrong. *Jones, R. R. Secur. § 91; Nebraska City Bank v. Nebraska City Gas-light Co. 4 McCrary, 319; S. C. 14 FED. REP. 763.* The value of the bonds in the market was enhanced by the long time they had to run, and the high rate of interest they bore. The defendant has enjoyed the benefit of these provisions in the enhanced value they imparted to its bonds. They are a part of the obligation of its contract, and the law would be singularly defective if the defendant could, by its own act, evade them.

The views of this court on the subject of appointing receivers of railroads are well known. It will not appoint a receiver except where the right and the necessity to do so are clear. *Overton v. Memphis & L. R. R. Co. 10 FED. REP. 866; Texas & St. L. Ry. Co. v. Rust, 17 FED. REP. 282; Sage v. Memphis & L. R. Co. 18 FED. REP. 571; Credit Co. v. Arkansas Cent. R. Co. 15 FED. REP. 49.* On the facts of this case, the duty of the court to appoint a receiver until the final hearing of the bill would seem to be as nearly imperative as the exercise of that jurisdiction can be said to be in any case. The order appointing the receiver will confer on him the usual powers, and will contain the following special provisions to which the plaintiffs must assent as a condition of appointing a receiver:

(1) That the debts, if any, due from the railroad company for ticket and freight balances; and for work and labor performed by its employes and laborers; and for supplies and materials furnished for equipping, operating, repairing, or improving the road; and all obligations incurred in the transportation of passengers and freight, or for injuries to person or property, which have accrued within six months last past,—shall be paid by the receiver out of the earnings of the road.

(2) That persons having demands or claims of any character against the receiver, may, without applying to this court for leave to do so, bring suit thereon against the receiver in any court in this state having jurisdiction, or may file their petition and have their claim adjudicated in this court at their election. This clause shall not be construed as authorizing the levy of any

writ or process on the property in the hands of the receiver, or taking the same from his custody or possession.

(3) That the debts and liabilities of the railroad company which the receiver is ordered to pay, together with all debts and liabilities which said receiver may incur in operating said road, including claims for injuries to person and property, shall constitute a lien on said road paramount and superior to the lien of the mortgages set out in the plaintiff's bill, and said lien shall continue until said debts and liabilities are satisfied; and the discharge of said property from the custody of the receiver shall not affect said lien, or deprive claimants of the opportunity of proving their demands, but said receiver or a successor shall be continued in office for the adjustment of such demands, and may be sued therefor; and if said demands are not paid by the person or corporation in possession of said mortgaged property, the court may repossess itself of the same, and operate said road by a receiver until said debts are paid, or may decree a sale of the property, as shall seem most expedient.

(4) That said plaintiff shall prosecute this suit to final decree as speedily as the same can be done under the rules of equity practice, and, failing so to do, the court of its own motion will discharge said property from the custody of the receiver.

1. The first clause is proper, because it has been open to the plaintiffs, to apply for and obtain the relief they now seek, for more than a year, and by permitting the company to run and operate the road, they must, as between them and the persons furnishing labor, supplies, and materials for the use of the road, and those damaged by its operation, be held to have impliedly assented that the earnings of the road should be applied to pay such expenses and liabilities, which, in a greater or less degree, were incurred for the plaintiff's benefit. There is ample authority for making this order. *Fosdick v. Schall*, 99 U. S. 251; *Miltenberger v. Logansport Ry. Co.* 106 U. S. 286; S. C. 1 Sup. Ct. Rep. 140; *Union Trust Co. v. Souther*, 107 U. S. 591; S. C. 2 Sup. Ct. Rep. 295. It is no answer to say the company used its earnings for other purposes. The bondholders knew such liabilities must be incurred in running the road. They had it in their power to take possession of the road and secure its earnings to pay such liabilities. The class of persons protected by this order could not do anything to protect themselves, or compel a different application of the earnings. The misapplication of the earnings, if there was any, is not, therefore, to prejudice the class of creditors named. The right to require the payment of such debts does not depend on whether current earnings have been used to pay the mortgage debt. *Union Trust Co. v. Souther*, *supra*.

2. The general license to sue the receiver is given because it is desirable that the right of the citizen to sue in the local state courts, on the line of the road, should be interfered with as little as possible. It is doubtless convenient, and a saving and protection to the railroad company and its mortgage bondholders, to have the litigation growing out of the operation of a long line of railroad concentrated in a single court, and on the equity side of that court, where justice is administered without the intervention of a jury. But, in proportion as the railroad and its bondholders profit by such an arrangement, the cit-

izen dealing with the receiver is subjected to inconvenience and expense, and he is deprived of the forum, and the right of trial by jury, to which, in every other case of legal cognizance, he has the right to appeal for redress. It is not necessary, for the accomplishment of the purposes for which receivers of railroads are appointed, to impose such burdens and deprivations on citizens dealing with the receiver; and neither the railroad company nor its bondholders have any equity to ask it. Where property is in the hands of a receiver simply as a custodian, or for sale or distribution, it is proper that all persons having claims against it, or upon the fund arising from its sale, should be required to assert them in the court appointing the receiver. But a very different question is presented where the court assumes the operation of a railroad hundreds of miles in length, and advertises itself to the world as a common carrier. This brings it into constant and extensive business relations with the public. Out of the thousands of contracts it enters into daily as a common carrier, some are broken, and property is damaged and destroyed, and passengers injured and killed by the negligent and tortious acts of its receiver and his agents. In a word, all the liabilities incident to the operation of a railroad are incurred by a court where it engages in that business; and, when they are incurred, why should the citizen be denied the right to establish the justice and amount of his demand, by the verdict of a jury in a court of the county where the cause of action arose and the witnesses reside? If the road was operated by its owners or its creditors, the citizen would have this right; and when it is operated for their benefit by a receiver, why should the right be denied?

It is said that if suits are allowed to be brought in the courts of common law the plaintiffs would probably receive more by the verdict of a jury than would be awarded to them by the master or chancellor, and that to compel the receiver to answer to suits along the entire line of the road, subjects him to inconvenience and entails additional expense on the estate. This is probably true. But why should a court of equity deprive the citizen of his constitutional right of trial by jury, and subject him to inconvenience and loss, to make money for a railroad corporation and its bondholders? If the denial of the right to sue can be rested on the ground that it saves money for the corporation and its creditors, why not carry the doctrine one degree further, and declare the receiver shall not be liable to the citizen at all for breaches of contract, or any act of malfeasance or misfeasance in his office as receiver? This would be a great saving to the estate. The difference is one of degree and not of principle. When a court, through its receiver, becomes a common carrier, and enters the lists to compete with other common carriers for the carrying trade of the country, it ought not to claim or exercise any special privileges denied to its competitors, and oppressive on the citizen. The court appointing a receiver of a railroad, and those interested in the property, should be content with the same measure of justice that is meted out to all

persons and corporations conducting the like business. The court appointing a receiver cannot, of course, permit any other jurisdiction to interfere with its possession of the property, or control its administration of the fund; but, in the case of long lines of railroad, the question of the legal liability of its receiver to the demands of the citizen, growing out of the operation of the road, should be remitted to the tribunals that would have jurisdiction if the controversy had arisen between the citizen and the railroad company; giving to the citizen the option of seeking his redress in such tribunals, or in the court appointing the receiver.

The case of *Barton v. Barbour*, 104 U. S. 126, simply decides that a receiver operating a railroad cannot be sued without the leave of the court appointing him. It does not decide that leave to sue him may not be given by a general order of the court appointing him.

3. The third clause is inserted for the protection of those who have dealings with the receiver, or who are injured in their person or property by the operation of the road under the receiver. In contemplation of law, the property is in the custody of the court, and the road is run and operated by the court. "A receiver is the agent of the court. He is an officer of the court, and his possession is that of the court. He is not the agent of either party, and neither party is responsible for his malfeasance or misfeasance." *Texas & St. L. Ry. Co. v. Rust*, 17 FED. REP. 262. No court, therefore, should engage in the operation of a railroad without reserving to itself the means of discharging the obligations incurred in the business. In its effort to coerce a corporation to pay its debts, a court should not contract obligations of its own, and neglect to make provision for their payment. It would be a scandal to do so. Courts should pay their debts, if nobody else does.

4. The fourth clause of the order is admonitory. Neither a railroad company nor its mortgage bondholders can rightfully ask a court to operate a railroad merely because it is desirable or profitable to them, in a business point of view, to have the road operated by such an agency. When a bill is filed by mortgagees to obtain possession or a decree of foreclosure, and a receiver has to be appointed, he should not be continued any longer than is necessary for the plaintiff, by the exercise of diligence, to obtain and execute a final decree, and any delay or want of good faith in this respect should result in his immediate discharge.

FARMERS' LOAN & TRUST CO. v. STONE and others.¹

(Circuit Court, S. D. Mississippi. April 24, 1884.)

1. CONSTITUTIONAL LAW—CHARTER OF CORPORATION—CONTRACT.

A charter granted by a state and accepted by the corporation constitutes a contract which falls within the protection of the tenth section of article 1 of the constitution of the United States.

2. SAME—STATUTES, WHEN DECLARED VOID.

It is a well-settled rule that courts will not declare legislative enactments void by reason of their repugnance to the constitutions, state or federal, except when the judicial mind is clearly convinced of such repugnancy.

3. SAME—POLICE POWERS OF STATE.

The legislature cannot part with any of the police powers of the state, which are matters that affect the public peace, public health, public morals, and public convenience.

4. SAME—REGULATION OF TOLLS FOR TRANSPORTATION OF PERSONS AND PROPERTY.

But the right to fix and regulate tolls to be charged and received for transportation of persons and property does not fall within the police power of the state.

5. SAME—MISSISSIPPI STATUTE OF FEBRUARY 17, 1848.

The twelfth section of the charter granted by the state of Alabama to the Mobile & Ohio Railroad Company, and adopted by the legislature of Mississippi, approved on the seventeenth of February, 1848, which provides as follows: "And be it further enacted, that it shall be lawful for the company hereby incorporated, from time to time, to fix, regulate, and receive the toll and charges, by them to be received for transportation of persons and property on their railroad or way aforesaid, hereby authorized to be constructed, or any part thereof,"—creates a valid and binding contract between the state of Mississippi and the Mobile & Ohio Railroad Company.

6. SAME—ACT OF MARCH 11, 1884, VOID.

The act of March 11, 1884, entitled "An act to provide for the regulation of freight and passengers on railroads in this state, and to create a commission to supervise the same, and for other purposes," is null and void in so far as the act relates to the Mobile & Ohio Railroad, for the reason the state conferred the right and power upon the company in its charter to fix and regulate the toll to be charged and received for the transportation of persons and property, without reserving the right at any time in the future to change, modify, repeal, or withdraw such right.

7. SAME—CHARTER OF MOBILE & OHIO RAILROAD COMPANY—OBJECT.

The states of Alabama, Mississippi, Tennessee, and Kentucky, in chartering the Mobile & Ohio Railroad Company, acted separately, it is true, but with one common purpose, and that was to create one corporate body for the maintenance of a great commercial highway of communication from Mobile, Alabama, to Cairo, Illinois, and to connect with all the commercial highways converging at those points.

8. SAME—REGULATION OF COMMERCE.

The act of March 11, 1884, is in conflict with and violates the eighth section of the first article of the constitution of the United States, because in purpose and effect it is a regulation of "commerce among the states," which right is exclusively vested by this provision of the federal constitution in the congress of the United States, and is therefore null and void.

In Equity.

E. L. Russell, John A. Campbell, and Peter Hamilton, for complainant.

J. W. C. Watson, for commission.

¹ Reported by B. B. Boone, Esq., of the Mobile, Alabama, bar.

HILL, J. This bill is filed against the defendants, John M. Stone, W. B. Augustus, and William McWillie, as railroad commissioners of this state, to enjoin and restrain them from in any way interfering with the Mobile & Ohio Railroad Company, its officers, agents, or employes, in the management of the business of said railroad, or the property and business of said corporation, and to prevent the officers of said railroad from obeying any orders issued or made by the railroad commission, etc. The questions presented have been most forcibly and exhaustively argued by the distinguished and learned counsel on both sides, and are questions of grave importance to the people and the commercial interests of the country generally, as well as to the complainant and all whose interest it represents or to be affected by the result hereof. The questions now to be decided arise upon complainant's motion for the issuance of the writ of injunction prayed for in the bill above stated.

The facts stated in the bill, not being disputed, will be considered as true in considering this motion, and of which the following is a brief statement, so far as it relates to the present motion: In the year 1848 the legislatures of the states of Alabama, Mississippi, Tennessee, and Kentucky, acting separately, but with a common purpose, by their several acts of incorporation incorporated the Mobile & Ohio Railroad Company, the purpose of which was to construct, equip, and operate a railroad to extend from Mobile, in Alabama, to a point opposite Cairo, in the state of Illinois, at the junction of the Mississippi and Ohio rivers, so as to connect with the channels of commerce at each end of this line with all those at intermediate points, thus creating a great national highway for the transportation of persons and property, not only from the one point to the other and intermediate points, but with other states and the markets of the world, one channel of commerce being connected with another as links in chains of commercial transportation to an unlimited extent. To promote this grand scheme, the United States granted to the corporation many thousands of acres of its lands situate in the states of Alabama and Mississippi, owning no lands in the other states through which this railroad was located. The corporation was further aided by the states and counties and citizens along the line of the road by contributions of money, labor, and otherwise, by which means the railroad has been completed, equipped, and has been operated for many years without any interruption by any state legislation until within a short time. That, as a consideration upon which said land was granted by the United States, certain rights were reserved by the government in relation to the transportation of the mails, property, and men belonging to or employed by the United States. The corporation being in need of money, has given a trust deed to complainant, as trustee therein, to secure certain bonds, upon which it has raised the needed funds for the purpose of discharging its other indebtedness, and for the better equipping and operating said railroad.

The bill further states that the acts of incorporation conferred upon this corporation, among other powers, the right to elect its own officers, and to do and perform all acts necessary to the building, equipping, and operating said railroad, and especially the right from time to time to fix, regulate, and receive the tolls and charges by them to be received for the transportation of persons and property on said railroad constructed or to be constructed. The bill further states and charges that, on the eleventh day of March last, the legislature of this state passed an act, which has been approved by the governor of the state, entitled "An act to provide for the regulation of freight and passengers on railroads in this state, and to create a commission to supervise the same, and for other purposes." That under the provisions of this act of the legislature the defendants have been appointed and commissioned as commissioners, and are now proceeding to exercise the powers and to discharge the duties imposed and prescribed in said act. If permitted so to do, so far as it relates to the Mobile & Ohio Railroad, it will greatly interfere with and embarrass the business and management of said company, and its railroad, and the interests of all concerned therein; that such interference, if permitted, will impair important and essential rights which have been vested in said corporation by the charter of said company, which formed and constitutes a contract between the state of Mississippi, which granted, and the company, which accepted, said charter, and which contract is protected and inviolate by the provisions of the tenth section of the first article of the constitution of the United States.

The provisions contained in the sixth section of the act complained of are mainly relied upon as impairing the contract so made and violating the rights so secured. This section is as follows:

"That it shall be the duty of all persons or corporations who shall own or operate a railroad in this state, within thirty days after the passage of this act, to furnish the commissioner with its tariff of charges for transportation of every kind; and it shall be the duty of said commission to revise said tariff of charges so furnished and to determine whether or not, and in what particular, if any, said charges are more than just compensation for the services to be rendered, and whether or not unjust discrimination is being made in such tariff of charges against any person, locality, or corporation; and when said charges are corrected as approved by said commission, the commission shall then append a certificate of its approval to said tariff of charges, but in revising or establishing any and every tariff of charges, it shall be the duty of said commission to take into consideration the character and nature of the service to be performed and the entire business of such railroad, together with its earnings from the passenger and other traffic, and shall so revise such tariffs as to allow a fair and just return on the value of such railroad, its appurtenances, and equipments; and it shall be the duty of said commission to exercise a watchful and careful supervision over every such tariff of charges, and continue such tariff of charges from time to time, as justice to the public and each of said railroad companies may require, and to increase or reduce any of said rates according as experience and business operations may show to be just; and said commission shall accordingly fix tariffs of charges for those railroads failing to furnish tariffs as above required; and it shall be the

duty of said railroad companies or persons operating any railroad in this state to post at each of its depots all rates, schedules, and tariffs for the transportation of passengers and freights, made or approved by said railroad commission, with said certificate of approval, within ten days after said approval, in some conspicuous place at such depot; and it shall be unlawful for any such person or corporation to make any rebate or reduction from such tariff in favor of any person, locality, or corporation which shall not be made in favor of all other persons, localities, or corporations by a change in such published rates, except as may be allowed by the commission; and when any change is contemplated to be made in the schedule of passenger or freight rates of any railroad by the commission, said commission shall give the person or corporation operating or managing said railroad notice in writing, at least ten days before such change, of the time and place at which such change will be considered."

These and other sections in the act imposing other duties upon said commission in relation to the control of said railroads, and imposing upon the persons and corporations managing them penalties for violating the provisions of said act of the legislature, and which it is alleged violates and impairs the contract so made between the legislature and corporation by the charter aforesaid, as well as in violation and in conflict with other provisions of the constitution of the United States and of the constitution of this state; but the section above quoted is sufficient to present the question to be decided upon this motion. It is not necessary to refer to adjudicated cases by the supreme court of the United States to maintain the well-settled rule that courts will not declare legislative enactments void by reason of their repugnance to the constitutions, state or federal, except when the judicial mind is clearly convinced of such repugnancy; but it is equally well settled that when the judicial mind is so convinced it is the duty of the court to declare the legislation void. The court has no jurisdiction to determine the wisdom or unwisdom of the act in question; if unwise, the legislature alone can grant relief. The only question which the court can decide is, did the legislature have the power to pass the act? or, in other words, did any inhibition against such power exist under any provision of the federal or state constitution? If none such existed the act must be maintained; but if such did exist it must be declared void so far as it relates to the Mobile & Ohio Railroad Company and the property and interest of all persons connected therewith.

The question to be determined is, did the act of incorporation passed by the legislature of Alabama and adopted by the state of Mississippi, in relation to the point under consideration which is as follows: "And be it further enacted, that it shall be lawful for the company hereby incorporated *from time to time to fix, regulate, and receive the toll and charges by them to be received* for transportation of persons or property on their railroad or way aforesaid hereby authorized to be constructed, erected, built, or used, or upon any part thereof,"—create a valid and binding contract between the state and the corporation, and which the legislature is inhibited by the provis-

v.20,no.5—18

ion of the tenth section of article 1 of the federal constitution from changing or impairing, without the consent of the corporation or those holding under it. That the rights, powers, and franchises granted by the legislature to corporators by the charter creating them, and which are accepted by those to whom they are granted, are contracts within the meaning of the constitution, was settled by the supreme court of the United States in the *Dartmouth College Case*, and has been repeatedly recognized by that court from that time to the present, and is the main pillar upon which corporate rights must rest for security; and it is not to be presumed that that court at least will depart from a rule so well settled as long as constitutional rights are maintained. The charter being the contract between the parties to it, must be taken with all its conditions, restrictions, and limitations. The legislature had the right in granting it to reserve the right to change, modify, or repeal it or any provisions in it; or if it contains any provisions within the police power of the state, or power from which the legislature is not at liberty to part, being such matters as affect the public peace, public health, public morals, public convenience, and the like, the legislature may at will revoke rights and powers conferred or may limit and contract them. Those accepting corporate rights take them subject to this power upon the part of the legislature.

In construing contracts we must ascertain, if we can, the intention of the parties to them, and in doing so we must look to the objects for which they were made, and in the light of the surrounding circumstances. One important, if not the main, object upon the part of the stockholders was to obtain a return by way of dividends for the investment made, and, upon the part of the United States and counties, the main purpose was the establishment of a reasonably safe and rapid mode of transportation of persons and property from one end of the line to be constructed to the other, with all its connections. These being the principal objects of the parties to the contract on the one side, it is not probable that the charter would have been accepted, with the understanding that the legislature of any one of the states could at pleasure place any restrictions or limitations upon the rights and powers conferred, and which were not reserved in the act of incorporation.

The right upon the part of the company to charge and receive compensation for services to be rendered, if taken away or impaired, would defeat the purpose of the contract. This right to fix the charges for compensation certainly does not fall within any police power of the states.

The next question is, to whom was it given by the contract in the charter? Most clearly to the company, without any restriction or reservation.

It is contended on the part of the defendants that this power was not given; that the words of the charter are that it shall be lawful for

the company to fix the amount to be received, and that these words were unnecessary. I am of the opinion that, by the language used, it was understood by both parties as conferring the *power and authority* to fix the charges. I am further satisfied that the right and power granted by the charter created a contract upon the part of the state which it could not change, repeal, or modify without the consent of the other parties to it; and any attempt so to do on the part of the state must be held, under the provisions of the constitution referred to, null and void, so far as it relates to the question under consideration. If the company, by its officers, has the power to fix its tariff of charges, the commission cannot fix a rate of charges different from that fixed by the company, which will be obligatory upon the company. It is clear that the legislature intended to give such power to the commission, and imposes severe penalties upon the corporation and its officers for demanding or receiving different rates than those those fixed by the commission, and for other violations of the act.

With the conclusion thus reached, I might dismiss the subject without further comment, but it has been pressed with great force and ability on the one side, and with equal ability resisted on the other, that this act of the legislature is in conflict with and violates the eighth section of the first article of the constitution of the United States, because, in purpose and effect, it is a regulation of commerce among the states, which right is exclusively vested, by this provision of the federal constitution, in the congress of the United States. This is a pregnant and important question in which all concerned are deeply interested.

As already stated, the right to demand and receive compensation for the expense incurred in building, equipping, and operating this wonderful and immense avenue and mode of transportation of commerce from one place, state, and country to another, is an absolute necessity; it is difficult to see how the right to fix and regulate the charges for the transportation of persons and freight can be considered in any other light than a regulation of commerce, and that when the railroad passes through more states than one, and the transportation passes from one state to another, or through more than one state, it does constitute commerce among the states, and deprives the states of the power to regulate it. As already stated, the Mobile & Ohio railroad was designed to be and was chartered by the legislatures of Alabama, Mississippi, Tennessee, and Kentucky, all acting separately, to be sure, but with one common purpose, and that was to constitute one corporate body for the maintenance of a great commercial highway of communication and transportation from Mobile, Alabama, to Cairo, Illinois, and thence to connect with all the commercial highways converging at those points. It is not, therefore, a mere local highway, although, as an incident, freight and passengers were intended to be and are transported from one place to another in the same state, as do vessels on the navigable streams; and in that

case the supreme court of the United States decided that in the transportation of a person from New Orleans to Hermitage, in the state of Louisiana, upon the Mississippi river, the latter place being the point of destination, was commerce, within the exclusive control of congress, for the reason that the vessel was engaged in the transportation of passengers between New Orleans, in Louisiana, and Vicksburg, in this state, and that an act of the legislature of Louisiana, attempting to control the carrying of passengers in steam-boats, was a violation of the provisions of the constitution of the United States conferring upon congress the power to regulate commerce among the states. *Hall v. De Cuir*, 95 U. S. 485. The reason given is that the points of destination of that line of transportation were in different states.

The cases of *Munn v. Illinois*, 94 U. S. 113; *Chicago, B. & Q. R. Co. v. Iowa*, Id. 155; *Peik v. Chicago & N. W. R. Co.* Id. 164, are relied upon to sustain the validity of the act as to the latter class of cases. The first-named case was in relation to warehouses situated in Illinois, and does not, in my opinion, apply to the question under consideration. In the second case the railroad about which the controversy arose was wholly within the state of Iowa. The last case at first view would seem to sustain the position assumed by counsel, but when examined will be found only to apply to such commerce as is of domestic concern, and to transportation within the state, and that carried without the state of Wisconsin, but controlled by the laws of that state, the constitution of which reserves to that state the power to alter or repeal the laws in relation to railroad companies. It is admitted in the opinion in that case that congress may pass laws to regulate the last-named transportation, but until congress acts the state of Wisconsin may pass laws regulating commerce over this particular road. In the case under consideration neither the constitution of the state of Mississippi nor the charter of the Mobile & Ohio Railroad Company reserved any power to legislate in relation to this or any other railroad company. I am therefore of opinion that the ruling of the supreme court in the last-named case does not apply to the case before the court, and that the question before the court upon this point is an open one so far as it relates to this court.

The question has been passed upon by Judge McCrARY, in the circuit court in Iowa, in the case of *Kaiser v. Illinois Cent. R. Co.* 18 FED. REP. 151, in which that distinguished judge held that a statute of Iowa fixing the maximum rate to be charged by railroad companies for carrying freight within the state is invalid in so far as by its terms it applies to through shipments from points within the state to points without the state, because it is a regulation of commerce beyond the state, and if upheld would enable the state to discriminate against other states.

In the recent case decided at Nashville by Judges BAXTER, HAMMOND, and KEY, (*Louisville & N. R. Co. v. Railroad Com'rs of Tenn.*

19 FED. REP. 679,) Judge HAMMOND, delivering the opinion on this question, which was assented to by the other judges, holds the same rule.

Other decisions might be referred to going to sustain the same rule; but being satisfied the rule stated is the law, I adopt it, and under the operation of which the act of the legislature complained of in the bill must be held in conflict with the constitution of the United States and void.

I am therefore brought to the conclusion that for the reasons stated, if for no other, so far as this act of the legislature authorizes and requires the commission to fix a tariff of charges to be enforced against the Mobile & Ohio Railroad Company, it must be declared null and void. The commission having no power to fix and regulate the tariff of charges for the Mobile & Ohio Railroad Company, the provisions of the act in relation to other powers and duties to be performed on the part of the commission, so far as they relate to that corporation, must also be declared void.

The other objections to this act of the legislature raised and argued by counsel, not being necessary to be considered upon the present motion, will be postponed until the hearing of the cause.

PACIFIC R. R. (of Missouri) v. ATLANTIC & P. R. Co.

(Circuit Court, D. Massachusetts. January 28, 1884.)

1. JURISDICTION OF COURT OF EQUITY IN MATTERS OF ACCOUNT.

A court of equity has jurisdiction in matters of account when there is a fiduciary relation between the parties, and when the account is so complicated that it cannot be conveniently taken in a court of law.

2. BILL, WHEN NOT MULTIFARIOUS—JURISDICTION OF COURT OF EQUITY.

Where all the matters in controversy are between the same parties, arise out of the breaches of the same instrument, relate to the same transaction, and can be conveniently settled in one suit, the bill in equity in which they are joined is not multifarious; and the court having jurisdiction for one purpose will proceed to determine the whole case although some of the questions do not furnish a basis for equitable relief when taken separately.

3. PARTIES IN ACTION FOR ACCOUNTING.

Where a lease provides that dividends shall be paid directly to the stockholders, the stockholders are not necessary parties to an action for an accounting, and the corporation being composed of all the stockholders, fully represents their interests, and is the proper party to enforce a claim for unpaid dividends.

4. WHEN DEMURRER WILL NOT LIE FOR LACHES.

Where a defendant has suffered no prejudice by delay in bringing an action, and the plaintiff's demand is not barred by the statute of limitations, and the latter also furnishes a satisfactory excuse for not commencing the suit earlier, a demurrer will not lie for laches.

In Equity.

W. P. & G. S. Montague, for complainants.

Hutchins & Wheeler, for defendants.

Before **LOWELL and NELSON, JJ.**

NELSON, J. The case made by the plaintiff's amended bill, so far as it is necessary to state it for the present purpose, is as follows :

The plaintiff, a railroad corporation organized under the laws of the state of Missouri, being the owner of a fully-equipped railroad in active operation, extending from St. Louis to Kansas City, in Missouri, a distance of 283 miles, subject to a mortgage indebtedness amounting to \$11,500,000, and of the value of \$9,500,000 above the mortgages, on the first day of July, 1872, by an indenture under seal, leased its railroad and equipments, and also certain branch railroads held under leases, to the defendant, a corporation deriving its corporate powers from an act of congress, for the terms of 999 years. By the indenture, the defendant, during the term, was to pay all taxes and assessments on the leased property, pay the operating expenses of the road, and maintain it in good working condition as a first-class railroad, assume and perform the obligations of the plaintiff in the leases of the branch roads, pay both the principal and interest of the mortgage indebtedness as it matured, and pay specified annual dividends on all the shares of the capital stock of the road; the dividends to be paid directly to the shareholders. Under this lease, the defendant entered into possession of the property, and continued in possession until the appointment of the receiver, as hereafter stated.

The lease also contained a provision that the plaintiff, whenever requested by the defendant, should issue its bonds and secure their payment by a mortgage on the road, which bonds, when issued, should be delivered to and negotiated by the defendant, and the proceeds expended by the defendant in enlarging the capacity of the road for business, by extending its tracks, and increasing its depot accommodations and equipments,—any surplus not needed for that purpose to be used in retiring previous indebtedness; and that the interest on all such bonds should be paid by the defendant at maturity. Under this clause, three separate series of bonds were issued, and were delivered to and negotiated, and the proceeds received, by the defendant, viz.: *First*, August 27, 1872, \$1,500,000, income bonds; *second*, December 11, 1872, \$2,000,000, improvement bonds; *third*, July 10, 1875, \$4,000,000, third mortgage bonds; the last series being secured by a third mortgage on the road, executed by the plaintiff. The proceeds of the income and improvement bonds were to be used in improving the road. Of the third mortgage series, \$3,500,000 were to be used in retiring the income and improvement bonds, and the remaining \$500,000 were to be expended in improvements.

The plaintiff charges that, although the net earnings of the road were amply sufficient for the purpose, the defendant never paid the dividends due on the stock after July 1, 1875, nor the interest on the mortgages existing at the date of the lease after April 1, 1876, nor

any part of the interest on the third mortgage bonds; that it failed to apply the proceeds of the income, improvement, and third mortgage bonds, or a large part thereof, to the purposes for which they were issued, but appropriated them to other uses not authorized by the lease; that in consequence of its default in the payment of the interest in the third mortgage bonds, a suit to foreclose the third mortgage was commenced by a holder of the bonds, in the circuit court of the United States for the Eastern district of Missouri, in which suit a receiver was appointed in April, 1876, and a decree of foreclosure afterwards obtained, under which the road was sold, and the sale confirmed by the court; and that the defendant failed to perform the obligations of the plaintiff in the leases of the branch roads, whereby the leases became forfeited and were lost.

The bill further contained the allegations that the plaintiff had been able to trace \$1,650,000 of the third mortgage bonds into the hands of various parties, who held them as collateral security for the obligations of the defendant, but it had been unable to ascertain what had become of the rest of the bonds; that, until the appointment of the receiver, the plaintiff's organization as a corporation, with all its books, papers, and accounts, continued to be in the possession and under the control of the defendant, and its officers and agents; that the accounts arising out of the matters complained of were voluminous and complicated, and could not, without manifest inconvenience, be taken in a court of law; and that the defendant had refused to account.

The prayer of the bill was for an answer, not under oath; for an account of the income, improvement, and third mortgage bonds; of the rent from July 1, 1875, to April 1, 1876; of the damages caused by the foreclosure of the third mortgage and the forfeiture of the branch road leases, and for other relief. The case comes before the court upon the bill and the several demurrers filed by the defendant thereto.

That the plaintiff is entitled, upon the case stated, to an account of the income, improvement, and third mortgage bonds, in some form of action, is not denied. The defendant insists, however, that the only remedy open to the plaintiff to obtain such an account is an action at law. A court of equity has jurisdiction in matters of account, (1) where there is a fiduciary relation between the parties, and (2) where the account is so complicated that it cannot be conveniently taken in an action of law. *Fowle v. Lawrason*, 5 Pet. 495; *Mitchell v. G. W. Milling & Manuf'g Co.* 2 Story, 648; *Badger v. McNamara*, 123 Mass. 117; *O'Connor v. Spaight*, 1 Schoales & L. 305.

The plaintiff seeks to maintain the bill on both grounds. It is unnecessary to consider whether, upon the facts stated, the defendant became the trustee of the defendant for the expenditure of the fund to be realized from the bonds, for we are of opinion that the bill states a case within the equitable jurisdiction of the court upon the

second ground, arising out of the nature of the accounts between the parties.

The case requires an investigation into accounts of the most complicated nature. The inquiry must ascertain the disposition made by the defendant of \$7,500,000 of railroad bonds, the manner in which they were negotiated, the amount realized, how much was properly applied to construction and equipment and to the retiring of existing indebtedness, and how much was misappropriated to purposes not authorized by the contract, and the damage to the plaintiff from the loss of its road and branches arising out of the defendant's failure of duty. The investigation must necessarily involve a minute examination of accounts, items, and vouchers, as well as of values. It would be practically impossible to take an account so extensive and complicated as this must necessarily be, in an ordinary jury trial; and it can only be taken, with justice to the parties, through the machinery of a court of equity.

The defendant also insists that the bill is multifarious, because it joins to the prayer for an account of the bonds a prayer for an account of the damages for the loss of the road and its branches, and for unpaid dividends in the nature of rent. But conceding that these are not independent grounds of equity jurisdiction, it does not follow that they are not properly joined in the bill. All the matters in controversy are between the same parties, arise out of breaches of the same instrument, relate to the same transactions, and can be conveniently settled in one suit. The case is one where the court, having jurisdiction for one purpose, will proceed to determine the whole case, although some of the questions, if presented separately, would not furnish a basis for equitable relief.

Another ground of demurrer is that the lessors of the branch roads and the stockholders, or one or more of the stockholders in behalf of all, are necessary parties. As to the lessors of the branch roads it is sufficient to say that they can have no possible interest in the decision of the questions presented by the bill. The lease provides that the dividends shall be paid directly to the stockholders. But the defendant's covenant to pay them was made with the plaintiff, and the corporation, composed as it is of all the stockholders having a common interest in the questions at issue, fully represents their interests, and is the proper party to enforce the claim for unpaid dividends, as well as the other demands in the suit.

Another ground of demurrer to be considered is laches. The original bill was filed April 21, 1881, within five years after the alleged causes of action accrued. In explanation of the delay, the bill states that in 1878, 1879, and 1880 the plaintiff attempted to obtain redress in Missouri, but owing to the defendant having abandoned its former place of business in that state it failed to secure service of process. In June, 1880, it sued the defendant in New York, where the defendant pretended to have an office and place of business, but

the suit was dismissed for want of proper service of the summons. Having afterwards learned that the defendant had a place of business in Boston, it brought this suit in the supreme judicial court of the state, and attached the property of the defendant, and the case was subsequently removed into this court upon the application of the defendant. Taking the case as stated in the bill, it does not appear that the defendant has suffered any prejudice by the delay, and the plaintiff's claims are not barred by any statute of limitations. We think also that the plaintiff's explanation furnishes a satisfactory excuse for not commencing this suit earlier.

Demurrers overruled.

MATHEWSON v. PHOENIX IRON FOUNDRY.

(Circuit Court, D. Rhode Island. May 20, 1884.)

1. WRITTEN CONTRACT OF MARRIAGE—VALIDITY.

A written contract of marriage, although not provided for by statute, is a good contract of marriage, *per verba de presenti*.

2. MARRIAGE A CIVIL CONTRACT—CONSENT.

Marriage is a civil contract, the essence of which is consent.

3. MARRIAGE AT COMMON LAW—CONSENT.

At common law, persons of suitable age might, by words of consent, contract a valid marriage without the presence and intervention of a minister, and without any particular form of solemnization.

4. SAME—EFFECT OF DIRECTORY STATUTE REGULATING MARRIAGE.

Where a state statute regulating marriage is directory merely, and does not forbid other marriage contracts, a marriage valid at common law is good in that state.

5. CHAPTER 134, REV. ST. 1857, R. I., DIRECTORY.

Chapter 134, Rev. St. 1857, of Rhode Island, relating to marriages, is directory merely.

6. COMMON LAW IN RHODE ISLAND.

The common law has always existed in Rhode Island, except so far as modified or changed by statute.

7. REPEAL OF STATUTE—REVIVOR OF COMMON LAW.

Where the legislature of a state does away entirely with the common law by passing statutes, but afterwards repeal those statutes, upon their repeal the common law revives.

8. COMMON-LAW MARRIAGE—VALIDITY IN UNITED STATES.

Marriages at common law are not partial in the United States, in the sense that the contract must be completed *in facie ecclesie*, but they are valid without the presence or intervention of a person "in holy orders."

9. SAME—VALIDITY—DOWER—UNLAWFUL RELATIONS OF PARTIES.

A written contract of marriage entered into between two parties in the presence of witnesses constitutes a valid marriage, and confers upon the wife the right to dower; the fact that the previous relations of the parties were unlawful is immaterial.

10. SAME—EFFECT OF DENIAL.

A denial by a party to a marriage *per verba de presenti* does not annul the contract.

11. LAND COVERED BY TIDE-WATER—DOWER IN.

Where a husband deeds land partially covered by tide-water, his wife is entitled to dower in the part not so covered.

In Equity.

Benj. F. Butler, E. M. Johnson, and E. S. Hopkins, for complainant.

Brown & Van Slyck and Jas. Tillinghast, for defendant.

Heard before LOWELL and COLT, JJ.

COLT, J. In this suit the complainant claims dower in certain land as the widow of Henry C. Mathewson, through whom the defendant derived title. As evidence of marriage she produces the following paper:

“PROVIDENCE, R. I., August 18, 1859.

“This is to certify that we, H. C. Mathewson and Sarah D. Mathewson, both of Providence, R. I., do hereby acknowledge ourselves before the following witnesses to be man and wife.

H. C. MATHEWSON.

“SARAH D. MATHEWSON.

“Signed in the presence of

“C. A. CARPENTER.

“S. J. HORTON.”

The witness Horton was a clergyman, then residing in Connecticut. Another person, named Connell, swears he was also present when the paper was signed. The defendant denies the legality of the marriage.

The statutes of Rhode Island, in force at this time, contain certain provisions regulating the subject of marriage. Rev. St. 1857, c. 124. By section 7, any minister or elder domiciled in the state, or either justice of the supreme court, may join persons in marriage. Section 9 prohibits any minister, elder, or magistrate from joining in marriage any person, unless they shall sign and deliver to such minister, elder, or magistrate a certificate setting forth their names, age, color, occupation, etc. By section 11 a penalty is imposed upon the minister, elder, or magistrate who shall join persons in marriage without first receiving such certificate. By section 14 the solemnization of marriage is required to be in the presence of two witnesses, at least, besides the minister, elder, or magistrate officiating. Section 15 permits Quakers, Friends, and Jews to marry according to their forms and ceremonies. Section 16 requires the parties to any marriage, before celebration, to deliver to the town clerk the certificate mentioned in section 9, under penalty of fine or imprisonment.

It is clear that the complainant was not married in the mode laid down by statute. The minister present was not domiciled in the state. It does not appear that he officiated at the marriage. He only testifies that he signed the paper, and that those whose signatures appear, signed it. The parties gave no certificate, as required by statute. But while this marriage was not according to the form of the statute, it was a good contract of marriage, *per verba de presenti*, or at common law, so called. Marriage has long since been regarded as a civil contract, the essence of which is consent. *Nuptias non concubitus, sed consensus facit*. This, says Chancellor KENR, is

the language equally of the common and canon law, and of common reason. 2 Kent, Comm. 51.

At common law, as held in this country, and until recently, it would seem, as generally understood in England, persons of suitable age might, by words of present consent, contract a valid marriage without the presence and intervention of a minister, and without any particular form of solemnization. A statute may, of course, take away this common-law right; but this is not to be presumed. The right is not conferred by statute, but exists independent of it, and therefore it is held the rule does not apply that when a statute directs a thing to be done in a particular way, it is void if done in any other way. The construction usually adopted is that when the statute regulating marriage is directory merely, when it does not expressly forbid other marriage contracts, a marriage *per verba de presenti*, or at common law, is good.

It will be observed that the Rhode Island statute is directory in form. It contains no words making marriage a nullity unless the statutory form is complied with. It nowhere declares that marriages good at common law shall be void. On the contrary, section 13 says: "Whoever shall be married without duly proceeding as by this chapter is required, shall be fined not exceeding fifty dollars;" which implies that marriage may be contracted independent of the statutory form, and that such marriage is not invalid, but that the parties so married shall be liable to a penalty. This provision is in marked contrast with the earlier sections of the chapter, where the statute expressly makes marriages within the prohibited degrees of affinity or consanguinity, and in some other cases, absolutely null and void.

We think a careful reading of the whole statute impresses the mind with the conviction that while the legislature intended to subject to punishment the parties, as well as those officiating, who might fail to observe the statutory provisions, it was not the intention to make marriages void by reason of non-compliance, and thus subject parties to all the serious consequences which would flow from such a result.

Undoubtedly the legislature could prohibit the exercise of the right of marriage except in the way prescribed by statute. But the question here is, what is the proper rule of interpretation under a statute like that of Rhode Island?

Judge STRONG, in construing a statute of similar character, and speaking for the supreme court of the United States, says:

"No doubt a statute may take away a common-law right; but there is always a presumption that the legislature has no such intention unless it be plainly expressed. A statute may declare that no marriages shall be valid unless they are solemnized in a prescribed manner; but such an enactment is a very different thing from a law requiring all marriages to be entered into in the presence of a magistrate or a clergyman, or that it be preceded by a license, or publication of bans, or be attested by witnesses. Such formal provisions may be construed as merely directory, instead of being treated as de-

structive of a common-law right to form the marriage relation by words of present assent. And such, we think, has been the rule generally adopted in construing statutes regulating marriage. Whatever directions they may give respecting its formation or solemnization, courts have usually held a marriage good at common law to be good notwithstanding the statutes, unless they contain express words of nullity." *Meister v. Moore*, 96 U. S. 76, 79. And see the remarks of GRIER, J., in *Hallett v. Collins*, 10 How. 174, 181.

The weight of authority seems largely to sustain this view. 1 Bish. Mar. & Div. § 283; 2 Greenl. Ev. § 460; 2 Kent, Comm. 51; Reeve, Dom. Rel. 307; *Hutchins v. Kimmell*, 31 Mich. 126, 130; *Pearson v. Howey*, 6 Halst. 12; *Hantz v. Sealy*, 6 Bin. 405; *Com. v. Stump*, 53 Pa. St. 132; *Fenton v. Reed*, 4 Johns. 52; *Jackson v. Winne*, 7 Wend. 47; *Rose v. Clark*, 8 Paige, 574; *Starr v. Peck*, 1 Hill, 270; *Clayton v. Wardell*, 4 N. Y. 230; *Cheney v. Arnold*, 15 N. Y. 345; *O'Gara v. Eisenlohr*, 38 N. Y. 296; *Duncan v. Duncan*, 10 Ohio St. 181; *Carmichael v. State*, 12 Ohio St. 553; *Graham v. Bennet*, 2 Cal. 503; *Estate of McCausland*, 52 Cal. 568; *Dumaresly v. Fishly*, 3 A. K. Marsh. 368; *Donnelly v. Donnelly's Heirs*, 8 B. Mon. 113; *Londonderry v. Chester*, 2 N. H. 268; *Newbury v. Brunswick*, 2 Vt. 151. But see *Northfield v. Plymouth*, 20 Vt. 582; *State v. Murphy*, 6 Ala. 765; *Potier v. Barclay*, 15 Ala. 439; *Yates v. Houston*, 3 Tex. 433; *Patton v. Philadelphia*, 1 La. Ann. 98; *Holmes v. Holmes*, 6 La. 463; *Cargile v. Wood*, 63 Mo. 501; *Dyer v. Brannock*, 66 Mo. 391.

In a few states it must be admitted the rule is different. *Milford v. Worcester*, 7 Mass. 48; *Com. v. Munson*, 127 Mass. 459; *Denison v. Denison*, 35 Md. 361; *Cram v. Burnham*, 5 Greenl. 213; *Ligonina v. Buxton*, 2 Greenl. 102; *State v. Samuel*, 2 Dev. & B. Law, 177, 180; *Bob v. State*, 2 Yerg. 177; *Grisham v. State*, Id. 589; *Dunbarton v. Franklin*, 19 N. H. 257.

But it is said that common-law marriages were never considered valid in Rhode Island. The question has not been passed upon by the state court. The argument is based upon the history of legislation upon the subject, and especially upon the older statutes. The earliest statute relating to marriage was passed at the first session of the general assembly ever held in Rhode Island, in 1647, and it provided that no other marriages should be held lawful except those contracted according to the form of the statute. The act declares:

"No contract or agreement between a man and a woman to owne each other as man and wife shall be owned from henceforth throwout the whole colonie as a lawful marriage, nor the children or issue so coming together to be legitimate or lawfullie begotten, but such as are in the first place with the parents, then orderly published in two severall meetings of the townsmen, and lastly confirmed before the head officer of the town, and entered into the towne clerk's booke."

Then follows a penalty against those going contrary to the "present ordinance." 1 Col. Rec. 187.

By act of March 17, 1656, parties were required to publish their intention of marriage, and objection to such marriage might be heard

before two magistrates, when, if disallowed, it was referred to the "general court of tryalls." Id. 330.

The act of May 3, 1665, after condemning the loose observance of the statute of 1647, orders that act and subsequent acts to be punctually observed, and inflicts an additional penalty of fornication on persons who should presume to marry otherwise, or live together as man and wife. The act then proceeds expressly to validate the relations of all such then living within the colony "that are reputed to live together as man and wife by the common observation or account of their neighborhood." 2 Col. Rec. 104.

By the act of 1701 it was ordered that all marriages take place after due publication of intentions, etc., and a fine was imposed on officers presuming to join persons in marriage without such publication, excepting those married according to the laws, customs, and ceremonies of the church of England, and Quakers. The exception was afterwards extended to Jews. This act was entitled "An act for preventing clandestine marriages," and this same title we find in the several subsequent revisions of the statutes until the revision of 1857. 3 Col. Rec. 435; Pub. Laws 1663-1745, p. 30; Digest of 1767, pp. 172-175.

By act of December, 1733, settled ministers and elders of every denomination were authorized to join persons in marriage after due publication, and upon receiving certificate. They were required to keep and return to the town clerk a record thereof for registry, and a fine was imposed upon them for marrying without publication. 4 Col. Rec. p. 490; Pub. Laws 1663-1745, p. 176.

It is claimed that these enactments are controlling, and that they show that common-law marriages were never recognized in Rhode Island. The common law has always existed in Rhode Island, except so far as modified or changed by statute. This is true of marriage, as well as other subjects. The legislature may have seen fit in early times to do away entirely with the common law, and to make marriage illegal unless it conformed to the statutory regulations. But if the legislature had at any time repealed all statutes on the subjects, the common law would have been revived. And, in so far as the legislature has seen fit to change the statute, to make it less restrictive by not declaring all other marriages illegal, as in the earliest enactments, in so far it has restored the common-law right. If, upon a proper construction of the statute in force, we find the common-law right is not denied, then it still exists, though it may not have existed under former and different statutes. Unless the statute under consideration, upon a proper construction, prohibits marriages *per verba de presenti*, we do not think we should, by implication derived from old statutes, decide against their validity. To make marriages void and children illegitimate, by implication, is a serious thing. Because, under earlier statutes, a marriage, not made in conformity therewith, may have been invalid, we do not feel war-

ranted in implying that such is the proper interpretation of the statute of 1857. We think it safer to hold that in modifying the terms of the statute the legislature intended to modify the law; and, as we have before said, our conclusion is that the statute of 1857 does not make a marriage *per verba de præsenti*, or at common law, void; this being the construction put upon similar statutes in most of the states, and in the supreme court of the United States.

But it is contended that marriage *per verba de præsenti* was not a full marriage at common law, that it was only a partial marriage, where either party could compel the other to go before the ecclesiastical court and complete the contract *in facie ecclesiæ*. Whatever view may now be taken in England since the case of *The Queen v. Millis*, decided in 1644, (10 Clark & F. 534,) where the house of lords, upon appeal, were evenly divided on the question, the adjudications in this country from the earliest times have established the full validity of marriages at common law. This is the view taken by the supreme court in *Meister v. Moore*, and by Chancellor KENT, Judge REEVE, Professor GREENLEAF, Judge COOLEY, and Mr. BISHOP. See authorities before cited. Partial marriages have never been recognized in this country. We have no established church, and no ecclesiastical court to which application can be made to complete the contract. Our situation and circumstances would necessarily bring about a modification of the common law as recently expounded by English courts.

The proposition that the presence and intervention of a person "in holy orders" is requisite to a valid marriage at common law in this country, is contrary to the opinion of our ablest jurists, and to a long line of adjudications. It would indeed have seemed strange to our Puritan forefathers, if, in order to contract a legal marriage, they had been obliged to bring with them a clergyman of the church of England or of Rome to be present at the ceremony. Bish. Mar. & Div. § 282.

If marriage at common law in this country, by words of present consent, is valid and complete, then clearly the widow should be entitled to dower. Scribner on Dower, says, (vol. 1, p. 107:)

"Under our system of laws it is a solecism in language to speak of a marriage as good for some purposes and not good for all,—as a marriage which is not a marriage. And it may be safely said that in those states where the courts already have, or hereafter shall determine, in favor of the validity of private marriages, such marriages will be regarded as being attended with all the civil rights and obligations which, under the ecclesiastical law, flow from a marriage duly solemnized *in facie ecclesiæ*, and therefore that they confer upon the wife the right to dower."

If the written contract entered into between these parties in the presence of witnesses—one of whom was a clergyman—constitutes, as we hold it does, a valid marriage *per verba de præsenti*, it can make no difference if their previous relations were unlawful; nor would the

fact that either party afterwards denied the marriage be sufficient to annul the contract.

The defendant derived title from Henry C. Mathewson. The evidence goes to prove that a large part of the land, at the time it was deeded, was covered by tide-water, and therefore it is claimed the title was in the state, (*Biley v. Burges*, 11 R. I. 330;) but this would not apply to the remaining portion, in which we hold the complainant entitled to dower as the lawful widow of Henry C. Mathewson. Rev. St. R. I. 1857, c. 202, § 1.

KIRKPATRICK and others v. ADAMS and another.

(Circuit Court, W. D. Tennessee. April 30, 1884.)

1. CONTRACTS—GAMBLING—FUTURES—OPTION.

If the parties intend in fact to buy or sell actual cotton, to be delivered at a future time agreed upon by them, it is not a gambling transaction, although they exercise the option of settling the difference in price rather than make delivery; but if the original purpose be not to deliver cotton but to use the form of a contract for a genuine sale, as a method of merely speculating in the fluctuations of the market price, the contract is void, although there be an option of veritable sale and delivery. It is a question of fact for the jury to determine the intention.

2. SAME—PRINCIPAL AND AGENT—BROKER.

Where the principal employs an agent to buy "futures," if the dealings be illegal as gambling transactions, the agent cannot recover his advances and commissions, as he is the active agency engaged in placing the contracts and directing the business.

3. SAME—KNOWLEDGE OF THE PRINCIPAL—INTENTION OF THE AGENT—TEST OF ILLEGALITY.

Where the defendant employed the plaintiff to buy "futures" in the market of the plaintiff, without specific instructions or restrictions, the plaintiff may assume that the business is to be done by the rules or custom established for himself; and the defendant's knowledge of that custom is not material; neither is his intention to engage in gambling in prices material in determining whether the contracts actually made were illegal; but the test of illegality is the intention of the plaintiff and the other parties to the contracts. If they intended to make contracts for actual delivery, and not for gambling in prices, the defendant is bound for the advances and commissions, although he intended and supposed he was only gambling in prices.

4. SAME—EVIDENCE—BURDEN OF PROOF.

While the law presumes that every man's contracts are intended to be legal until the contrary appears, and the defendant who sets up illegality must prove it, there is no presumption that any particular contract is valid or invalid, and the plaintiff must prove the case made by his declaration. In doing this, if it appears that the dealings were illegal, he cannot recover, and the jury is to follow the presumption of legality only where there is no proof whatever to satisfy them to the contrary.

5. NEW TRIAL—VERDICT AGAINST THE WEIGHT OF THE EVIDENCE.

It is difficult to draw the line, but in the exercise of its power to set aside a verdict, because contrary to the weight of the evidence, the court must be careful not to subvert the right of trial by jury by usurping the function of deciding the facts. Where there is substantial evidence to support the verdict the court will not disturb it simply because the judge may differ with the jury about the weight of the evidence.

The plaintiffs sued the defendants for a balance due by account, and the plea of defendants sets up that the balance arose out of contracts for gambling in "futures." The plaintiffs were commission merchants doing business at New Orleans, and the defendants, country merchants doing business at Trezevant, Tennessee. During the season the defendants shipped cotton to the plaintiffs, which was sold for account of defendants, who drew drafts in the usual way. From time to time defendants also ordered the plaintiffs, by telegram and letter, to buy for them "one March," "one April," etc., and would instruct them to "cover our March," or "close our Aprils," etc. At the end of the season there was a balance due the plaintiffs on the account. The senior member of defendants' firm also had an account with plaintiffs, on which there was a balance due him about equal to the balance due plaintiffs from the defendants. Correspondence about settlements arose, in which representation was made that defendants were in need of money, and a request that plaintiffs should pay what was due the senior Adams and carry over the firm account until the next season, when it should be paid. Plaintiffs consented to this, and forwarded the money due the senior Adams, but upon its receipt defendants remitted to plaintiffs the sum which they found due on account of shipments of cotton, and informed them that the balance due for losses on "futures" would not be paid; whereupon this suit was brought.

The plaintiffs testified that they were members of the New Orleans cotton exchange, and dealt for defendants under its rules, which were put in evidence, showing the forms of contracts for future delivery, and the other rules governing such dealings. They explained that "one April" meant 100 bales of cotton for delivery in April; and showed in detail all the dealings had on the orders of defendants entering into the account, and exhibited the whole correspondence by telegram and letter. They testified that the contracts were *bona fide*, and for actual delivery in every case; that they were, on the order of defendants, transferred or sold before maturity to other parties; that the business of buying and selling under such contracts was carried on by a system of clearing-house settlements between the merchants or brokers, the contracts being protected by margins advanced by them on account of defendants, until the maturity of the contract, when the cotton was either actually delivered to the holder of the contract, or a settlement had of the differences, at the option of the holder. They testified that, as a matter of fact, only about 2 per cent. of the contracts were settled by actual delivery of cotton, but that, notwithstanding this fact, it was well understood in the cotton exchange that these contracts were for *bona fide* sales and purchases of real cotton, and not a settlement of mere differences, as in the "bucket shops."

One of the defendants testified that they knew nothing of the rules of the New Orleans cotton exchange, or its method of dealing, and

that, wishing to speculate in "futures," they had given the orders to plaintiffs; had been guided in their dealings by their advice as to closing out the contracts, when the market broke down and the panic ensued, out of which the losses arose; and that they had no intention to buy or sell actual cotton, and did not authorize such contracts, but intended only to speculate in prices.

The court charged the jury as follows:

HAMMOND, J. The plaintiffs were commission merchants in the cotton trade, and the defendants were their customers. The suit is that of the factor against the customer for the balance of account. There were between the parties "spot" transactions and transactions in "futures." The former, covering cotton in fact consigned to the factor and sold for the account of the customer, have been fully settled by the parties, and are eliminated from the account, the balance claimed being wholly composed of advances made by the factor for the customer on account of the transactions in "futures" and the factor's commissions.

Before considering the subject of gambling in its bearing on this suit it is proper to dispel any confusion that may exist in the minds of the jury as to the relation of certain facts in proof to the main inquiry:

First. This is not, in any sense, a suit upon the gambling contracts, if they be such, involved in the controversy. These have been settled, and the losses paid by Kirkpatrick & Co., who are suing for the moneys advanced to pay these losses and their commissions as factors. There can be no question on the facts of this case that they were requested to advance the money by the defendants, and that they have performed the services entitling them to commissions, if you find in the end that there was no gambling in the business. But Kirkpatrick & Co. claim that although Adams & Son may have been gambling with divers and sundry persons to this court and jury wholly unknown, they are entitled to recover their advances notwithstanding. There may be, and often are, circumstances when a commission merchant or other agent, having full knowledge that his customer has been engaged in the illegal business of gambling in the fluctuations of price of a commodity, may recover for his advances to pay the losses. But we need not here stop to inquire about those circumstances, because whatever may have been the precise, legal character of the defendants' dealings, Kirkpatrick & Co. had not only knowledge, but were active participants in them. They knew vastly more about them than the defendants did, and were far more active in the matter than the defendants were. If Adams & Son were gambling with Kirkpatrick & Co.'s money, the latter knew all about it, assented to it, advanced it for the purpose, and willingly played the game for their principals. There cannot be a doubt of this on the proof, and we may dismiss that contention from the case. The plaintiffs cannot recover unless the defendants and the unknown persons from whom they bought, and to whom they sold, under the guidance of the plaintiffs, were engaged in legitimate trade.

Second. There has been some contention about the knowledge Adams & Son had of the cotton exchange rules and customs,—not in reference to any supposed defense arising out of the clearing-house usage of settling the contract,—for neither in the proof nor argument has any such defense been suggested as that, by the clearing-house arrangements, Kirkpatrick & Co. were dealing inconsistently or in hostility to their relation as agent for Adams & Son, and the court will therefore assume that the incidental mention of the clearing-house usage has no effect on the case, and that Kirkpatrick & Co. closed out the contracts directly with the parties with whom they were made.

But Adams & Son claim that, because they knew nothing of the rules of the cotton exchange in the matter of the forms, covenants, or stipulations

contained in the contracts given in evidence, they are in no sense bound by them. They say they were dealing in "futures," employed Kirkpatrick & Co. to place them, and that if they chose to operate under the rules of the cotton exchange that was their affair, and the rules cannot be invoked to bind them or aid as evidence in determining the real intention of the parties as to the character of the contract. There is considerable force in this, as there is in the other argument made in behalf of defendants based upon it, that whatever Kirkpatrick & Co. were doing in New Orleans, with the unknown people with whom they were trading, in behalf of Adams & Son, they themselves knew Adams & Son were gambling in "futures;" that Adams & Son had no other intention than to so gamble, and therefore they were not authorized to make any but gambling contracts for Adams & Son, and if, under the rules or otherwise, they made legitimate contracts they exceeded their authority as agents. In other words, defendants say: We employed you to do our gambling for us and not to bind us to valid contracts for the sale and future delivery of cotton.

Forcible as this is, the court does not think it founded on any proof before the jury, or that it is proper to submit it as a possible or fair inference the jury might, on their responsibility, make from the facts disputed or undisputed. It is apparent from the proof that Adams & Son gave no specific directions to their agents. They did not tell them in terms to do anything; their orders were, "buy us one April," etc. What was in their own minds as to this order may have been one thing, and what was understood by Kirkpatrick & Co. may have been another. The law presumes it was an order to do a legal thing, not an illegal thing, and Kirkpatrick & Co. had, in the absence of specific directions, a right to assume that it meant a legitimate transaction, if there were any to which it could apply, and not an illegal one. Moreover, while Adams & Son may have had, and did, perhaps, have, a very confused notion of the details of dealing in "futures," they employed these agents to do their dealing in the most general way possible. The agents were familiar with the business in hand, and were employed because of their familiarity. Adams & Son could scarcely have done the business without a broker; they knew very well that brokers deal according to customs and usages in their business, whether these customs and usages come from the general law or are established by the course of dealing in the market through rules made by the brokers themselves or otherwise. These brokers were employed as such to deal for Adams & Son in the market of the brokers, and, in the absence of specific instructions, they were agents authorized to use their own discretion about the business, and Adams & Son are bound, by the legal contracts made for them, as long as the discretion of the agents is exercised within the scope of their instructions and was reasonable. Their orders were simply to buy or sell for future delivery, and, in doing this, it was their privilege to follow the usages of their business, whether established by the rules of the cotton exchange or in some other way. As between them and Adams & Son, it was a usage of their own. They were the rules of dealing between a broker and his customer, and, when limited to their dealings with each other, as it is in this case, the inquiry about the extent of the agent's authority in making the particular contract is in no way dependent on the principal's knowledge of the usage or rules. Kirkpatrick & Co. were employed by Adams & Son to make contracts for them in the market at New Orleans, not according to the knowledge of Adams & Son about the business, but according to the knowledge and skill of Kirkpatrick & Co. about that business; and our inquiry here about the character of the contracts, in respect to their being lawful or gambling contracts, is limited strictly to the facts and circumstances entering into the dealings between Kirkpatrick & Co. and the unknown persons with whom they made the contracts. It is not the intention of Adams & Son about which we are to inquire, but of

Kirkpatrick & Co., their agents, who made the contracts under the broadest authority, and without specific instructions as to details and the unknown persons with whom they dealt.

We come now to the chief and only important question of controversy between the parties, and it is one of fact, gentlemen of the jury, for you alone to determine. All the court can do is to direct your minds to the principles of law involved in its determination, and it is for you to weigh the proof in all its bearings and decide whether or not Kirkpatrick & Co., the agents of the defendants, and the unknown persons with whom they made the contracts, intended in those particular instances to sell and buy cotton as a commodity to be delivered by the seller to the buyer at a time agreed upon in the future, or only to speculate in the fluctuations of the market, using imaginary and wholly mythical bales of cotton as a basis of the speculation. If they bought and sold in good faith, for actual delivery, they had a right to do all they did; but if they did not intend to buy and sell for actual delivery it was a gambling transaction, void *in toto*, and the defendants are in no way liable to pay this account. It is not sufficient that the parties reserved to themselves an option of converting the contracts into a real transaction of buying and selling for actual delivery if the original intention was to make a contract which contemplated in fact no delivery, but a mere adjustment of differences in prices. It would be none the less a gambling transaction if such was the original purpose, because of the option. And, on the other hand, if the original purpose was to actually deliver the cotton at the time named in the contract, the fact that the parties agreed not to deliver, but to settle on a basis of difference in prices, does not make it a gambling transaction. The existence of the option in the contract is merely one element of fact to which you may look, with all the others, in arriving at the real *bona fide* intention of the parties. And so of the whole contract and all its stipulations. You are not confined to its terms in deciding the question of intention. It may be fair enough on its face and express all the purposes of a fair transaction, and present all the features of a genuine contract to buy and sell actual cotton, yet if you can see from the proof in the case that it was not a genuine contract to buy and sell actual cotton, but a contract to use the simulation of a genuine contract for actual cotton as a real contract for mere speculation in prices, the plaintiffs cannot recover. Every contract to speculate in prices must be necessarily, in form, a contract of buying and selling, unless it is a mere bet in the usual form that on a certain day cotton will be such a price. It is not merely this kind of wagers or bets that the law condemns as gambling. It denounces all transactions that are not genuine contracts to buy and sell the actual commodity as mere gambling. Everybody has a right to speculate in prices if he does it through *bona fide* contracts for actual sale and delivery of the commodity, but no one has a right to speculate through mere imaginary buying and selling in which the parties do not intend in fact to transfer the commodity, but only to meet together and pay the difference. You will see then how plain and simple your inquiry is in this case. It narrows itself down to the one question, of intention of the parties; and the real facts of the transactions, whatever their form, are the subject of your inquiry. Did Kirkpatrick & Co. and the unknown persons in making these contracts really intend to buy and sell actual cotton, or did they merely intend to settle the profits or losses without any actual buying and selling? If you find the contracts were for actual cotton to be delivered according to the stipulations, your verdict must be for the plaintiffs; if they were not contracts for actual delivery, you must find for the defendants.

A good deal has been said about the burden of proof; it is a very simple matter. The law does not presume that these contracts were either valid or invalid, and you are to determine that question from the facts as you find them in the case. The law does presume, in the absence of all proof to the

contrary, that men do not violate the law or its policy, and that in their dealings with each other they comply with the law and its policy, and intend to obey it. But this is all. The plaintiffs must show that the defendants owe them money according to their declaration in the case. The law does not presume the money is due because there have been dealings between them; and if, from the nature and character of the dealings the plaintiffs rely on to show the indebtedness, you can see that those dealings were illegal and contrary to law, there can be no recovery. In the absence of proof of illegality you are to assume them to be legal, and, the defendants having set up the alleged illegality by their plea, your inquiry is, does the proof show that the contracts were legal or illegal? If no satisfactory proof of facts making them illegal is given, you follow the presumption of legality; but if there be proof of illegality, you take the whole testimony into consideration as in all other cases, and decide according to its weight and value.

Much has been said about the character of this defense calculated to prejudice the defendants by appealing to that natural repugnance which all men feel toward those who plead the "baby act," the "gambling act," the "usury act," etc. There is a pretty general sentiment that a man who is willing to pocket the profits of illegal dealings should manfully pay the losses. It finds an expression in the maxim that "there is honor among thieves;" but when a man is found who does not recognize the code which demands a compliance with the rules of that honor which prevails among gamblers, and he appeals to the Code of Tennessee and rejects the gambler's "code," courts and juries must enforce the Code of Tennessee and have no jurisdiction of the other. The law encourages men to make the defense, and you should abolish all prejudice against it and decide the issue in this case according to law, without partiality, prejudice, fear, or favor from any source. I know you will do this.

The jury rendered a verdict for \$1,493.83, the amount sued for by plaintiffs.

Motion for new trial.

Geo. Gantt and Spl. Hill, for plaintiffs.

W. W. Murray and J. R. Hawkins, for defendants.

HAMMOND, J., (orally.) The motion must be overruled. The case was submitted fairly to the jury, and their is evidence to sustain their verdict. It may be that if the case had been tried by the court alone a different result would have been reached, or, if the judge of the court had been one of the jury, he might have drawn different inferences from the facts, and insisted on a different verdict. But it would be a mere usurpation of the functions of a jury for the court to set aside the verdict because it might or would have given a different one.

The trial by jury is a constitutional right of the parties, and this means the concurrent judgment of 12 men, on questions of fact, and not the single judgment of the judge of the court, who cannot lawfully set aside verdicts until one is procured in accordance with his own judgment of the facts. This court is committed to this view of the law by several reported opinions, and its almost invariable practice not to disturb verdicts on the ground that they were contrary to the judge's opinion of the weight of the evidence. The power to do this in a proper case is not denied; but, under our practice, where the par-

ties desire to try the facts by the court, they may so stipulate and take its judgment; or where the court, on a motion for a new trial, would not be satisfied to let a verdict stand, it should direct a verdict for the proper party. It is only where the jury has been misled, misinstructed, or so plainly acts from prejudice, passion, or other unknown influence that the court can see that their verdict must be the product of some such influence, and not a deliberate judgment on the evidence, that it should be set aside. It should not, in my judgment, be set at naught simply because the judge does not like it or has a different notion from the jury as to the weight of the evidence. The line is difficult to draw, but the leading consideration is the preservation of trial by jury and a care not to usurp their function while protecting the parties from partial, improper, or corrupt verdicts. The jury should decide the facts, and parties who go before it should cheerfully submit to their decision, and not experiment, first with the jury, and then with the court if the jury decides adversely. There must be an end somewhere, and this jury may as well end this case as another.

The law was charged strictly according to the adjudged cases of *Irwin v. Williar*, 4 Sup. Ct. Rep. 160, (to appear in 110 U. S. 499,) and *Marshall v. Thruston*, 3 Lea, 740, and very favorably to defendants. Both sides seemed contented, and neither made exceptions to the charge. Since the verdict it has been subjected to a searching scrutiny, as is proper, to find some error. The court does not see that the jury could have been misled by it. If the court had directed a verdict for the plaintiffs there would have been great complaint by defendants, and if for defendants alike complaint by plaintiffs, and justly so, for it is a clear case for the jury to determine.

It is as plain to the court as a mathematical demonstration that there is no foundation for the objection that the court eliminated from the consideration of the jury the intention of Adams & Son to gamble in prices. Both sides argued the case, and tried it from first to last, on the question whether the contracts out of which the controversy arises were gambling contracts or not. Here are contracts A, B, and C, etc., each for 100 bales of cotton, and the contention is that they were not contracts for actual delivery, but for mere speculation in differences. Now, Adams & Son did not, in fact, make these contracts; they were hundreds of miles away, had no dealings with the other contracting parties, and were ignorant of all the details of the transactions. How, then, can *their* intention enter into the determination of the question whether they were gambling contracts or not? They employed an agent to make the contracts, without specific instructions about the details; and, in testing the legality of the contracts, we must necessarily inquire about the intention of the agent and the other parties. The principal may have intended to gamble, to pocket the profits and repudiate the losses, but if the agent was not engaged in the gambling business, and supposed his princi-

pal was willing to speculate for future prices in a lawful way, the principal cannot, on the facts of this case, defend against the agent's advances on the theory that *he* was only gambling. The court is satisfied with the charge in that respect, and its treatment of that subject. Kirkpatrick & Co. were employed to do the dealing in "futures," and there were no restrictions on their discretion and no instructions to them. Hence they might bind their principals to legitimate dealings as well as imperil their advances by gambling. There might be some force in saying that they were not authorized to bind the principals except by lawful dealings, and therefore the principals were not liable for the losses by illegal gambling transactions; but it is a strange doctrine that, being uninstructed and unrestricted, the agent must lose his advances in lawful dealings because his principal intended to violate the law against gambling and supposed *he* was doing this.

Overrule the motion.

UNITED STATES *ex rel.* HAYT v. BOARD OF DIRECTORS OF INDEPENDENT SCHOOL-DISTRICT OF MONONA and another.

(Circuit Court, S. D. Iowa, C. D. May Term, 1884.)

TAXES—CERTIFICATE OF AMOUNT—BOARD OF DIRECTORS OF SCHOOL-DISTRICT—LIMITATION—COUNTY BOARD OF SUPERVISORS—LEVY OF TAXES—AMOUNT—MANDAMUS.

The laws of Iowa examined, and *held* that there is no limitation upon the amount which a board of directors of an independent school-district may certify to as a tax necessary to raise funds to meet the interest and principal of bonds properly issued under the authority of a vote of the electors of the district; and it is the duty of the board of supervisors of a county to levy the vote certified by the directors, and a writ of *mandamus* to compel them to do so may be issued.

Demurrer to return to *Mandamus*.

Parsons & Runnells, for relator.

Mitchell & Dudley, for respondents.

SHIRAS, J. At the October term, 1883, of this court an alternative writ of *mandamus* was issued in the above cause, requiring the board of supervisors of Clayton county, Iowa, to levy the full tax certified to them by the board of directors of the independent school-district of Monona, for the purpose of paying the judgment in favor of the relator. It appears that the board of directors of the school-district, in obedience to a writ of *mandamus* from this court, had certified a tax of 75 mills on the dollar to the board of supervisors as the rate needed to pay the amount of the judgment in favor of the relator. The board of supervisors refused to levy a tax greater than 1 mill on the dollar, and thereupon the relator procured the issuance of an alternative writ to the board of supervisors, requiring the board to

levy the tax certified by the directors, or to show cause to the contrary. The board of supervisors file a return to the writ, setting forth that under the statutes of Iowa 10 mills is the highest rate of taxation allowed in the independent school-districts for school-house fund, including the payment of debts incurred in the erection of school-houses, and that the board of supervisors cannot, therefore, be required to levy a tax in excess of that rate for the payment of the judgment due relator. To this return a demurrer was filed on behalf of the relator, and thereby the question is presented whether the property of independent districts can be subjected to a tax greater than 10 mills, in any one year, for the purposes embraced within what is known as "the school-house fund."

In the case of *U. S. v. County of Macon*, 99 U. S. 582, it was ruled that the court could by *mandamus* only bring into operation the power and right of taxation existing at the time the debt was created, and such increase of the right of taxation as might have been conferred upon the county after the creation of the debt. In other words, it was held that if, by the terms of the special act providing for the issuing of the bonds, or of the general statutes of the state, a limitation upon the rate of taxation was fixed, the purchasers of the bonds took the same subject to this limitation, and that the court could not compel the levy of a tax in excess of this rate, even if it should appear that the rate thus fixed by the statute was wholly inadequate to meet the demands against the county.

The question, therefore, for determination is whether, at the time the bonds were issued by the independent district of Monona, there was a limit upon the rate of taxation by independent districts, and, if so, whether this limitation has since been removed. The ninth general assembly of this state passed an act providing for the organization of school-districts and of independent districts. By section 7 of this act is declared the powers that belong to the electors of the district when assembled at the annual meeting, among which is the power "to vote such tax, not exceeding five mills on the dollar in any one year, on the taxable property of the district township, as the meeting shall deem sufficient, for the purchase of grounds and the construction of the necessary school-houses for the use of the sub-districts, and for the payment of any debts contracted for the erection of school-houses, and for procuring district libraries and apparatus for the schools." Sections 84 to 91, inclusive, provide for the creation of independent districts, no special provision being found therein touching the levy of taxes for any purpose; it being, however, declared in section 89 that such school-districts "shall be governed by the laws enacted for the regulation of district townships, so far as the same may be applicable."

The tenth general assembly, by an act approved March 19, 1864, amended section 89 of the act of the ninth general assembly by adding thereto the following:

"Provided, that it shall be lawful for the electors of any independent school-district, at the annual meeting, to vote a tax not exceeding ten mills on the dollar, in any one year, on the taxable property of such district, as the meeting may deem sufficient, for the purchase of grounds and the construction of the necessary school-houses for the use of such independent district, and for the payment of any debts contracted for the erection of such school-houses, and for procuring library and apparatus for the use of the schools of such independent district."

The twelfth general assembly, by an act approved April 5, 1868, empowered independent school-districts to borrow money for the erection and completion of school-houses, and authorized the issuing of negotiable bonds for that purpose, under certain restrictions set forth in the act. By section 3 it is provided that—

"Nothing in this act shall be deemed to conflict or interfere with subdivision five of section seven of chapter one hundred and seventy-two of the Laws of the Ninth General Assembly of the state of Iowa; but in the event the electors of an independent school-district which has issued bonds, shall, at the annual meeting in March for any year, fail to vote sufficient school-house tax to raise a sum equal to the interest on the outstanding bonds which will accrue during the then coming year, and such *pro rata* portion of the principal as will liquidate and pay off said bonds at maturity, then it shall be lawful for the school board of such district to vote a sufficient per cent. on the taxable property of the district to pay such interest and such *pro rata* portion of the principal as will pay said bonds in full by the time of their maturity, and shall cause the same to be certified and collected the same as other school taxes."

On behalf of the respondents, it is claimed that the bonds owned by the relator were issued under the provisions of this act, and that the clause providing that nothing in the act shall be deemed to conflict or interfere with subdivision 5 of section 7 of chapter 172 of the Acts of the Ninth General Assembly, must be held to mean that independent school-districts are limited to the amount of tax therein authorized to meet the payment of the bonds authorized to be issued. On behalf of the relator, it is claimed that the only effect of this clause is to provide that the subdivision in question is left in full force as to subdistricts, but is not applicable to independent districts. If these were the only provisions of the statutes applicable to the case, the question thus presented would be one of doubt, and any conclusion reached therein would be open to some question under the loose phraseology found in these several statutes.

When the Code of 1873 was adopted, it was declared, by section 47 thereof, that—

"All public and general statutes passed prior to the present session of the general assembly, and all public and special acts, the subjects whereof are revised in this Code, or which are repugnant to the provisions thereof, are hereby repealed, subject to the limitations and with the exceptions herein expressed."

Title 12 of the Code is devoted to the subject of education, and chapter 9 thereof deals with the system of common schools, and is, in fact, a revision and amendment of the several statutes previously

enacted on that subject, and consequently, under the declaration contained in section 47, just quoted, all previous acts are repealed, and we must look at the provisions of this chapter, and the amendments subsequently made thereto, in order to ascertain the extent of the taxing power conferred upon independent school-districts.

By section 1807 of the Code it is enacted that—

“It shall be lawful for the electors of any independent district, at the annual meeting of such district, to vote a tax, not exceeding ten mills on the dollar in any one year, on the taxable property of such district, as the meeting may deem sufficient, for the purchase of grounds and the construction of the necessary school-houses for the use of such independent district, and for the payment of any debts contracted for the erection of any such school-houses, and for procuring a library and apparatus for the use of the school of such independent district.”

Sections 1821 and 1822 provide for the borrowing of money for the purpose of erecting and completing school-houses, and for the issuing of negotiable bonds, provided authority therefor is given by an affirmative vote by the electors of the district, to whom the question may be submitted at any general or special election. By section 1823 it is then provided that—

“If the electors of an independent school-district, which has issued bonds, shall, at the annual meeting in March for any one year, fail to vote sufficient school-house tax to raise a sum equal to the interest on the outstanding bonds which will accrue during the then coming year, and such proportionate portion of the principal as will liquidate and pay off said bonds at maturity, then it shall be lawful for the board of such district to vote a sufficient rate on the taxable property of the district to pay such interest and such portion of the principal as will pay said bonds in full by the time of their maturity, and shall cause the same to be certified and collected the same as other school taxes.”

Unless the provisions of this section are limited and controlled by section 1807, it is clear that the board of directors have the power to levy such rate of tax as will meet the annual interest and the bonds maturing each year; or, in other words, there is no fixed limit to the rate of taxation when it is necessary to raise funds to meet the interest and principal of bonds issued under authority of a vote of the electors of the district.

Does the limitation of taxation to 10 mills, found in section 1807, control the right of taxation conferred by section 1823? It will be noticed that section 1823 is a revision of section 3 of the act of 1868. The clause of that section providing that nothing therein contained shall be deemed to conflict with subdivision 5, § 7, c. 172, Laws of the Ninth General Assembly, is wholly omitted. Looking at the entire scope of chapter 9 of the Code of 1873, it is our conclusion that it was not the intent of the legislature to limit the power granted in section 1823 by the provisions of section 1807. Had such been the intent, some reference, surely, would have been made thereto, but none is incorporated in section 1823. The grant of power therein is full and complete, without limitation, for the purposes therein con-

templated; *i. e.*, raising sufficient funds by taxation to meet the interest and principal of the bonds lawfully issued under the sanction of the electors of the district. Section 1807 defines the powers of the electors at the ordinary annual meeting. Under its provisions, without any previous notice, those present may authorize a tax for school-house purposes up to the limit of 10 mills, and no provision is made for borrowing money or issuing bonds under the terms of this section. Its provisions, therefore, are intended to define the rights that may be exercised at any annual meeting without previous notice or action on the part of the directors, and are intended to meet the usual annual wants and needs of the district. Sections 1821 and 1822 are intended to provide for unusual and extraordinary demands. If the needs of the district are such that the amount of funds raised by the tax levied under the provisions of section 1807 is insufficient, then the directors of the independent district may submit to the voters of the district, at an annual or special meeting, the question of issuing bonds for the purpose of borrowing money, due notice thereof being given; and if the majority of the votes cast are in favor of the issuing of the bonds, then the board of directors are authorized to issue the same. To meet the indebtedness thus created, section 1823 provides that the electors of the district, at the March meeting, and, failing their action, the board of directors, may vote a sufficient rate of taxation to meet the interest and the principal maturing yearly. There being no limitation found in this section on the power of taxation, it must be held that the legislature did not intend to fix a limit thereto, and that, consequently, it is within the power of the directors to certify a tax in excess of 10 mills, and that it is the duty of the board of supervisors to levy the rate certified by the directors.

The demurrer to the return of the board of supervisors is therefore sustained.

BREWER and LOVE, JJ., concur.

Ex parte MORGAN.

(District Court, W. D. Arkansas. October, 1883.)

1. FUGITIVES FROM JUSTICE—POWERS OF GOVERNOR OF STATE—REQUISITION—PUBLIC POLICY.

The chief executive of a state cannot issue a warrant of extradition for the arrest of a fugitive from justice on the ground of public policy. His only power to extradite a person from his state must be found in the constitution and laws of the United States.

2. SAME—POWER, WHENCE DERIVED.

The manner of the exercise of this power is derived exclusively from the constitution and laws of the United States.

3. SAME—COMITY.

No such power can be exercised by the chief executive of a state on the ground of comity.

4. SAME—REASON FOR CREATION OF A POWER.

The reasons for the creation of a power are not the power.

5. SAME—HABEAS CORPUS—JURISDICTION OF CIRCUIT COURT.

Because it is alleged in the petition for the writ that Morgan is restrained of his liberty, contrary to the constitution and laws of the United States, there can be no doubt of the right of this court, by *habeas corpus*, to inquire into the legality of his arrest.

6. SAME—QUESTION FOR COURT TO DECIDE.

The state of the case at the time the governor issued the warrant for the arrest of Morgan, as shown by the record before him, is what is to be passed on by this court.

7. SAME—PROVISIONS OF CONSTITUTION AND ACT OF CONGRESS—SUPREME LAW OF THE LAND.

The provisions of the constitution on the subject of interstate extradition, together with the act of congress on the subject, are a part of the supreme law of the land, and therefore a part of the law of each state.

8. SAME—POWER OF GOVERNOR OF TERRITORY.

Under the constitution and law of congress the governor or chief executive of a territory, as well as the governor of a state, has a right to make a demand, upon the governor or chief executive of another state or territory, for the extradition of a fugitive from the justice of the demandant state.

9. SAME—PROVISION OF ACT OF CONGRESS BINDING ON GOVERNOR OF STATE.

That part of the law of congress providing that demand can be made by the governor of a territory, is binding on the governors of states and to be observed by them.

10. SAME—"STATE"—"TERRITORY."

The words "state" and "territory" have a definite, fixed, certain, legal meaning in this country and under our form of government.

11. SAME—DEFINITION OF "STATE."

A state means one of the commonwealths or political bodies of the American Union, and which, under the constitution, stand in certain specified relations to the national government, and are invested, as commonwealths, with full power in their several spheres over all matters not expressly inhibited.

12. SAME—DEFINITION OF "TERRITORY."

A territory, under the constitution and laws of the United States, is an inchoate state,—a portion of the country not included within the limits of any state and not yet admitted as a state into the Union, but organized under the laws of congress, with a separate legislature, under a territorial governor and other officers appointed by the president and senate of the United States.

13. SAME—CHEROKEE NATION NEITHER STATE NOR TERRITORY.

The Cherokee Nation is neither a state nor territory; it has an autonomy, but it does not come within the meaning of either a state or territory, but is a part of what is called "Indian country."

14. SAME—TRIBES—NATIONS.

The several tribes or nations belong to the republic, though they are neither a state nor territory.

15. SAME—DEMAND OF CHIEF FOR FUGITIVE FROM JUSTICE.

The Cherokee Nation being neither a state nor territory, the constitution of the United States and the laws of congress did not authorize the governor of the state of Arkansas to honor the demand of the chief of the Cherokee Nation for the extradition of Morgan.

16. SAME—REQUISITION—CERTIFICATE OF GOVERNOR.

By act of congress the affidavit or indictment upon which a requisition is based must be certified by the governor or chief executive as authentic.

17. SAME—LAWS IN RESTRAINT OF LIBERTY—CONSTRUCTION.

All laws in restraint of liberty are to be strictly construed and strictly pursued.

18. SAME—AFFIDAVIT—CERTAINTY.

The affidavit, when this form of evidence is adopted, must be so explicit and certain that if it were laid before a magistrate it would justify him in committing the accused to answer the charge.

19. SAME—AUTHENTICATED COPY OF INDICTMENT—AFFIDAVIT.

The representations of the executive of the demanding state are of no effect unless supported by a duly-authenticated copy of an indictment found or an affidavit made.

20. SAME—STRICT COMPLIANCE WITH ACT OF CONGRESS.

The act of congress provides for a method that is summary in its effect, and must therefore be strictly complied with.

21. SAME—AFFIDAVIT ON BELIEF OR INFORMATION—SUFFICIENCY.

The affidavit must be certain and absolute, and it is not sufficient if founded on belief or information.

22. SAME—"CHARGED WITH CRIME."

"Charged with crime," in legal parlance, means charged in the regular course of judicial proceedings.

Proceedings in *Habeas Corpus*:

In this case the petitioner, Frank Morgan, files his petition for a writ of *habeas corpus*, in which, among other things, he states that by virtue of a requisition issued by the principal chief of the Cherokee Nation upon the governor of the state of Arkansas, the said governor did, on the eighteenth day of August, 1883, issue his warrant, directed to the sheriff of Sebastian county, state of Arkansas, for the arrest of the petitioner for the crime of murder by having killed one Albert Johnson; that on the eleventh day of September, 1883, the said sheriff, by virtue of the said warrant, arrested the petitioner, and now has him in custody for the purpose of delivering him into the custody of the authorities of the Cherokee Nation; that the said requisition so made by the chief of said nation was issued without any authority of law or treaty stipulations between the United States and the said nation; that the warrant of arrest issued by the governor of the state was issued without authority of law; that the said petitioner is now restrained of his liberty by the said sheriff in violation of the constitution and laws of the United States. For these reasons he prays a discharge from arrest. To this writ the sheriff returns that he holds the said Frank Morgan in custody by virtue of a warrant of arrest issued by the governor of the state of Arkansas upon a requisition of the principal chief of the Cherokee Nation, which said warrant so issued by the governor of the state of Arkansas, together with duly-certified copies of the requisition of the principal chief of the Cherokee Nation, and with demand and warrant accompanying the same, upon which said warrant was issued, are attached to his return. To this return the petitioner files a demurrer and answer. In his demurrer he sets up that the response of the sheriff and accompanying documents do not show facts sufficient to authorize the custody and imprisonment of the petitioner.

Brizzolaro, Marcum & Tiller and Taliaferro & Tabor, for petitioner.
Grace & Duncan, for the Cherokee Nation.

PARKER, J. The demurrer to the sheriff's return, from the nature of that return, raises all the questions affecting the legality under the constitution and laws of the United States of the imprisonment of Morgan. I have no concern with the morality or public policy of this case. From the state of the case, I am called on to consider it from a purely legal stand-point, and to view it as a naked, simple legal question. It is true that, in the construction of a law, where there is doubt as to the purpose to be subserved by the law-maker, we may take into consideration an existing condition of affairs, and the demands of public policy as to such affairs. But, in a case of this kind, the chief executive of a state cannot act on grounds of public policy. His power, and his only power, under the law as it now stands, to extradite a person from his state, must be found in the constitution and laws of the United States. If it is not there, it does not exist. Not only the power, but the manner of its exercise, is based exclusively on the constitution of the United States, and the law of congress passed in pursuance thereof.

Interstate extradition is regulated by law. No such power can ever be exercised by the chief executive of a state on the ground of comity. Rorer, *Interstate Law*, 225. Nor has it ever been, in this country, properly and legally exercised on such ground. Comity may and does afford a strong reason for the enactment of laws providing for the extradition of criminals, that they may be brought to justice, and society be thus protected. But we must look to the law for the right to exercise this extraordinary power. Even before our present form of government came into existence we find a number of the colonial plantations entering into a compact in the nature of a treaty for the extradition of fugitive criminals. If it could be done upon comity alone why enter into a compact. As early as 1643 the plantations under the government of Massachusetts, the plantations under the government of New Plymouth, the plantations under the government of Connecticut and the government of New Haven, and the plantations in combination therewith, pledged themselves to each other to render to the colony from which he escaped, the fugitive from justice, and they prescribed the means to be employed in such rendition. *Kentucky v. Dennison*, 24 How. 66; Winthrop's *Hist. Mass.* 121, 126. A similar compact was entered into by the American colonies when they organized themselves under the articles of confederation and assumed the title of "The United States of America." The fourth of these articles provided that if "any person, guilty or charged with treason, felony, or other high misdemeanor in any state, shall flee from justice and be found in any of the United States, he shall, upon demand of the governor or executive power of the state from which he fled, be delivered up and removed to the state having jurisdiction of his offense." This article of the confederation was one of the principles of the "firm league of friendship and perpetual union" that the then acting as sovereign and independent states established. The

reasons of the creation of this power were public policy and public peace and public justice. But the reasons for the creation of a power are not the power, but they can only be used as a means of ascertaining what the created power is. The power under the articles of confederation is to be found in the fourth of these articles. The same power was incorporated into the constitution of the United States. The second section of the fourth article is as follows:

"A person charged in any state with treason, felony, or other crime, who shall flee from justice, and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up to be removed to the state having jurisdiction of the crime."

On the twelfth of February, 1793, congress passed an act respecting fugitives from justice, and persons escaping from the service of their masters. The first section of this act is substantially reproduced in section 5278 of the Revised Statutes of the United States, and is as follows:

"Whenever the executive authority of any state or territory demands any person, as a fugitive from justice, of the executive authority of any state or territory to which such person has fled, and produces a copy of an indictment found, or an affidavit made before a magistrate of any state or territory, charging the person demanded with having committed treason, felony, or other crime, *certified as authentic* by the governor or chief magistrate of the state or territory from whence the person so charged has fled, it shall be the duty of the executive authority of the state or territory to which such person has fled, to cause him to be arrested and secured, and to cause notice of the arrest to be given to the executive authority making such demand, or to the agent of such authority appointed to receive the fugitive, and to cause the fugitive to be delivered to such agent when he shall appear," etc.

We are able to see by this history of the method of extradition among the colonies and states that almost from the first organization of civil society in this country it has been regulated, as to the right of and the method of the exercise of the right, by law. Those who founded the colonies came from countries where personal liberty was not at that time very secure, and they were therefore extremely jealous of any discretionary power founded upon comity or anything else affecting the liberty of the citizen. Hence they sought early in our history to provide by positive enactments, in the shape of compacts or laws, in what cases and in what manner the citizen shall be restrained of his liberty.

There is no doubt of the right of this court, by *habeas corpus*, to inquire into the legality of the arrest of Morgan, as it is alleged in the petition that he is restrained of his liberty contrary to the constitution and laws of the United States. If he is properly held in arrest, it must be by virtue of the constitution and laws of the United States. If he is improperly held, it is in violation of such constitution and the law of congress. This state of the case clearly gives this court jurisdiction, by *habeas corpus*, to inquire whether the governor of Arkansas had the power to honor the requisition of the Cherokee chief; and,

again, if he had such power, did he comply with the act of congress in the exercise of it? The state of the case at the time the governor issued the warrant for the arrest of Morgan, as shown by the record before him, is what is to be passed on by this court. The provision of the constitution on the subject of interstate extradition is the fundamental law of the land. This provision, together with the act of congress on the subject passed in pursuance of the constitution, is a part of the supreme law of the land, and is therefore a part of the law of each state. Congress having acted, the law passed by it is the one to be observed in the matter of interstate extradition.

The question most material in this case, and the one going to the very marrow of it, is, could the governor of the state of Arkansas honor a requisition from the chief of the Cherokee Nation by issuing a warrant for the arrest of Morgan that he might be delivered to the agent of the Cherokee Nation? Suppose the act of congress was fully complied with as to the manner of executing this power, is the chief of the Cherokee Nation the executive authority of any state or territory in the sense in which the word "state" is used in the constitution, and the words "state" and "territory" are used in the act of congress? If so, and the demand is made in due form as prescribed by the act of congress, the governor has done no more in causing the arrest of Morgan than to properly exercise the power vested in him by the laws of the United States. The power making the demand must be the chief executive of a state, as required by the constitution, or of a state or territory, as provided by the act of congress.

The question has been raised in argument that the act of congress, so far as it provided that the demand for extradition could be made upon the governor of a state by the chief executive of a territory, was void as being against or beyond the constitution. Of course, congress cannot legislate beyond the power given it by the constitution. The exercise of its legislative authority must be because of a power expressly given, or of one which is necessary to carry out and make effective one expressly given, by the constitution. The constitution uses the word "state" alone, and the act of congress uses the words "state" and "territory." It is a question that will admit of serious discussion. But it must be remembered that, under article 4, § 3, of the constitution, congress has power to make all needful rules and regulations respecting the territory or other property belonging to the United States. Is not this part of the constitution a part of the fundamental law of the land? It is a part of the supreme law of the land, and is therefore a part of the law of each state. Are not all laws deemed necessary to be passed by congress, and within their power under the constitution to pass, binding on the states and to be observed by them? If congress deems it a needful rule or regulation, relating to the territories of the Union, to extradite their fugitive criminals, it has the power to pass such a rule, not, perhaps, under the extradition clause of that instrument, but under the clause

relating to the territories, and this rule is binding on the states, and to be observed and obeyed by them. I believe, therefore, that this part of the act of congress is valid, and the obligation to obey it, on the part of the governors of the respective states, is as binding as when the demand for extradition is made by the governor of a state. But, in my view of this case, this question need not be decided.

There is no doubt that the Hon. D. W. Bushyhead is the chief executive of the Cherokee Nation. But is the Cherokee Nation a state, according to the meaning to be attached to the word as used in the constitution? Without stopping to inquire as to the different meanings of the word "state," we find that it has a definite, fixed, certain, legal meaning in this country and under our form of government. It had acquired this meaning when the constitution was adopted, and this is the one which must be attached to it when used in that instrument, or in laws of congress. What is that meaning? It means one of the commonwealths or political bodies of the American Union, and which, under the constitution, stand in certain specified relations to the national government, and are invested as commonwealths with full power, in their several spheres, over all matters not expressly inhibited. This understanding of a state started with the adoption of the articles of confederation, and was incorporated into the constitution, and, when used in that instrument or in the acts of congress, must be understood to have this meaning. It is a political organization, having a chief executive who can make a requisition for extradition, and whose duty under the law is to obey one when made by one having authority under the constitution and laws of the United States, that is meant.

The word "territory," when used to designate a political organization, has a distinctive, fixed, and legal meaning under our political institutions. We find a continental resolution of October 10, 1780, to be the foundation of our territorial system. This declares that the "demesne or territorial lands shall be disposed of for the common benefit of the United States, and be settled and formed into distinct republican states, which shall become members of the federal Union and have the same rights of sovereignty, freedom, and independence as other states." Schouler's Hist. U. S. 98. Again, in 1784, an ordinance was adopted by the congress of the confederation, providing for the division of all the country ceded, or to be ceded, into states, with boundaries ascertained by ordinance. This plan for the establishment of governments for the territories provided for their temporary government by the laws of any one of the states. This ordinance was superseded three years later by the ordinance of 1787, restricted in its application to the territory northwest of the river Ohio. These ordinances were all adopted prior to the adoption of the constitution. Then came the clause of the constitution giving to congress the power to dispose of, and make all needful rules and regulations respecting, the territory or other property belonging to the United States. Ar-

title 4, § 3. Then we find the general laws of congress relating to all the territories. A territory, under the constitution and laws of the United States, is an inchoate state,—a portion of the country not included within the limits of any state, and not yet admitted as a state into the Union, but organized under the laws of congress, with a separate legislature, under a territorial governor and other officers appointed by the president and senate of the United States.

It seems that the very language of section 1839 of the Revised Statutes of the United States settles the question that the Cherokee Nation is not a territory. It provides that nothing in this title shall be construed to impair the rights of person or property pertaining to the Indians in any territory, so long as such rights remain unextinguished by treaty between the United States and such Indians, or to include any territory which, by treaty with any Indian tribe, is not, without the consent of such tribe, embraced within the territorial limits or jurisdiction of any state or territory; but all such territory shall be excepted out of the boundaries and constitute no part of any territory now or hereafter organized, until such tribe signifies its assent to the president to be embraced within a particular territory. On the twenty-third day of May, 1836, the United States and the Cherokee Nation, by the fifth article of a treaty made between them, provided that the United States "hereby covenant and agree that the lands ceded to the Cherokee Nation in the foregoing article shall in no future time, without their consent, be included within the territorial limits or jurisdiction of any state or territory." This article is still in force. The treaty-making power and the Cherokee Nation must have then understood that such tribe or nation was not either a state or territory. Has the *status* or relation of this Indian nation to the United States and the different states in the union changed since the time of this treaty? It has not. That relation is manifestly different from either a state or territory. Both the word "state" and the word "territory" have attached to them, under the constitution and laws of the United States, a technical meaning. The Cherokee Nation does not come within this meaning, but it is a part of what is called "Indian country." Early in the life of the country a certain section of the domain of the nation was set apart as Indian country. By the advancing tide of white population and the formation of new territories first, and then states, much of what was then Indian country has ceased to be such, and has become states in the Union; but the Cherokee Nation maintains the same *status* to-day in its relations to the federal government as it did when first set apart by such government,—not as a state or territory, but as the home of the Indian. These Indians have, from the foundation of the government, been treated as being separate and apart from the states and territories of the Union, and this tribe as well as all others are contradistinguished by a name appropriate to themselves, and one dif-

fering from either a state or a territory. They belong to the republic, though they are neither a state or territory in it.

If the law regulating interstate extradition applies to the Cherokee Nation, why was it necessary for the United States to agree, by the second article of the treaty of 1846, that the authorities of the United States should deliver to the Cherokee Nation for trial and punishment all fugitives from justice seeking refuge in the territories of the United States? The law of interstate extradition was in full force at the time, and afforded an effective and complete method of obtaining a fugitive from justice. Then, if this law applied to the Cherokee Nation, why enact this clause of the treaty? It clearly provides for a different process of rendition from that prescribed by the act of congress. By the latter the executives of states and territories are to deliver up fugitives from justice, and by the former the authorities of the United States are to deliver them up. The governor of a state is not an authority of the United States. The constitution of the United States recognizes states, and treats them as commonwealths making up the American Union. It recognizes the existence of territories, and confers upon congress the power to pass laws for their government. It recognizes the existence of the Indian tribes, and confers upon congress the power to regulate commerce with them, and this recognition is of a body of people different from either a state or territory. In pursuance of this power, early in the life of the government, congress declared certain country Indian country, and enacted different laws from those relating to the territories for the government of this Indian country. Through the whole legislative history of the government the Indians have been treated as communities different from a state or territory. Until the act of congress of the third of March, 1871, the different Indian tribes were treated as domestic, dependent nations, with whom the treaty-making power could make treaties as with a foreign nation. This act of congress did not change the relation of the Indian tribes to the United States, but only changed the method of enacting laws for their government. Their relation to the government is the same now as before the passage of this act.

The states and territories are communities of people who are citizens of the United States, and who enjoy the rights and perform the duties of citizens. The Indian tribes are made up of persons who are not citizens of the United States, and who do not enjoy the rights of or perform the duties of citizens. Hardly a congress has been in session for the last 18 years that propositions have not been before it to make the Indian country a territory; and the Indian people have, in protection of their rights, as they believed, persistently opposed such action by congress. Why create the Indian country a territory if it is already one? If the Cherokee Nation is a territory, then the other four civilized tribes, as well as the numerous other Indian tribes, in the Indian country, are territories, and we have,

by the force of the interpretation of the word "territory," a large number of communities of people who were never heard of as territories before, suddenly elevated to the position of inchoate states in the American Union, when, perhaps, not a member of any one of these communities is a citizen of the United States. This would, indeed, be an anomaly unknown to the laws of this country. These Indian tribes have always been considered by every department of the government—legislative, executive, and judicial—as distinct, independent political communities, differing in so many essential particulars from states and territories in the American Union as not to come under the designation of either.

I therefore conclude that the Cherokee Nation is neither a state nor territory, in the sense to be attached to the words when used in the clause of the constitution and in the act of congress relating to interstate extradition, and that, therefore, the governor of Arkansas could not, under the constitution and laws of the United States, issue a warrant for the arrest of Morgan upon the demand of the chief of the Cherokee Nation. This, of course, is decisive of this case.

Other questions are raised in the argument by counsel in regard to the sufficiency of the papers upon which the governor of the state acted. By the act of congress the affidavit or indictment upon which a requisition is based must be certified by the governor or chief magistrate as authentic. This wise provision is to prevent the restraint of liberty by false charges and fraudulent papers; to enable the executive upon whom the demand is made to determine whether there is probable cause for believing a crime has been committed. It must be remembered that this law is one in restraint of liberty, and therefore to be strictly construed and strictly pursued. The affidavit, when this form of evidence is adopted, must be so explicit and certain that if it were laid before a magistrate it would justify him in committing the accused to answer the charge. *Hurd, Hab. Corp.* 611. The affidavit in this case is the foundation for the requisition of the chief of the Cherokee Nation, and the same is not certified as authentic by him. The representations of the executive of the demanding state are of no effect unless supported by a duly-authenticated copy of an indictment found, or an affidavit made. *Ex parte Thornton*, 9 Tex. 635. The act of congress provides for a method that is summary in its effect, and it must therefore be strictly complied with. This failure to certify to the affidavit by the Cherokee chief, in the manner prescribed by the law of congress, leaves the governor of Arkansas without jurisdiction to act. In the affidavit in this case the affiant says "*that he has reason to believe, and does believe, from information received, that one Frank Morgan did commit the crime of willful murder.*" This is a charge upon suspicion, and the constitution of the United States and the law of congress are not satisfied with such a charge. The affiant, Patten, swears to his belief. Suspicion does not warrant the arrest of a party that he may be sent from a state

where he may be found to another, and it may be a distant state. All legal intendments in a case of this kind are to avail the prisoner. *Ex parte Smith*, 3 McLean, 126.

Again, there is nothing on the face of the papers which were before the governor to show that any court in the Cherokee Nation had jurisdiction to try Morgan for the crime of murder. It must appear to the governor honoring the requisition that the tribunals of the demanding state or territory had jurisdiction to try, or else how can a charge of crime be legally made. Charged with crime, in legal parlance, means charged in the regular course of judicial proceedings. A man cannot be legally charged with crime when there is no jurisdiction to try him. The fact that he is so legally charged, means that he is charged by an authority having a right to try. *Kentucky v. Dennison*, 24 How. 66. Right to try means jurisdiction over the place where the crime has been committed, and over the person who commits it. Now, ordinarily, properly charging a man with the crime of murder, in a state or territory, would be sufficient to show jurisdiction to try, because the courts of all the states and territories have jurisdiction to try for the crime of murder, if committed within their boundaries, regardless of who commits the crime and against whom it is committed. But this is not so in the Cherokee Nation. The courts of that nation have jurisdiction, and can only try for the crime of murder when the person murdered is an Indian, and the one charged with the crime is also an Indian. Rev. St. § 2146. And the word "Indian," as used in this connection, means, says the supreme court of the United States, in the case of *U. S. v. Rogers*, 4 How. 567, "an Indian by blood; one belonging to the race of Indians as contradistinguished from one who may be a member of the tribe." This jurisdictional fact nowhere appears on the face of the papers submitted to the governor. The affidavit fails to show that either Johnson or Morgan were Indians. It does recite that Johnson was sheriff of Sequoyah district. He might have been such sheriff, under the laws of the nation, if he were a white man and had been adopted into the nation, and this recital does not necessarily show that the courts of that country had jurisdiction to try Morgan for killing him. The requisition of the chief recites that Frank Morgan is a citizen of the Cherokee Nation. That does not of necessity show him to be an Indian, because he may become a citizen and still not be an Indian in the sense attached to that word by the supreme court in the case above cited. In order to give jurisdiction it must appear that both were Indians. The fact that the tribunals of the demanding power had jurisdiction to try gives the right to charge with crime, and demand the extradition of the person charged. No charge can be made when there is no jurisdiction, and no demand can be made where there is no jurisdiction of both person and place. For this reason the governor of the state could not honor the requisition for Morgan. Then, because there is no proper affidavit charging Morgan with mur-

der, and there is nothing showing that he could be tried by the courts of the Cherokee Nation, and therefore such nation had no right to demand him, and because, under the constitution and laws of the United States, the chief of the Cherokee Nation, not being the chief executive of a state or territory, could make no demand upon the governor of the state of Arkansas for the extradition of Morgan, it must be held that the warrant of the governor of the state of Arkansas, issued for the arrest of Morgan, and by which he is now held, is void, and he is illegally restrained of his liberty, and the prayer of his petition must therefore be granted, and he will be discharged.

M'CULLOUGH, Jr., v. LARGE and others.

(Circuit Court, W. D. Pennsylvania. May 23, 1884.)

1. INTERNAL REVENUE—LEVY BY SHERIFF ON WHISKY IN BONDED WAREHOUSE.

Whisky deposited in a bonded warehouse of the United States, and held therein for internal revenue tax due the government, is virtually in the possession of the United States, and a sheriff has no right to enter such warehouse and seize, in execution, such whisky as the property of the defendant in a writ of *fi. fa.* in his hands, even though he may offer to pay the tax.

2. SAME—REMOVAL OF CAUSE—RULE ON COLLECTOR TO SHOW CAUSE—CONTEMPT OF STATE COURT.

A rule upon a United States internal revenue collector, granted by a state court, upon the petition of the sheriff, to show cause why an attachment should not issue against him for contempt of the process of said court in refusing to permit the sheriff to enter a bonded warehouse of the United States and seize, in execution, whisky held therein for internal revenue tax, is a "civil suit" removable into the United States circuit court under section 643 of the Revised Statutes.

3. SAME—JURISDICTION OF CIRCUIT COURT—WHEN ATTACHES—REV. ST. § 643.

Where a cause is removable under said section 643, the jurisdiction of the circuit court attaches upon the filing therein of a proper petition, and, upon the delivery of the prescribed process issued to the state court, the jurisdiction of the latter court is wholly divested, so that its subsequent orders are *coram non iudice* and void.

In re Petition of William McCallin, sheriff of Allegheny county, for a rule upon Frank P. Case, United States collector of internal revenue, etc.

Wm. A. Stone, U. S. Atty., for F. P. Case, U. S. Int. Rev. Collector.
Before BRADLEY and ACHESON, JJ.

ACHESON, J. William McCallin, sheriff of Allegheny county, presented his petition to the court of common pleas, No. 2, of said county, setting forth that Henry Large, the defendant in a writ of *fi. fa.* issued out of said court, was the owner of about 300 barrels of whisky, subject to an internal revenue tax of 90 cents per gallon due the United States, stored in a certain warehouse on his premises, which he, (the sheriff,) by virtue of said writ, was proceeding to seize and take in execution, when he was hindered and prevented by Frank P. Case,

collector of internal revenue for the Twenty-second collection district of Pennsylvania, who refused to permit him to enter said warehouse to levy upon, seize, and remove said whisky, although by direction of James McCullough, the plaintiff in the writ, the sheriff offered to pay to the collector the government taxes and liens against the same, which the collector refused to receive; and the petition concluded with the prayer that the court grant a rule upon the said Frank P. Case to show cause why an attachment should not issue against him for contempt of the process of the court, and for obstructing and interfering with the sheriff while engaged in executing said process, and that he (the sheriff) might have such remedy and relief in the premises as to right and justice might appertain. Thereupon the court made the following order:

"And now, February 23, 1884, the within petition presented, considered, and ordered to be filed; and, on motion of John Barton and W. C. Moreland, attorneys for James McCullough, Jr., and Wm. McCallin, sheriff, the court does order and grant a rule on Frank P. Case to appear and answer said petition, and to show cause why an attachment should not issue against him for contempt of the process of this court for obstructing the sheriff of said county in the execution of its process; said rule returnable on Saturday, March 8, 1884, at 10 A. M."

On March 5, 1884, Mr. Case presented his petition in this court, under section 643 of the Revised Statutes, which provides for the removal into the circuit court of the United States for the proper district of "any civil suit" or criminal prosecution commenced in any court of a state against any officer appointed under or acting by authority of any revenue law of the United States, on account of any act done under color of his office or of any such law, or on account of any right, title, or authority claimed by such officer under any such law. This petition being strictly conformable to the statute, this court, as thereby directed, issued a writ of *certiorari* (which was duly delivered) to the said court of common pleas, requiring it to send to the circuit court the record and proceedings in the said cause against the collector. With the requirement of the writ of *certiorari* the court of common pleas has failed to comply, nor has it made any return to the writ. We need scarcely say, however, that in a case removable, under the statute, the jurisdiction of the circuit court attaches upon the filing therein of a proper petition, and upon the due delivery of the prescribed process, issued to the state court, the jurisdiction of the latter court is wholly divested, so that its subsequent orders are *coram non judice* and void. *Davis v. South Carolina*, 107 U. S. 597; S. C. 2 Sup. Ct. Rep. 636.

That the proceeding here against the collector is a "civil suit," removable under section 643, Rev. St., is entirely clear. *Weston v. City Council of Charleston*, 2 Pet. 449, 464. Defining a "suit," within the meaning of the judiciary act of 1789, Chief Justice MARSHALL there says:

"The term is certainly a very comprehensive one, and is understood to apply to any proceeding in a court of justice by which an individual pursues that remedy in a court of justice which the law affords him. The modes of proceeding may be various, but if a right is litigated between parties in a court of justice, the proceeding by which the decision of the court is sought is a suit."

An authenticated copy of the record and proceedings in the court of common pleas has been filed, as authorized by the statute, in this court by the collector, who has also here filed his answer to the petition of the sheriff and to the rule to show cause.

It appears that the warehouse in which the whisky in question was and is stored is a distillery warehouse, under section 3271 of the Revised Statutes, and, with its contents, subject to the provisions of that and other sections of title 35, "Internal Revenue," and of the amendatory act, approved May 28, 1880, (21 St. at Large, 145.) It is a bonded warehouse of the United States, under the direction and control of the said Frank P. Case, the collector of the district, and in charge of the internal revenue store-keeper assigned thereto. The entry for deposit in such warehouse is to be made by the distiller or owner of the distilled spirits, under oath, specifying the kinds of spirits, the whole number of packages, the marks and serial numbers thereon, and other particulars. Section 3294 of the Revised Statutes, as amended by the act of March 1, 1879, (20 St. at Large, 337,) and section 5 of the act of May 23, 1880, (21 St. at Large, 146,) regulates the withdrawal of spirits from the warehouse on the payment of the tax thereon. Such withdrawal can only be made on application to the proper collector, on making a withdrawal entry in duplicate, in a prescribed form. Such entry must specify the whole number of casks or packages, with the marks and serial numbers thereon, the number of gauge or wine gallons, and of proof gallons and taxable gallons, and the amount of the tax on the distilled spirits contained in them at the time they were deposited in the distillery warehouse; and said entry must also specify the number of gauge or wine gallons and of proof gallons and taxable gallons contained in said casks or packages at the time application shall be made for the withdrawal thereof, all of which must be verified by the oath of the person making such entry; and the removal is to be made upon the order of the collector, addressed to the store-keeper in charge, and after the gauging, stamping, and branding of the casks by United States officials. Section 3295. These sections, we think, preclude the exercise by the sheriff of the authority claimed by him here. It is plain that such officer cannot make the sworn withdrawal entry required by the statute, and, in fact, in the present instance the sheriff did not propose so to do. We find no provision in any part of the internal revenue laws giving countenance to the idea that a sheriff has a right to enter a bonded warehouse of the United States and seize spirits held therein for government tax, as the property of the defendant in

an execution in his hands, even though he may offer to pay the tax.

Our conclusion that the whisky in question was not liable to seizure by the sheriff is well sustained by adjudged cases.

In *Harris v. Dennie*, 3 Pet. 292, the supreme court held that the United States having a lien on imported goods for the payment of duties accruing on them and not secured by bond, and being entitled to the custody of them from the time of their arrival in port until the duties are paid or secured, an attachment thereof by a state officer is an interference with such lien and right to custody, and, being repugnant to the laws of the United States, is void. There, at the time of the attachment, the sheriff offered to give security for the duties, which the collector declined accepting.

In *Fischer v. Daudistal*, 9 Fed. Rep. 145, a writ of foreign attachment from a state court was served on the United States collector at the port of Philadelphia, and the attaching creditor tendered him the duties on the imported goods sought to be reached, which tender was declined. Thereupon the court from which the attachment issued granted a rule upon the collector to show cause why he should not receive the duties and surrender the goods into the custody of the court. The case having been removed into the United States circuit court, was argued before Judges McKENNAN and BUTLER, and the service of the attachment as to the collector set aside, on the ground that it would not lie against him in respect to goods of the defendant held for duties.

The present case is not distinguishable in principle from those above cited. The whisky in question was virtually in the possession of the United States,—held for internal revenue taxes,—and the sheriff could not rightfully disturb that possession. The collector, therefore, was guilty of no contempt or unlawful obstruction of the process of the court of common pleas when he refused to permit the sheriff to enter the bonded warehouse of the United States and make the proposed levy.

Mr. Justice BRADLEY authorizes me to say that he concurs in this opinion and in the following order:

And now, May 23, 1884, this cause having been heard and duly considered by the court, the rule granted by the court of common pleas, No. 2, of Allegheny county, Pennsylvania, upon Frank P. Case, United States collector of internal revenue, to show cause why an attachment should not issue against him, etc., is discharged; and it is ordered, adjudged, and decreed that the aforesaid petition of William McCallin, sheriff of said county, be dismissed, at his costs.

BY THE COURT.

RINTOUL and others v. NEW YORK CENTRAL & H. R. R. Co.

(Circuit Court, S. D. New York. May 26, 1884.)

1. REHEARING—MOTION—AFFIDAVITS—AGREED STATEMENT OF FACTS—ADDITIONAL FACTS.

Where a case is tried upon an agreed statement of facts, a motion for a rehearing will not be granted when the affidavits upon which it is based fail to disclose adequate reason why additional facts, which the party fully knew at the time the agreed statement was signed, should be introduced.

2. INSURANCE—TO INURE TO BENEFIT OF CARRIER BY AGREEMENT WITH OWNER.

The rule that an insurer, when he has indemnified an owner of property for a loss occasioned by a carrier, is entitled to all the means of indemnity which the satisfied owner held against the carrier, and that the owner cannot, after loss, relinquish any rights to which the insurer is entitled, does not mean that the owner and the carrier may not, at the time the goods are shipped, and before insurance is effected, make, without fraudulent concealment, a valid agreement that any insurance shall inure to the benefit of the carrier.

Motion for Rehearing. See S. C. 17 FED. REP. 905.

Geo. W. Wingate, for plaintiffs.

Frank Loomis, for defendant.

SHIPMAN, J. This case was originally tried upon an agreed statement of facts which did not contain the terms of the policy of insurance. The plaintiffs move for a rehearing in order to introduce the policy of insurance, which they claim is important. I do not perceive that any adequate reason is given in the affidavits why additional facts, which the plaintiffs fully knew at the time that the agreed statement was signed, should now be introduced.

The counsel for the plaintiffs has also reargued the case upon the old statement of facts, and has insisted that the shipper and the carrier cannot enter into a valid contract, at the time of the shipment of the goods, whereby the carrier may obtain the benefit of the insurance, because the insurer is, as matter of law, entitled to pursue the remedy of the shipper against the carrier in case the former has received a full indemnity from the insurer, and therefore that his legal right, after full payment of the loss, to sue the carrier in the name of the insured, cannot be impaired in any way.

It is true that the insurer, when "he has indemnified the owner for the loss, is entitled to all the means of indemnity which the satisfied owner held against" the carrier, (*Hall v. Railroad Cos.* 13 Wall. 367,) and that the owner cannot, after a loss, relinquish any rights to which the insurer may be entitled; but this does not mean that the owner and the carrier may not, at the time the goods are shipped, and before insurance is effected, make, without fraudulent concealment, a valid agreement that any insurance shall inure to the benefit of the carrier. The law has not interdicted the owner from making, at the time the goods are shipped, a contract in regard to insurance with the carrier, provided no fraud or fraudulent concealment is practiced upon the insurer. This is recognized in the *Hall Case*,

supra, for the court, after commenting upon the supposed difference between the right of subrogation in marine insurance and in fire insurance upon land, say:

"There is, then, no reason for the subrogation of insurers, by marine policies, to the rights of the assured against a carrier by sea which does not exist in support of a like subrogation in case of an insurance against fire on land. Nor do the authorities make any distinction between the cases, though a carrier may, by stipulation with the owner of the goods, obtain the benefit of insurance."

The motion for a rehearing is denied.

PENTLARGE v. NEW YORK BUNG & BUSHING Co. and others.

(Circuit Court, S. D. New York. May 16, 1884.)

1. **PATENTS FOR INVENTIONS—RELIEF FOR INFRINGEMENT, WHEN GRANTED.**
Relief for the infringement of a patent will not be granted unless the patents interfere.
2. **SAME—INTERFERENCE.**
When differences in patents are distinct, and neither covers the same things as the other, they do not interfere.

In Equity.

Brodhead, King & Voorhies, for complainant.

Wyllys Hodges, for defendant.

WHEELER, J. The orator owns reissued patent No. 10,175, dated August 1, 1882, the original of which was No. 192,886, dated June 26, 1877, granted to himself and Philipp Hirsch, for a vent-bung. The defendants own patent No. 203,316, dated May 7, 1878, and granted to George Borst for an improvement in bungs. This bill is brought under section 4918, Rev. St., to have the latter patent declared void. There were bungs having a hole nearly through them, leaving a thin web of the wood on the inside, to be driven through in venting the cask, as described in the patent of Rafael Pentlarge, No. 148,747, dated February 18, 1874. The orator's patent is for a bung with a hole on each surface, and a web between the holes in the interior of the bung. The defendant's patent is for a bung like Rafael Pentlarge's, with a core left on the web by a groove cut around it, leaving it ready for removal, or for a bung like the orator's with a like core on one or both sides of the web. The orator is not, and is not claimed to be, entitled to any relief here unless his patent and the defendant's interfere. *Mowry v. Whitney* 14 Wall. 434. The patents are each good for the difference only between the bungs described in them and those in existence before. *Ry. Co. v. Sayles*, 97 U. S. 554. The difference between the orator's bung and Rafael Pentlarge's was the having the web in the interior instead of at the inner surface, and

his patent covers that. The difference between the defendant's bung and the others is the having the core to strengthen or protect the web, and their patent covers that. These differences are not the same, but distinct, and neither covers the same thing as the other, and therefore they do not, as now viewed, interfere. The practice of the invention of the latter may infringe upon the former and may not; but if it does, it will not do so because the patents interfere, but because the latter takes the invention of the former to improve upon.

Let the bill be dismissed, with costs.

ARNOLD v. PHELPS and others.

(Circuit Court, S. D. New York. May 16, 1884.)

PATENTS FOR INVENTIONS—INFRINGEMENT.

Where it is shown that one patented process is the application of heat and steam to coffee, in its uncured state, to cure it, and a second is the application of heat alone for the same purpose, the second is not an infringement on the first.

In Equity.

Edmund Wetmore, for orator.

Edward N. Dickerson, for defendant.

WHEELER, J. This suit rests on reissued patent No. 4,479, dated July 25, 1871, granted to John Ashcroft, for an improvement in processes for treating coffee, division A. The process consists, essentially, in subjecting unripe or damaged coffee to the direct action of steam in a close compartment to heat and sweat it, and then to dry heat to complete the curing of it. There are four claims. The first claim is, in substance, for the process of maturing and browning coffee by subjecting it to the direct action of steam; the second, the process of maturing and browning coffee by subjecting it to the sweating and expanding action of steam and the drying action of heat; the third, subjecting it both to the action of steam and heat while in sacks; and the fourth, subjecting a series of sacks to the action of sweating steam and drying heat. The defendants subject the coffee to the action of heat in a close compartment. The heat raises steam from the moisture of the coffee and produces a result similar to that of the process of the patent. The orator's evidence tends to show that this process, taken by itself, is the same as that of the second claim and, in connection with the result, the same as that of the third claim of the patent. The witness giving this testimony is understood, however, to refer to these claims as measured by their own terms, which do not refer to the source of the steam. His meaning, apparently, is that the steam generated from the moisture of the coffee performs the office of steam applied from without. But this does not alter the

patented process. The claims are made upon the invention described in the specification, and are to be construed with reference to that. The process there described begins with the application of steam from without to the coffee; these claims, therefore, must refer to steam so applied. The patented process is the application of steam and heat to the coffee in its uncured condition; the defendants' process is the application of heat only to the coffee in that condition. The steam cannot be omitted and the process be the same. *Russell v. Dodge*, 93 U. S. 460. Upon this construction the patent may be sustained, but the defendants are not shown to infringe. If the patent should be construed to cover the application of heat only to coffee in a close compartment, it might be void for want of novelty.

Let there be a decree dismissing the bill, with costs.

WOOSTER v. SIMONSON and others.

(Circuit Court, S. D. New York. May 16, 1884.)

1. PATENTS FOR INVENTIONS—MEASURE OF DAMAGES FOR INFRINGEMENT.

The amount of an established license fee for the use of a patented invention is a proper measure of damages for the infringement of a patent.

2. SAME—ADDITIONAL EVIDENCE NOT MAKING A NEW CASE.

Where a case is referred back to a master in chancery to take additional proof, and the proof so taken is on the same subject, it does not make out a new case.

3. SAME—PAROL TESTIMONY OF A LICENSE TO USE PATENT.

A license for using a patent, and the amount of the fee required, may be shown by parol testimony without varying the written license contracts, the suit not being brought on such contracts and the defendants not being parties to them.

In Equity.

Frederic H. Betts, for orator.

Edmund Wetmore, for defendants.

WHEELER, J. This case has now been heard on the defendants' exceptions to the second report of the master, made on the reference of the case back to him pursuant to the former decision. *Wooster v. Simonson*, 16 FED. REP. 680. The master now reports that the orator's license fee was for the privilege of using guides precisely like those used by the defendants, for which this account of damages is being taken. This is objected to, because it is said that it makes a new case for the orator different from that made by the opening proofs on the former hearing before the master, and that the master had no power to admit proofs of such new case without an order of court, and that the proofs vary the terms of the written contracts by which the license fee was fixed. There is no question made but that the amount of an established license fee for the use of a patented in-

vention is what the patentee loses by the use of the invention in violation of the patent without license, and a proper measure of damages for such infringement. An account of damages for the same infringement was being taken on each occasion when this case was before the master. The orator was on each occasion proving his damages for that infringement. Had he proved a different infringement on the latter occasion from what he did on the former, he would have had a new case. But he did not; the infringing guides used by the defendants were the same subjects of proof all the while. On the former hearing, as the proofs were left, they showed a license fee, and the master reported damages for, a larger use of the patented invention than the defendants were guilty of. The case was referred back to the master, with liberty to the complainant to reopen his proofs. This was, of course, to enable him to make his proof of damages conform to the defendant's infringement. This he accomplished by showing that the license fee was for exactly such use as the defendants had. The amount of the license fee was exactly what the defendants would have to pay for a lawful use of the same extent, and exactly what the orator lost by their use without making the payment. The amount of the license fee for such use of the patented invention as the defendants had, was a question of fact to be proved by any competent evidence. Such licenses are not required to be in writing, neither is the amount of the fee required to be shown by writing. The whole may be shown by parol. The written contracts of license between the orator and others might be evidence between the orator and the defendants; but this suit is not brought upon those licenses; the defendants are not parties to them, and they are not conclusive upon either the defendants or the orator, as they would be upon the parties to them in suits between those parties upon them. 1 Greenl. Ev. § 279. The exceptions by which these objections are raised do not appear to be well founded.

The exceptions are overruled, and the report is accepted and confirmed.

GOULD v. SPICERS and another.

(Circuit Court, D. Rhode Island. April 9, 1884.)

PATENT—INFRINGEMENT—FURNACE—GRATE—BARS—CAM-SHAFTS.

A combination patent is not infringed by another patent unless all of the elements composing the combination in the first patent, or equivalents therefor, are employed in the second patent.

In Equity.

Thos. Wm. Clarke, for complainant.

W. H. Thurston and B. F. Thurston, for defendants.

COLT, J. This is a bill in equity brought for the alleged infringement of reissued letters patent, No. 9,956, granted to David R. Gould, December 6, 1881, for an improvement in grates. The invention relates to agitating the coal-bed of a furnace by lifting the grate-bars and letting them fall suddenly by means of two shafts provided with cams arranged under and near the ends of the grate-bars. The general principle of agitating the fire surface of a furnace by the employment of a series of loose grate-bars operated by one or more cam-shafts, is not new. The same principle we find in various older patents, and it is illustrated in the Cass English patent, the Watson English patent, and the Allen and Hudson American patent. The patent under consideration must, therefore, in view of the prior state of the art, be limited in its scope to the particular combination of devices described in the patent. Nor do we understand the patentee to claim more than this. The specification declares that the object of his invention "is to provide means for gradually lifting the grate-bars, with their load, and letting them fall suddenly and alternately as the cams are rotated, thus producing a sufficient agitation of the coal-bed without the exercise of undue strength in turning the cam-shaft." The first claim, embodying the combination of devices by which this result is secured, is as follows:

"The loose grate-bars, A, having enlargements, C, and projections, *d*, in combination with the wiper-shafts, D, having the alternate curved cam projections terminated by abrupt shoulders, as and for the purposes described."

It is clear that the main improvement contemplated by this invention is such a construction of loose grate-bars and cam-shafts that upon turning the shafts the bars will fall suddenly; this result being accomplished by means of projections on the under side of the grate-bars near the end, in connection with the abrupt shoulders of the cams. Now, in the defendants' grate we find neither grate-bars nor cams of this peculiar construction. The bars have no such projection at either end, and no equivalent therefor. In the absence of such projections they resemble the bars of the Cass and Watson patents. The cams in defendants' grate are not terminated by abrupt shoulders, but are curved on both faces much like the Watson patent. In consequence of this, the cam-shaft can be revolved in either direction, or oscillated; while, in the plaintiff's grate, the shaft can be turned only one way, owing to the peculiar shape of the cams and the projections on the bars, such shape being necessary to produce the sudden fall described in the patent. In the place of two cam-shafts,—one at each end of the grate-bars,—the defendants use only a single shaft arranged under the centers of the bars.

The combination described in the first claim of the patent is made up of several elements. One of these consists of the projections on the grate-bars; another, of the abrupt shoulders of the cams. These features are wanting in the defendants' grate. The claim in the patent also embraces two cam-shafts; the defendants use only one. Un-

der these circumstances, there can be no infringement. It is well settled that a claim for a combination is not infringed unless all of the elements composing the combination, or equivalents therefor, are employed.

THE LA FAYETTE LAMB.

(District Court, W. D. Wisconsin. 1884.)

1. COLLISION—LIBEL—BURDEN OF PROOF—FAILURE TO COMPLY WITH LAW—DAMAGES.

When the law provides that lights shall be carried by barges at certain hours and in certain positions, and a barge is run into which has not complied with the law, the burden of proof is upon the owners of the barge, in a libel for damages, to show that the damage did not result from the failure to comply with the law, and they cannot recover unless they so show.

2. SAME—DEROGATION OF LAW—CUSTOM.

A custom cannot be set up in derogation of the strict requirements of a law, by those whose duty it is to comply with the law.

In Admiralty.

John J. Cole, for libellant.

Wing & Prentiss, for respondent.

BUNN, J. This is a libel brought by Jacob Riehtman against the steam-boat *La Fayette Lamb* to recover damages sustained in the sinking of a barge loaded with stone through a collision between the said steam-boat and said barge upon the Mississippi river near Island No. 69, above Winona, on October 8, 1879. The libellant was engaged in carrying stone from Fountain City, Wisconsin, down the Mississippi river to the government works at Argo island, a little above Winona, and on the occasion when the collision occurred had the two barges loaded with stone in tow of the steam-boat *Express*, Capt. Peter E. Schneider being in charge, taking them down the river after dark on the evening of October 8, 1879, to deliver at Argo island. The steam-boat *La Fayette Lamb* was a raft-boat engaged in making regular trips between Beef slough, in Wisconsin, and Clinton, Iowa. The collision occurred near Island No. 69, on the Wisconsin side, about 9 or 10 o'clock of a rather dark night.

Capt. Schneider testifies that he had his signal lights on the *Express*, one red and one green; that he first saw the *Lamb* when the *Express* was crossing from one side of the river to the other, and waited for the *Lamb* to blow the signal, but that she came pretty close without blowing, and that then he (Schneider) blew a signal for the *Lamb* to keep to the right, and that then the *Lamb* was far enough off to keep away from a collision; that it was the duty of the ascending boat to signal first, but the *Lamb* did not signal nor answer the signal of the *Express*. There were no lights at all upon either of the barges which projected about 25 to 30 feet in front of

the Express' bow. But after Capt. Schneider blew his signal, and just before the collision occurred, he sent a man with a lantern upon the bow of the larboard barge, who held the light he carried in front as high as his breast. The barges were heavily loaded with stone, so that they came but about two feet above the water. Capt. Schneider testifies that, instead of going to the right, as signaled, the Lamb went to the left, and in passing collided with the starboard barge attached to the Express, striking the forward starboard corner of the said barge near its bow; that when he observed that the Lamb was taking the left, he ordered the man with the lantern from the larboard to the starboard barge, where he arrived just before the collision occurred; and that the barge sunk in about five minutes from the time it was struck, about five to seven rods from Island No. 69. It was afterwards raised by libelant, but was damaged and the stone lost. Capt. Schneider says the collision occurred seven or eight minutes after he first sighted the Lamb. He also testifies that when the Lamb did not answer his signal he stopped the engines of the Express, and commenced backing, and almost stopped; that when he first saw the Lamb, the Express was hugging the west shore of Island No. 69; and that the Lamb was aiming straight across the river from Argo island, on the west or Minnesota side; but that there was room enough for the Lamb to have passed the Express to the right, and between the Express and Island No. 69. Again, Capt. Schneider says that the Lamb changed her course when he blew the whistle; that the Lamb was then coming straight up the stream before she went across the bow of the Express; that she was coming right for the Express, but changed her course, and went to the left instead of the right; and that the Express was headed straight down the river.

The testimony of Charles Moeckel, a fireman on the Express, corroborates that of Schneider in most respects, and tends to show that the Express was headed straight down the river, which runs south at this point; and that the Lamb, in crossing her bow to the left, ran into the barge when the Express was backing, the Lamb striking the barge about the center of the Lamb; and that the Lamb did not change her speed from the time she was first sighted until the collision occurred. He testifies, also, that the lights on the Express were properly displayed and in good shape, though the red light was not as bright as usual. He thinks before the whistle blew the Lamb was going to the right of the Express, but then changed to the left, crossing the Express' bow and striking the starboard barge of the Express. This witness says he cannot state whether the Express was stopped or not, but that her headway was checked by reversing the engines.

The tendency of the testimony from the La Fayette Lamb is quite different. From this it appears that Thomas C. Withrow was at the time acting as pilot and lookout upon the Lamb; that, as he was crossing over from Argo island to Island No. 69, he heard a boat whistle; that he looked and discovered a boat coming towards the

Lamb in a form which he describes as an angle of some 45 degrees, headed out from the shore towards the middle of the channel, about 200 feet away from the Lamb, above and to the right of the Lamb. He says that he saw but one very dim red light, and that they had no time to answer the signal; that he saw many other lights up the river, and one on a raft on the opposite side; and that he was looking at those lights, when the whistle first blew, to see whether they were coming or not. Says he had no warning of the Express before, she being under the shadow of the shore, and the night so dark he could not distinguish a boat unless there was a light to show it. He says there were no lights on the barges and but one on the Express; that when he heard the whistle he rang to reverse the engines and back; that the Lamb was straight up and down the river, going straight up; and that the Express was lying crosswise and quartering nearly across west of the river; that the signal one whistle indicated to go to the right, but he could not have done so, and that was why he stopped the boat and reversed her. He says they collided with him; that the starboard barge struck the Lamb midships on the starboard side; that the Express was from 200 to 300 feet from the east side out in the channel, off Island No. 69, at the time the collision occurred; that the Lamb was to the left or west side of the channel, and clear out of the way, as far as he could get handily, and that if the Express had been headed properly she would not have struck the Lamb, and that there was ample room for the Express to have passed; that if the Express had given direction to the Lamb to take the left, the collision would have been avoided. He says he did not see the barges at all until after the collision, and that in the Lamb's position they should have seen both lights, but that he don't think the Express had any green light lit; that it was one-half minute from the time of the whistle to the collision. Says the Lamb did not change its course, and had no time to do so; that the Express was going out from the bank, perhaps endeavoring to take the right, according to the signal; that the channel there was about 300 feet wide; and that a good channel runs close to the bank of Island No. 69. He says the Lamb was not going towards the Express, but the Express was headed, as above stated, towards the Lamb.

Frank Huffman, who was second engineer on the Lamb, was on watch at the time of the collision. Says they were within 200 feet when he heard the whistle; that he went into the engine-room, and the bell rang to stop and back, and that about the time the Lamb got to backing the boat hit; and it was not more than a minute from the time of the whistle to the collision. His testimony, and the other testimony from the Lamb, corroborates that of Capt. Withrow as to the position of the boats in the channel when the accident occurred. Says he could see no barges, but that the Express had two lights, both dim; but that there was none on the barges. He says if the bow of the Express had been straight down the river she would not have hit the Lamb; that

the Lamb was going about seven miles an hour. The captain of the Lamb, L. B. Hanks, was in bed and got up when the collision happened.

The evidence is very conflicting; and allowing both boats and the barges to have been properly manned and lighted, it would be a matter of great difficulty, from the testimony, to determine on which side the fault is shown to be, or whether it was not a casualty, without fault on either side. But I am inclined to think there are principles of law that will determine the case without deciding upon the mere weight of conflicting evidence. If there were any fault on the part of the Lamb which should make her responsible for the sinking of the barge, I think it must be a want of vigilance in discovering the Express in time to have avoided a collision. I think, from all the evidence, that the officers of the Lamb, as soon as the whistle of the Express was blown, did all they reasonably could to avert the danger, and if there was any fault it was in not keeping a sufficient vigilant watch and lookout to discover any danger that might be approaching in time to avoid it. But the engineers, or one of them, was on watch, and the pilot, Withrow, who was at the steerage at the time, was also on the lookout from the pilot-house; but neither of them discovered the existence or proximity of the Express or barges until it was probably too late to avoid a collision. Why did they not discover the Express and barges? It might be because they were not sufficiently attentive and vigilant in their respective stations, or it might be because the Express, or the barges she had in tow, were not properly lighted. By rule 10 of the board of superintending inspectors, it is required that all barges, when towed by steamers and navigated between sunset and sunrise, shall have their signal lights, as required by law, placed in a suitable manner in the starboard bow of the starboard barge and in the port bow of the port barge, which lights shall not be less than 10 feet above the water.

There is considerable doubt raised, even by the testimony from the Express, whether her own signal lights were in proper condition. I think the evidence as a whole shows that one of them, if they had two lights displayed, was very dim. But there is no claim that the law requiring a fixed light upon each barge was complied with. To send a man with a lantern upon a barge when danger has already become imminent, is no equivalent for having a fixed and permanent light at least 10 feet above the water. It was proved before the examiner, by the libellant, against the objection of the defendant, that it was not the custom on the Mississippi river to have a permanent light upon barges. But those whose duty it is to provide such lights for the benefit and safety of navigation cannot set up a custom in defiance of the plain requirements of the law, and if they do so they invite the law upon their own heads. And in case of a collision happening under such circumstances, the burden is upon the party so failing to comply with the law to show that such failure did not cause

the damage. *Waring v. Clarke*, 5 How. 465; *The Cherokee*, 15 Fed. Rep. 119; *The Oder*, 13 Fed. Rep. 272.

In this case the libellant has not shown that his failure to provide permanent lights upon the barges did not cause the accident, or that the collision would have occurred if such lights had been provided. On the contrary, it seems altogether probable, from the testimony, that if lights had been displayed in proper place upon the two barges that the collision would not have happened. It is evident the law in this case is much more reasonable than the proved custom of disregarding it. These flat-boats, heavily loaded with stone, but two feet above the water, and projecting 25 or 30 feet ahead of the steamer upon either side, out into the darkness of night, would seem to invite the very sort of danger which came in this case, and the need of having them well and sufficiently lighted, as the rule requires, seems obvious.

Libel dismissed, with costs.

THE GEORGE HEATON. (Two Cases.)

(District Court, D. Maryland. May 15, 1884.)

STOWAGE—DAMAGE TO CARGO.

The claimants of the ship having proved a succession of severe storms, and having proved that the cargo was stowed with customary care and skill by experienced stevedores, *held*, on the evidence, that the libellants had not supported the *onus* of showing affirmatively that by proper attention to the stowing the damage to the cargo might have been avoided.

In Admiralty.

Cowen & Cross, for libellants.

Stirling & Thomas, for respondents.

MORRIS, J. This is a question of responsibility for a very considerable damage to a cargo of steel-wire rods, which the libellants seek to charge upon the steam-ship *George Heaton*, on account of alleged negligent stowage, and which the claimants of the steamer allege was solely caused by the force of the storms which the ship encountered on the voyage, and which they contend caused the damage, notwithstanding the goods were stowed in a careful and proper manner. The fact that the goods were damaged during the voyage is established, and the burden is upon the claimants of the steamer, in order to exculpate themselves, to prove the defense they have set up. The ship took the steel-wire rods on board in good condition (except some fresh-water rust) at Rotterdam, and sailed thence, as was the understanding, for Newcastle-on-the-Tyne, where she took on the balance of her cargo, and sailed thence to Baltimore, to which port the wire rods were consigned. The cargo consisted in all of 700 tons pig-iron, 221 tons of soda crystal and soda-ash, 33 tons of bags, about 4½ tons of sheep-wash, and 1,025 tons of steel-wire rods, in coils. The steel-wire rods

of libelants, which received the principal damage, were stowed in the hold, in the forward part of the ship, under hatches Nos. 1 and 2. There were 290 tons of wire in No. 1 lower hold, 340 tons in No. 2 lower hold, and there were besides, under hatches 3 and 4, 120 tons stowed between-decks, and 275 tons in Nos. 3 and 4 lower hold. On top of the wire in Nos. 1 and 2 lower holds there were placed deal boards, and on them was put a large quantity of pig-iron. In the forward between-decks there were placed 220 tons of soda-ash in casks, and forward of No. 1 hatch were 20 oil barrels filled with sheep-wash. These 20 barrels of sheep-wash were placed apart from other cargo, 10 barrels being put on each side of a stationary iron partition running fore and aft, in the middle of the ship, from No. 1 hatch to the fore-castle bulk-head. During the voyage 10 of these barrels of sheep-wash, all on one side, were broken up; and also about 20 of the casks of soda-ash in the between-decks, next aft of the sheep-wash, broke loose and were destroyed. These packages, breaking adrift, broke down the two ventilators and a sounding pipe which ran through this compartment into the hold, and the liquid mass of sheep-wash, mixed with soda-ash, streamed down through the ventilator holes, and through the crevices of Nos. 1 and 2 hatches, to the pig-iron beneath, and thence found its way down to the coils of steel-wire rods which were under the pig-iron. The sheep-wash, being an alkaline mixture, together with the soda-ash, greatly corroded the libelant's steel wire, and caused a most serious loss to them.

The respondents, to show that the storms encountered by the ship caused the damage, have produced the ship's log, and the testimony of the ship's officers. From the log it appears that the vessel left Newcastle-on-the-Tyne, November 18, 1882, and, proceeding on her voyage by way of the north of Scotland and Pentland Firth, had variable weather until Friday, the 24th, which commenced with stormy winds and sea, with ship rolling heavily, and taking very heavy water on deck. Then the entries are:

"At noon, strong gale and high sea; ship making very heavy weather. At 2 P. M., strong gale and high sea; ship taking dreadful heavy seas over all, filling the decks fore and aft, and splitting tarpaulin on No. 2 hatch; 8 P. M., terrific gale and high sea, attended with dreadful heavy hail squalls; ship rolling heavily, and shipping heavy seas over all; at midnight, heavy gale and high sea; heard the cargo adrift in the holds; impossible to take off the hatches to secure the same; brought ship's head to the sea and wind. Saturday, November 25th, at 1 A. M., took very heavy sea over all, moving life-boats and filling the decks full, fore and aft; engine going dead slow; 2 A. M., terrific gale; cargo rolling heavily in the hold; 4 A. M., ship making dreadful weather; 8 A. M., improving weather; kept ship her course; at 2 P. M., took hatches off and found several casks stove and broke; crew employed securing cargo, and trimming ship upright, having a strong list to port."

The weather was then moderate until Monday, November 27th, when a strong gale set in, with high sea, the ship taking large bodies of water on deck. "At 8 P. M. sudden change of wind, high cross-sea,

ship rolling dreadfully; heard cargo adrift in the hold; impossible to take off the hatches; shipped very heavy sea forward, and sorely injured one man." There was another gale of a few hours on the 28th, but the remainder of the voyage was without incident. With regard to the severity of the storm, the captain testifies that it was as heavy weather as he had ever had on any passage, and that no reasonable precaution in stowage could have prevented the injury.

The first officer testifies that after the first storm, on the 24th, he found several casks of the soda-ash in Nos. 1 and 2 hold had started adrift and broken up, and one of the stringers or wood planks against the sides of the ship had broken; and that after the second storm he found four or five casks of soda-ash and 10 of the barrels of sheep-wash broken up, and all the ventilator pipes knocked away in Nos. 1 and 2 between-decks, and also one or two casks of soda-ash broken up in the after-part of the ship; and he gives it as his opinion that such was the weather and the straining of the ship that the cargo would have started no matter how well secured. He states that the soda-ash was placed fore and aft, in single tiers, except four or five casks which were placed athwart ship, on the hatches between-decks. This officer overlooked the stowing of the cargo, and declares that proper dunnage was used, and that it was well stowed. The second officer also testifies to the extreme severity of the storms. All the cargo was stowed under the superintendence of an experienced stevedore named Chunside, and his subordinates were all men of very great experience in stowing and securing similar cargoes for Atlantic voyages. The testimony of the stevedores gives in detail the means adopted by them to secure the cargo, and they all swear it was carefully stowed in the manner which experience had proved was sufficient and proper. There is also the testimony of a number of expert stevedores, who prove that the methods adopted for securing and the manner of placing the cargo were those approved and adopted by all stevedores on the Tyne, and those which experience has proved to be sufficient. Of course, all this testimony of the officers and stevedores is to be received with caution, as they are all of them, in a measure, justifying their own acts after a loss has occurred, alleged to have been caused by their want of skill and care; but still, it is the only testimony which the claimants of the ship could, in any similar case, produce, and must have its proper weight.

There was scarcely any means of judging of the stowage when the vessel arrived. The cargo was then in disorder, and there had obviously been attempts to restow it on the voyage, and it was almost impossible to say whether or not it had been properly secured at the first. One of the libelants' witnesses, an experienced and careful marine surveyor, and formerly a master mariner, gave it as his decided opinion, that, from the small amount of wood which was on the decks, he was satisfied there had not been sufficient dunnage used. This would be an opinion of some weight if there were proven facts

to support it; but, except the fact that the goods were injured, and that the amount of wood appeared to this witness insufficient for dunnage, there is nothing derived from observation of the cargo on its arrival which directly supports the charge that the cargo was not sufficiently secured, and an inference drawn from such insufficient *data* would, of itself, hardly rebut the presumption that experienced stevedores had done their duty.

It is urged that much weight is not to be given to testimony with regard to the severity of the gales, because, after all, the steamer made an average voyage, being 17 to 18 days from Newcastle to Baltimore, and suffered no damage herself. But it is to be considered that the ship was a new iron steamer,—only a few months launched,—225 feet long, 1,428 tons English measurement, 37 feet beam, and 24 feet 6 inches depth of hold; and certainly such a steamer might be expected to ride out almost any storm without sustaining injury. It is true, on such a northerly passage in November and December severe weather may be expected as one of the probable incidents of a voyage, and more care is to be used in stowing cargo than on smoother seas, but it does not seem to me that because the storm, although of great severity, cannot be said to be extraordinary, in the sense that it is out of the ordinary course of nature and but seldom occurs, we are to hold that it is no excuse for the shifting of a cargo. It cannot be predicated, with any reasonable certainty, just what character of straining a cargo, stowed in the customary and proper manner, will withstand. As is the case with seaworthy wooden vessels, which sometimes spring a leak in a rough cross-sea when they have stood the strain of most violent gales, I think it may be quite possible that one cargo stowed with all reasonable and customary caution may get adrift, when another, stowed with like precaution, will come safely through the stress of the same storm. All that can be demanded of the ship-owner is reasonable and customary skill, and where it is shown that the injury was sustained during a severe stress of weather, and was the result of it, and there is also affirmative proof of the proper care in stowage, the shipper must sustain the *onus* of showing, by affirmative proof, that, by proper attention, the damage might have been avoided. *The Titania*, 19 FED. REP. 101.

The quotation from Lord Chief Justice DENMAN's charge in *Muddle v. Stride*, 9 Car. & P. 380, given with approval in *Clark v. Barnwell*, 12 How. 281, is quite applicable to this case:

"If, on the whole, it be left in doubt what the cause of the injury was, or if it may as well be attributable to perils of the sea as to negligence, the plaintiff cannot recover. * * * That the jury were clearly to see that the defendants were guilty of negligence, before they could find a verdict against them."

It has been urged that it was a fault to have placed the sheep-wash—a liquid which, if it escaped from the barrels, was likely to cause damage—in the bow of the ship, although separate and somewhat

apart from any other cargo, and properly secured and dunnaged, because what did happen was very likely to happen; namely, that, being on an elevated part of the deck, if it escaped it would run back and flow over other articles. As to the proper placing of such barrels in such a cargo, there is no sufficient testimony produced to refute the statements of the stevedores that it was a customary and proper place to put it. It could not be placed under articles of weight, and, wherever placed, if it escaped it was likely to spread. As it was, the damage would not have been considerable but for the fact that the shifting of the casks of soda-ash broke down the ventilators, and the rolling of the ship caused it to flow over the combings of the between-deck hatches, which were 8 to 10 inches in height.

I have spoken principally of the damage to that part of the libellants' wire which was in the forepart of the ship. That which was under Nos. 3 and 4 hatches must have been but slightly injured; it did not come in contact with the sheep-wash, and was only damaged slightly by a small quantity of soda-ash which got on it from the one or two broken casks of soda-ash which broke in that part of the ship during the storms.

On the whole testimony, I think the libel must be dismissed.

THE E. A. PACKER.

(District Court, S. D. New York. May 8, 1884.)

1. COLLISION—LOCAL STATUTES—PROXIMATE CAUSE.

Where both steam-tugs were navigating in violation of local statutes, but there was plenty of time and space to avoid each other, the breach of the statute was *held* immaterial, as not a fault proximately contributing to the collision.

2. SAME—ROUNDING BATTERY—USAGE.

Where a tug with a tow is rounding the Battery within the eddy, and within 300 or 400 feet of the shore, another tug with a tow upon a hawser, coming down and crossing with the ebb-tide, has no right to cross the bow of the former in order to run between her and the New York shore, both from the inherent danger of such a maneuver, and the established usage of boatmen, to the contrary in rounding the Battery.

3. SAME—CASE STATED.

Where the tug E. A. P., with a tow lashed upon her port side, was rounding the Battery and going up the East river, the tide being strong ebb, and she was proceeding in the eddy, about 300 or 400 feet off the barge office, when the tug W., with the barge A. in tow upon a hawser of 20 fathoms, was seen coming down and across the East river from the direction of Roberts' stores, about 500 or 600 yards distant, and the E. A. P., being headed somewhat towards the New York shore, gave two whistles and put her helm to starboard, and the W. ported her helm and gave a strong sheer also towards the New York shore, in order to run inside the E. A. P., and the latter then stopped and backed, but the W., keeping on at full speed, crossed the bows of the E. A. P., but brought her barge into collision with the latter's tow, and the evidence being exceedingly conflicting as to the relative positions and bearings of the two tugs when first seen, *held*, that the W., when first seen, was on the E. A. P.'s starboard hand, about one-third the distance to the Brooklyn shore, and much further out in the stream than the E. A. P.; that the latter, before

the W.'s sheer to starboard, was nearly directly ahead of the W.; that, under the peculiar circumstances of navigation about the Battery, the exceptions in the inspector's rules, as well as under statutory rule 24, and the established local usage of boatmen, it was the duty of the W. to pass outside of the E. A. P. in accordance with the two whistles of the latter; that she had no right to cross the E. A. P.'s course near the shore; and that the latter was without fault and the W. solely responsible for the collision.

In Admiralty.

Benedict, Taft & Benedict, for libelants.

E. D. McCarthy, for claimants.

BROWN, J. The libel in this case was filed to recover damages for the loss of the barge *Atlanta*, which was sunk in a collision with a boat in tow of the *E. A. Packer*, upon her port side, at about 4 o'clock in the afternoon of October 25, 1880, off pier 1 or 2, in the East river. The *Atlanta* had been lying at Roberts' stores, three piers above the Wall-street ferry on the Brooklyn side. She was taken in tow by the steam-tug *Wolverton*, on a hawser of about 20 fathoms, and was bound up the North river. The tide was about half ebb, and strong. The *Wolverton*, after hauling the *Atlanta* away from the dock at Roberts' stores, and getting straightened down the East river, was put upon a course heading down and somewhat across the East river, towards a point a little below Communipaw, on the Jersey side, and so as to clear pier 1, according to the testimony of Schultz, her pilot, by about 600 feet, and the battery by about 700 feet. Schultz further testifies that this course was kept unchanged until he heard two whistles from the *Packer*, when he put his helm hard a-port, and changed his course some four or five points, heading in towards the New York shore. The *Packer* was also headed somewhat towards the same shore. The *Wolverton* crossed the bows of the *Packer*, clearing her by some 12 or 15 feet; but the *Atlanta*, which was about 100 feet astern, was struck just forward of amid-ships on her port side by the tow of the *Packer*, and speedily sank. Upon a libel filed in the district court of the Eastern district of Pennsylvania against the *Wolverton* by the master of the *Packer's* tow, to recover her damages arising out of this collision, it was contended, on the part of the *Wolverton*, that the two tugs approached each other port to port; that is to say, that the *Packer* was outside, and further off from the New York shore than the *Wolverton*, and that the two were upon courses which, if kept, would have cleared each other by the *Packer's* going astern of the *Wolverton*. The libel in that case was dismissed on the ground, as I understand, that this theory of approach was not disproved. *The Wolverton*, 13 FED. REP. 44. By the undeniable weight of evidence in this case that theory is untenable, and is proved to be untrue. Of all the witnesses on both sides, Capt. Schultz alone maintains it. It is clearly inconsistent with the situation as indubitably established by other proof, and is substantially abandoned by the libelants' counsel.

For the claimants, it is contended that the two tugs, at the time

when they were first seen to each other and when the first signal of two whistles was given by the Packer, were approaching each other starboard to starboard; that is, that the Packer was heading up the East river in the eddy off the barge office, and then being within 200 to 400 feet of the New York shore, while the Wolverton was much further out in the river, headed somewhat quartering across the river, but still downwards and outside of the Packer. The libelants' counsel, though not denying that the weight of evidence shows that the Packer had the Wolverton on her own starboard bow, still contends that the Wolverton had the Packer on her port bow, and that the Wolverton had, therefore, the right of way, and that the Packer was bound to keep out of the way. The testimony on this point is more than usually embarrassing; not merely from the contradiction between different witnesses, but from the inconsistencies, contradictions, and corrections by several of the most important witnesses on each side, in their own testimony. It would not be profitable to point these out in detail; both counsel have sufficiently commented upon them. Almost any theory of the case can be maintained by taking detached portions of the testimony. I shall state only some of the points which I think best established.

1. Both the tugs were navigating in violation of the statutes of this state in passing so near to the Battery; but as they were visible to each other in ample season to avoid the collision, and as there was plenty of room for them to avoid each other where they were, the violation of the statute is not deemed a proximate cause of the accident, and is therefore regarded as immaterial. *The Maryland*, 19 FED. REP. 551, 556; *The Fanita*, 8 Ben. 11.

2. The collision took place between piers 1 and 2, and probably not over 300 feet off from the latter.

3. The Packer, with a heavy tow on her port side, had come down the North river, and rounded within 300 or 400 feet of the Battery, and probably less than that distance, according to the prevailing custom of boatmen, in order to avail herself of the eddy there; intending to pass through this eddy, and to keep close in by the piers beyond. She passed the barge office, probably within 400 feet of it, under a starboard wheel, so as to keep along by the piers, and so as to draw nearer to the longer piers beyond. She was moving slowly, at the rate of not more than a couple of miles per hour by land; while the Wolverton, with a strong ebb-tide, was moving by land at about the rate of eight miles per hour. The two tugs were seen by each other, according to the testimony of the pilots of each, when about 400 or 500 yards apart. Before the collision the Packer's engines were reversed; and, at the time of the collision, she was not probably making any headway. The distance of 400 or 500 yards between the two, when first seen, would be passed over in about a minute and a half. During that time the Packer, considering her slow motion and the backing of her engines, during the latter part of this inter-

val, could scarcely have made more than about 300 feet progress; and this agrees with her evidence as to the place from which she first saw the Wolverton, viz., off the barge office. The Wolverton did not back at all, but kept on at full speed; and she must have gone, during the same time, from 900 to 1,200 feet.

4. In reaching the point of collision from the place where she first saw the Wolverton, it is clear that the Packer could not have much shortened her distance from the New York shore; both because she could not have gone much over 300 feet altogether during the interval, and because, in the edge of the slack water, where she then was, the slight ebb-tide against her operated to lessen the effect of her starboard wheel. The libelants' counsel contends, even, that through this effect of the ebb-tide she was actually headed outwards and away from the shore. This does not accord with the evidence, and does not seem to me probable; several of the libelants' own witnesses testified to the Packer's heading in somewhat towards the New York shore. At most, however, the Packer, in passing over some 300 feet, could have neared the New York shore but little, although, in approaching pier 2, she would come much nearer to it than to pier 1, as pier 2 projects about 75 or 100 feet further out into the water.

5. On the other hand, it is certain, from the testimony of the witnesses on both sides, that the Wolverton, when the Packer was first seen, about 400 or 500 yards distant, must have been far out in the East river, at least one-third of the distance to the Brooklyn shore, and in the full sweep of the ebb-tide. That distance back from the place of collision would place her there.

6. The Wolverton's course, as given by her pilot and wheelsman, would carry her outside of the Packer's line of approach, making them starboard to starboard when first seen. Considering the gross error of the pilot, Schultz, in testifying that the Packer, when first seen, was further out in the river than the Wolverton, that the tugs approached port to port, and that the Packer seemed to have come from the vicinity of Bedloe's island, and not around the Battery, I attach little weight to his evidence on these disputed points. It is not impossible that in his testimony he has confounded the situation of the Packer with that of another tug outside of her; that it was not the Packer which he saw 400 or 500 yards distant, but the other tug more in the direction of Bedloe's island; and that he did not see the Packer till afterwards, when she was much nearer to him. But there is no reason to discredit his testimony as to the course which he took and kept up to the time of his "rank sheer," after the Packer's whistle. That course, he says, was headed for "a little below Communipaw," after straightening down the river from Roberts' stores. From that point, after straightening down the river, the course testified to so as to "clear the Battery by some 700 feet" would have brought the Packer upon the Wolverton's starboard bow, unless the Packer were more than 500 feet off from the barge office, which was not the case, as

the place of collision proves. The Wolverton reached the place of collision only after a sheer of four to five points. She passed the Packer's tow only about 20 feet off, and I regard it as in the highest degree improbable, therefore, when the Packer was first seen, or ought to have been seen, *i. e.*, before the Wolverton ported, that the Packer was to any appreciable extent on the Wolverton's port bow. She must have been either on the Wolverton's starboard bow or nearly ahead, as several of the witnesses testify. Schultz's testimony, that the Packer was at no time on his starboard bow, cannot be true. If he ported to go to the right of the other tug above referred to before seeing the Packer, that would explain some of his testimony, though it would introduce other contradictions.

7. Much of the contradiction in the testimony may be explained by the different times at which the observations of the witnesses may have been made. There is no question that after the Wolverton made her sheer towards the New York shore, she had the Packer upon her own port bow. Several of the witnesses who testified, including the wheelsman of the Wolverton and of the *Atlanta*, did not see the Packer until after this sheer was made. Their evidence on this point is therefore irrelevant. I do not mean to say that all of the evidence on the part of the libelants can be harmonized in this way; plainly it cannot be.

8. The cause of the collision, in my judgment, was the determination of Capt. Schultz, of the Wolverton, to run into the eddy ahead of the Packer, and between her and the New York shore, instead of keeping his former course and passing outside of and astern of the Packer, as that course would have carried him, had the Packer been allowed to keep on under her starboard wheel. The testimony of the libelants' witnesses, as to having the Packer two or three points on their port bow, is, I think, founded upon the picture in their minds of the situation after it became noticeable and dangerous, through the sheer given by the Wolverton in order to get into the eddy across the Packer's bows.

9. Assuming that the Wolverton had the Packer either directly ahead, or even a little on her own port bow, before she ported her wheel, I am of opinion that, under the peculiar circumstances of navigation around the Battery, the pilot of the Wolverton had no right to attempt to go inside the Packer as he did, or to change her course to starboard; and that the Packer, being in the slack water when first seen, and near to the shore, far inside of the Wolverton, had a right to retain that position as respects the Wolverton, and properly kept to port under a starboard wheel, with a signal of two whistles; and that her subsequent conduct was without fault. The Wolverton, in crossing the river and attempting to run across the tide into the eddy between the Packer and the New York shore, would necessarily cause her tow, astern on a hawser, to swing round outwards with the tide, and present a longer front to boats coming in the opposite direction. Such a maneuver would evidently be very hazardous to her tow, ren-

dering it difficult, if not impossible, for the Packer to escape her. The Packer might, it is true, on first seeing the Wolverton, have gone right out from the eddy into the East river tide, and thus have got round the Atlanta; but the tide, in that case, would have swept her round and far astern of her course. The custom of navigation about the Battery has determined against any such unnecessary and unreasonable navigation as that, on the part of a tug which is already in the eddy, going eastward near the shore. The evidence shows clearly, in my judgment, that the prevailing custom in navigating around the Battery on the ebb-tide, where a tug and tow are going eastward in the slack water near the barge office, and another tug, with a tow on a hawser, is coming down the East river and bound up the North river, but much further out in the stream, requires the latter to keep off from the former, and not to attempt to run between the former and the shore, in order to get into the eddy, but to go outside and astern of the other tug. The libelants' witnesses do say that it is customary for tugs going either way to hug the shore; but none of them assert that, in the situation of the two tugs, as above described, and as I have found it, the Wolverton could properly endeavor to run in near shore as she did; while several of them, and all of the respondents' witnesses, justify the Packer in her course under the situation described. This usage is founded upon the manifest considerations of prudence and convenience above stated. This usage must have been known to the pilot of the Wolverton. The statute did not entitle him to run towards the shore inside of the Packer as he did, but forbade it; and the settled usage, as well as the most obvious prudence, also forbade it. The pilot of the Packer, being already very near the shore when the Wolverton was sighted, had a right to rely upon the Wolverton's observing this usage, under the peculiarities of navigation around the Battery. Being near the shore, it was his duty to keep there, and to navigate precisely as he did; giving, as he did give, the appropriate signals of two whistles. The ordinary rules of navigation do not apply to such a case; it falls within statute rule 24, and the exceptions to the inspectors' rules, (page 38,) which for good reason permit going to the left, and require the other vessel to navigate accordingly. The circumstances here did furnish good reason for going to the left, and justified the Packer's course. The pilot of the Wolverton knew it, or ought to have known it; and he was bound to accept, without hesitation, the first signal of two whistles given by the Packer in time, and to pass to the left, which the result shows he could easily have done. In fact, the testimony of Schultz himself, and the ground upon which he justifies his conduct, serve to confirm the view above taken. He does not claim that he would be justified in running between the Packer and the shore if the Packer were already near the shore, in the eddy, and heading towards the piers; and that is the situation as I find it. His defense is upon the ground that the Packer was, in reality, further out in the stream than the Wolverton, and that the two were approaching port

to port; and that is the claim in the libel; a wholly different situation, which, as I find, the evidence in this case disproves.

10. Nor can I doubt that had the Wolverton merely kept her own course without change the collision would have been avoided. The Atlanta was struck after she had ported her helm and passed some distance on that course. This alone, I think, shows that had the Wolverton and Atlanta kept their previous courses, and allowed the Packer to keep on to port, they would have gone clear to the left. The Packer, in giving two whistles and keeping to the left, had the right to assume that the Wolverton would at least keep her course, and not sheer to the right; but by the Wolverton's porting the Packer was compelled to stop, and the collision was thus brought about. Though the Packer was navigating where she had not by statute any right to be, still this, as I have said, in no way contributed to the collision. The positions of both tugs were perfectly well known to each other in ample season to avoid any collision. The Packer, being near the shore, was navigated according to the prevailing usage, and without any fault that I can perceive. Being near the shore, usage and common prudence required her to keep there, as respects the Wolverton, which was far out in the stream; while the latter was bound by the same usage and prudence to pass outside, without reference to her particular heading in crossing and coming down the river. The collision was, in my judgment, solely the fault of the Wolverton, in persisting in an unauthorized and dangerous attempt, which the Packer could not have anticipated, to run into the eddy between the Packer and the shore. When this was seen to be pertinaciously adhered to on the Wolverton's part, the Packer gave way and endeavored to avoid the collision; but without avail. As I cannot find any fault on her part, the libel must be dismissed, with costs.

THE SAM ROTAN.

(*District Court, S. D. New York. April 21, 1884.*)

1. COLLISION—EAST RIVER—TUG AND TOW.

A tug, with a tow on a hawser, in the East river, is bound to keep out of the way of a schooner close-hauled.

2. SAME—CASE STATED.

The schooner C. was sailing close-hauled up the East river, below Corlear's Hook, about 200 feet off the New York shore, heading to Grand street, Williamsburgh; and the steam-tug R., having the schooner K. in tow, on a hawser 240 feet long, came down the river from above, and passed between the C. and the New York shore, clearing the C. by about 50 or 75 feet, but the K. and C. came into collision. *Held*, that the tug was in fault for needlessly attempting to pass between the schooner C. and the shore, there being no obstructions toward the middle of the river, where she might have gone, and where the statutes required her to keep.

In Admiralty. Collision.

Lester W. Clark, for libellant.

Goodrich, Deady & Platt, for the Rotan.

BROWN, J. On the tenth day of December, 1881, the libellant's schooner Commerce was sunk through a collision with the schooner Kirk, in tow of the Rotan, in the East river, about 200 feet off the point of the Corlear's Hook. The Commerce was bound up the East river, the wind being north, and the tide the last of the flood, and slack. She was sailing close-hauled, on her port tack, heading about N. E. by E., and so as to make the Grand-street ferry on the Brooklyn shore, and her course remained unchanged. The Rotan, with the Kirk, a three-masted schooner, in tow upon a hawser about 240 feet long, was bound down the river. The Rotan, with her tow, had passed on the easterly side of the Tenth-street buoy, and came down about the middle of the river; and when she approached the Grand-street ferry had veered to the right, so as to pass Corlear's Hook close to the westerly shore, in accordance with the prevailing practice of boatmen. The captains of the Commerce and Rotan testify that they saw each other when from a quarter to half a mile distant. On the part of the Rotan it is claimed that she could not properly keep to the leeward of the Commerce, but rightly passed to the extreme right-hand side of the river close to the Hook; that the Rotan cleared the Commerce at least 100 feet in passing her; and that the Kirk, which was a little nearer the shore, would also have easily gone clear, had not the Commerce, as claimants' witnesses allege, made a strong sheer to port and run directly into the Kirk nearly at right angles; which, as they allege, was the sole cause of the collision. The libellant denies any such sheer, and alleges that his wheel was put to port so as to go to starboard, and that the Commerce did fall off about half a point, and struck the Kirk a glancing blow on the port side of the Commerce. The captain of the Commerce was at the wheel, and three other men were forward; all of whom were occupied, so that there was no proper lookout. One of the three was killed by the collision; the Commerce sank almost immediately, and her captain was rescued from the mast-head.

The case has been tried mainly upon the question whether there was any such luff by the Commerce as the claimants' witnesses testify to. But, in my judgment, that point does not wholly dispose of the liabilities of the respective parties. The defendants have much the greater number of witnesses from the Rotan and the Kirk, who testify to such luffing; the libellant has but two witnesses to contradict it. Notwithstanding the greater number of witnesses who testify to such a luff by general statements, I am not satisfied of the correctness of these witnesses in this particular.

(1) It is in the highest degree improbable. The luff alleged is a luff of about four points. The Commerce, without doubt, was previously heading somewhat inshore, so as to pass the point of the hook and clear it by about 200 feet. A luff of four points would have carried her directly inshore, and would have been without any conceivable reason.

(2) The Commerce was already sailing close upon the wind, and such a luff as alleged would not only have put her in stays, but have

rendered her, so near to the shore at that point, unmanageable. Some of the defendants' witnesses say that her sails were shaking when she struck the Kirk; others say that her sails were full. This disagreement is important; if her sails were full, the wind was such that there could not possibly have been such a luff as alleged.

(3) The luff alleged could not have been accomplished within the space assigned for it. It is not claimed by the defendants that she began to luff until she was abreast of the Rotan. The Kirk was only 240 feet astern of the Rotan, and they were going at from six to eight knots an hour; the Commerce about two to three. The distance between them would, therefore, have been passed over in from 15 to 20 seconds. No luff of any importance could have been accomplished in that time, for the Commerce was heavily loaded and proceeding slowly.

(4) All the witnesses who testified to this luff testify that the collision was a little below the point of the hook; that is, after the Rotan and her tow had rounded the turn to the southward. While they were making this turn, the Commerce, although preserving her own course unchanged, would seem to be coming more quartering upon the Kirk; and the change in the Kirk's own position and heading, I have no doubt, has been largely ascribed, through a natural mistake, to a supposed luff of the Commerce, which would produce the same relative change had the Kirk kept a straight course.

(5) The testimony of the captain of the Garlic, who, being astern of the Commerce, testified to seeing her starboard her wheel, may easily have arisen from the fact that the Commerce used a "traveling wheel," which was in fact turned to starboard, as the master testifies, in order to put the helm to port.

(6) All these various considerations lead me to adhere to the usual rule which gives greater credit to the statements of those on board a vessel, as to her own movements and maneuvers, than to the testimony of those on other vessels in motion.

The Kirk had her sails set; and it would seem that the captain of the Commerce did not observe the hawser of the Rotan, and supposed that the Kirk was coming down by herself and not in tow. But this does not affect the improbability of his making such a luff as to run into her. At the time the luff is alleged to have been made, the Kirk was clearly nearer the shore than the Commerce. Rejecting, therefore, the theory of the Commerce's luffing as the cause of the collision, it seems clear to me, from the other testimony, that both were in fault.

1. The Rotan was bound by statute to keep as near as may be to the middle of the river. She did so, in this case, until she neared Corlear's Hook, when she drew rapidly over to the northerly shore in order to get the benefit of the slack water there; and, in doing so, she crossed the course of the Commerce, as the captain of the latter rightly states. It is possible that the Commerce was not observed by the captain of the Rotan until he had already got so far towards the New

York shore that the Commerce was no longer on his starboard bow, as she must have been previously. Whether seen or not, the Commerce might have been seen; and she was navigating according to her legal right. The Rotan, in violating the statute which required her to keep near the middle of the river,—where there were in fact no obstructions,—and in hugging the New York shore at Corlear's Hook and attempting to pass inside of the Commerce in a space not over a couple of hundred feet wide, necessarily did so at her own risk of being held responsible in case of accident. Had there been plenty of room to pass inside safely, and had the accident been caused solely by an unjustifiable change of course by the Commerce, the Rotan would not have been held liable for this violation of the statute. *The Maryland*, 19 FED. REP. 551, 556. But I am not satisfied that there was such abundant space, or that the collision was brought about by such a luff as alleged. Nor is the fact that the Rotan herself passed clear, sufficient evidence that there was room for the Kirk, which was in tow on a hawser, to pass safely also. The Rotan passed the Commerce at a distance variously estimated at from 50 to 100 feet only; but the course of the Commerce was then headed about a point and a half towards the shore; and, in my judgment, it was the keeping of her previous course, and not any luff, which brought her in contact with the Kirk before the latter got past. The nearness of the Commerce to the shore, and her course somewhat headed towards it, made the experiment of the Rotan, in passing inside of her, clearly hazardous and unjustifiable. There was nothing in the way to prevent the Rotan's passing along the middle of the river, where the law required her to go; and the Rotan must therefore be held in fault.

2. The Commerce, on the other hand, cannot be acquitted of blame. She had no proper lookout, because the men forward were busily engaged in other work. The captain at the wheel could not see properly. He did observe, as he testifies, that the Rotan was crossing his bows to go inside of him. Had a proper lookout been kept, it would have been seen that the Kirk was in tow of the Rotan; and when the Rotan, with such a tow, was going inside under such circumstances, it was the duty of the Commerce at once to port her wheel in order to avoid the evident danger of collision which the faulty maneuver of the Rotan involved. Had the wheel been ported in time, when this course of the Rotan and her tow should and would have been seen by a proper lookout, I cannot doubt that the collision would have been avoided. The captain ported, but too late, because there was no lookout to observe the Kirk in time. The fault of the Rotan in going inside does not relieve the Commerce in this respect. *The Maria Martin*, 12 Wall. 31; *The Pegasus*, 19 FED. REP. 46; *The B & C*, 18 FED. REP. 548; *The Vim*, 12 FED. REP. 906.

The libellant is entitled to a decree for half his damages, with costs. If the parties do not agree, a reference may be taken to compute the amount.

KING and others v. SHEPHERD and others.

*(Circuit Court, N. D. Iowa, B. D. April Term, 1884.)***REMOVAL OF CAUSE TO FEDERAL COURT AFTER JUDGMENT GIVEN IN STATE COURT.**

After judgment against defendant in a state court, plaintiff cannot have a removal of his cause to a federal court as against parties who have filed their petition of intervention.

Motion to Remand Cause.

F. C. Platt and Henderson, Hurd & Daniels, for plaintiffs.

Gibson & Dawson and Robinson; Powers & Lacy, for intervenors.

SHIRAS, J. The plaintiffs, Henry W. King & Co., filed a petition in the name of the copartnership, in the circuit court of Bremer county, Iowa, against A. Shepherd, upon whom personal service of the original notice was duly made, returnable to the February term, 1884, of that court. The action was aided by a writ of attachment against the property of the defendant Shepherd, which was levied upon certain goods and merchandise, and under which notices of garnishment were served upon the Bremer County Bank, the Bank of Waverly, A. Kretshmeier, and A. Coddington. On the fourth day of February, 1884, Charles Shepherd, the Bank of Waverly, and A. Kretshmeier, by leave of the circuit court, filed their several petitions of intervention, wherein they set forth that by virtue of several chattel mortgages duly executed to them by the defendant A. Shepherd, a lien in their favor was created upon the goods seized under the attachment as security for debts due them from the defendant A. Shepherd; that, as against their rights as mortgagees, the levy of the attachment was wrongful; and praying that the court make such order as may be necessary to protect their rights; that said property be discharged from the levy of the attachment, and be appropriated to the payment of the mortgage claims due to the intervenors; and that they recover costs. On the eighth day of February, 1884, the plaintiffs filed answers to the several petitions of intervention, denying the rights set up under the chattel mortgages. The defendant Shepherd failed to appear on the return-day of the notice, and default was entered against him on the eighth day of February, 1884, but no judgment was entered on the cause of action. On the same day, to-wit, February 8th, a petition for the removal of the cause into the federal court was filed on behalf of plaintiffs, and on the first day of March the court granted the application, and ordered the removal of the entire cause, including the case against the defendant, the garnishees, and the intervenors. The record having been duly filed in this court, the intervenors move at this term to remand the cause to the state court.

In support of this motion, it is urged, in the first instance, that the questions at issue between the plaintiffs and the intervenors are

v.20,no.6—22

simply auxiliary to the main cause, and do not themselves constitute a controversy that can be removed from the state to the federal court; and that the interventions were filed under the provisions of section 3016 of the Code of Iowa; and that the questions raised thereby are to be disposed of in a summary way in connection with the original action between plaintiffs and defendant. It will be noticed that the defendant, garnishees, and intervenors are all citizens of Iowa, and plaintiffs are citizens of Illinois. Had the application for the removal of the cause been filed before default was entered against the defendant, no reason exists why the entire case could not have been removed. The entry of default, however, it is claimed, terminated the right of removal so far as the main cause is concerned.

In *Keith v. Levi*, 1 McCrary, 343, S. C. 2 FED. REP. 743, it was ruled that if a defendant filed a stipulation in the state court admitting the claim sued on, the cause could not, as between the plaintiff and defendant, be removed to the federal court. Granting that the same result follows from a default entered upon a failure to appear or answer, the question then arises whether the issues between the plaintiffs and intervenors are removable to this court, and, if so, whether the entire cause is thereby removable.

In *Keith v. Levi* the defendant, under the Missouri statute, filed a plea in abatement, denying the facts upon which a writ of attachment had been issued, and the court held, notwithstanding the admission of the main cause of action, that the issue presented by the plea in abatement might be removed, provided it was shown that the requisite amount was involved.

In *Buford v. Strother*, 3 McCrary, 253, S. C. 10 FED. REP. 406, and *Poole v. Thatcherdest*, 19 FED. REP. 49, it is ruled that a proceeding in garnishment is merely auxiliary to the original action, and when the latter cannot be removed, the former cannot be. In both these cases judgment had been entered up in the state court against the defendants, and the garnishee proceedings were supplemental thereto.

In *Bank v. Turnbull*, 16 WaH. 190, it was held that where a proceeding in a state court is merely incidental, and auxiliary to an original action in that court, it cannot be removed to the federal court under the act of 1867. In this case it appeared that the First National Bank of Alexandria had obtained a judgment in the state court against one Abijah Thomas, upon which execution had been issued and levied upon certain cotton. Turnbull & Co. asserted a claim thereto as owners, and gave bond, as required by the statutes of Virginia; and under the provisions of the statutes in question the state court ordered an issue to be tried before a jury to determine the right to the property levied on. Thereupon Turnbull & Co. filed a petition for the removal of the cause. The supreme court held that the proceeding was auxiliary and incidental to the original suit, and therefore not removable; reaching this conclusion upon the ground that

the proceeding was under the state statute, and necessarily brought in the court which rendered the original judgment, and was, in fact, a proceeding to enable the state court to determine whether its process had been misapplied.

The rule thus laid down by the supreme court is adverse to the right of removal on the part of the intervenors in the present cause, for the object and purpose of the intervention is exactly the same as that sought to be accomplished by the intervenors in the case decided by the supreme court. If, therefore, neither the intervenors nor garnishees could remove the case, it is not properly in the federal court unless the right of removal existed as against the defendant. A default having been entered against the defendant, in the state court, this terminated the right of removal as against the defendant, under the ruling in *Keith v. Levi*, *supra*.

It follows that the motion to remand is well taken, and the cause must be remanded to the state court.

PATRICK v. ISENHART and others.

(Circuit Court, D. Kansas. May 19, 1884.)

1. **EQUITABLE ACTION TO REMOVE CLOUD ON TITLE—POSSESSION—LEGAL AND EQUITABLE TITLE.**

In order to maintain an action in equity to remove a cloud on the title to land a plaintiff must have possession, and the legal and equitable title.

2. **GENERAL AND SPECIAL PRAYERS FOR RELIEF—DEMURRER—EQUITABLE ACTION.**

Where a plaintiff brings a suit in equity, under a misapprehension as to the special relief that he is entitled to, but the bill contains a general as well as special prayer for relief, and sets forth facts showing a right to relief, there is no ground for a demurrer, and the court will grant the proper relief.

3. **LACHES—ACTION TO REMOVE CLOUD ON TITLE.**

Where a plaintiff obtains title to land, and he and his grantors have exercised unmolested ownership over it, and paid taxes on it for many years, not being advised of any adverse right or title, he cannot be charged with laches in failing to bring an action to remove a cloud upon the title, made many years before, against which there had been an attempted adjudication.

4. **DEMURRER—PARTIES.**

Where certain persons are not necessary parties, a demurrer to a bill in equity for defect of parties will not be sustained.

Demurrer to Bill.

Guthrie & Bergen, for complainant.

G. C. Clemens, for defendants.

FOSTER, J. If the facts alleged in this bill could be held to fix the legal title of the land in the plaintiff, then the bill could not be maintained, for he would have a complete and adequate remedy at law by an action of ejectment; but it seems to me the facts alleged show the equitable title only to be in the plaintiff and the legal title and possession in the defendants. It charges notice to all the de-

defendants, at the time of their purchase, of the facts and proceedings upon which the plaintiff's rights are predicated, and charges a conspiracy and confederation on the part of the defendants to cheat and defraud him. It also charges that the defendants paid no consideration for the legal title, and are not *bona fide* purchasers, etc. It further avers that the defendants have entered upon and are in possession of the premises and have built a fence thereon, and make a claim of title and ownership thereto, etc. It is evident from the bill that it makes a case relievable in equity, but not a case for removing a cloud from the title. It seems that in order to obtain that relief the complainant must have the legal and equitable title, as also the possession. "Those only who have a clear legal and equitable title to land, connected with possession, have any right to claim the interference of a court of equity to give them peace or dissipate a cloud on the title." *Orton v. Smith*, 18 How. 265.

The prayer in this bill is for discovery and relief, and the relief prayed is as follows:

"And that your orator may be decreed to be the owner in fee-simple of said lands and tenements; that said defendants have no right or title therein; that your orator's title thereto be quieted, etc. And that the defendants * * * be forever barred from setting up any claim of right, title, or interest in said premises, and that your orator may have, generally, such other and further relief as the nature of his case may require."

Equity rule 21 provides:

"The prayer of the bill shall ask the special relief to which the plaintiff supposes himself entitled, and also shall contain a prayer for general relief."

The special relief prayed in this bill is to quiet title or remove a cloud, but there is also a prayer for general relief. Upon the state of facts set forth by the bill, I am of the opinion the plaintiff cannot have the special relief he prays, but rather would be entitled to a decree declaring him to be entitled to the legal estate, and that the defendants hold the same in trust for his use and benefit, and for a conveyance of the same to him, etc. But a misapprehension by the plaintiff as to the special relief he is entitled to is no ground for a demurrer where there is a general prayer for relief, for in such a case, if the bill sets forth facts showing a right to relief, the court may grant the proper relief under the general prayer. *Taylor v. Ins. Co.* 9 How. 406; *Stevens v. Gladding*, 17 How. 454.

The objection that plaintiff has been guilty of laches, were it not for special reasons set out in the bill, would be a serious one, especially if he is charged with the laches of those under whom he holds. This plaintiff obtained his title in 1876, and he and his grantors have exercised unmolested ownership over this land and paid taxes on it for many years, and were not advised that any adverse right or title was claimed by any one under the conveyance of Snow to Faut, made in 1858, and against which there had been an attempt at least to make an adjudication in the proceedings set out in the bill. And not until

the year 1882 was the plaintiff advised that any adverse right or title was claimed by any one under that conveyance. Under these circumstances I do not think the plaintiff can be charged with laches to defeat his suit.

In reference to the claimed defect of parties defendants, it is sufficient to say that Henry and Snow are not necessary parties, and it is not a ground of demurrer on the part of these defendants.

The demurrer must be overruled.

GRIGGS v. ST. CROIX Co. and others.

(Circuit Court, W. D. Wisconsin. 1884.)

1. INVALID TAX—REV. ST. WIS. 1878, § 1063—FAILURE OF ASSESSOR TO COMPLY WITH STAY OF PROCEEDINGS—REV. ST. WIS. 1878, § 1210.

Where an assessor does not annex to the assessment roll the affidavit required by section 1063, Rev. St. Wis. 1878, the tax is invalid, and it is the duty of a court to stay all further proceedings in the case until a reassessment can be made. Rev. St. Wis. 1878, § 1210.

2. SAME—APPEARS BY ADMISSION UPON RECORD—REV. ST. WIS. 1878, § 1210—STAY OF PROCEEDINGS.

Section 1210, Rev. St. Wis. 1878, relating to stay of proceedings, applies to cases where the fact of the invalidity of a tax appears by an admission upon the record.

In Equity.

John C. Spooner, for complainant.

R. H. Start, for defendant.

BUNN, J. This action is brought by Chauncey W. Griggs, a citizen of Minnesota, against the county of St. Croix, in the state of Wisconsin, and James A. Mapes, the county treasurer thereof, to enjoin the sale of a large quantity of lands for the payment of the taxes assessed thereon in the town of Emerald, in said county, for the year 1882, and to have such taxes, amounting to the sum of \$1,912.16, declared void, and the lands upon which they were assessed, lying in said town of Emerald, declared free from the lien and payment thereof.

The bill of complaint sets up a very great number of defects in the assessment of the said lands, going to the groundwork thereof, and rendering such assessment void. Among many other defects and irregularities, it is alleged that the assessor wholly failed to assess the lands upon view, as the law required, and that he made the assessment without any knowledge of the value; that all the said lands were wild and uncultivated; that they presented a great variety of surface, some being broken and hilly and of little or no value, while others were level and fertile, well timbered, and valuable for agricultural purposes; and that the assessor valued them all arbitrarily and at nearly

uniform rates, without reference to the difference in value thereof, and without reference to the difference in location, quality of soil, or the improvements, or quantity of standing timber; that said assessor intentionally, and for the purpose of discriminating against the plaintiff and in favor of the residents of said town, valued a large portion of said lands at more than their actual value; and intentionally and fraudulently made a distinction in said assessment against the plaintiff and other non-residents, for the purpose of making them pay more than their just proportion of the taxes; that the assessor did not annex to the assessment roll the affidavit required by section 1063 of the Revised Statutes of Wisconsin.

The defendants by their answer, which is verified, deny all of the allegations of the bill except the last above-named, but expressly admit that the assessor of the town did not annex to the assessment roll the affidavit as required by the statute. The answer was filed and served on September 1, 1883. Afterwards testimony was taken in the case before an examiner upon the various issues, and the cause now comes on for hearing upon bill and answer, and upon the testimony taken.

The complainant wholly fails to make any case except upon the one question so admitted in the answer,—that the assessor failed to annex his affidavit,—but he asks for judgment upon that admission. The testimony for the defendants shows that the assessment was legally and fairly made in all respects, except in the failure of the assessor to annex the affidavit to the assessment roll, and that this omission arose from inadvertence on the assessor's part, and from his not supposing that the law required it of him, and under these circumstances it is insisted by defendant's counsel that the omission furnishes no reason for holding the tax invalid or inequitable. The court is of opinion that within the rule laid down by the supreme court of Wisconsin in *Marsh v. Sup'r's Clark Co.* 42 Wis. 502, this defect goes to the groundwork of the tax so as to render the entire assessment invalid. I am well aware that there are many authorities—probably the weight of authority upon the question outside of the state is the other way. But it is not desirable that there should be one rule in the state court and another in this court, under the same statute; and the case is one where this court will follow the decisions of the state court. I therefore hold that the assessment of the lands for the year 1882, upon which the tax in question was founded, was invalid, for the reason before stated.

There were several other questions discussed on the argument, but the only remaining question I care to notice is whether it is the duty of the court to stay all further proceedings in the case until a re-assessment can be made. It is contended by the defendant county that this should be done in case the court is of opinion the assessment is void; while the plaintiff contends that it is not a case coming within the meaning of the statute. The section containing the pro-

vision is section 1210b, Rev. St., the main portion of which is as follows:

"In all actions heretofore tried upon issue joined in any of the courts of this state, in which it shall be sought by either party to avoid or set aside, in whole or in part, any assessment, tax, or tax proceeding, for any of the causes mentioned in section 1210b of these statutes, if the court shall be of the opinion, after a hearing in that behalf had, that, for any reason affecting the ground-work of the tax, and affecting all the property in any town, village, city, or county, said assessment, tax, or tax proceeding should be set aside, it shall immediately stay all proceedings in such action, and in all other actions brought to set aside such tax in such town, village, or city, until a reassessment of the property of said town, village, or city can be made."

It is contended by plaintiff's counsel that, as the fact appears by admission upon the record, and not by the finding of the court upon an issue joined thereon, the statute does not cover the case. But I am of opinion it does, and that the case comes within the letter as well as the intent and meaning of the statute. In two cases before the supreme court, that court has reversed the judgment below, because the court rendering it did not stay the proceedings until a reassessment should be made. See *Kingsley v. Bd. Sup'rs Marathon Co.* 49 Wis. 649; S. C. 6 N. W. Rep. 317; *Clarke v. Lincoln Co.* 54 Wis. 580; S. C. 12 N. W. Rep. 20.

In *Potter v. Brown Co.* 56 Wis. 272, S. C. 14 N. W. Rep. 375, the court held the statute inapplicable in case where judgment went by default. But that is not an authority here. There was no issue joined in that case, and no hearing or trial or judicial examination of the issues between the parties.

In the case at bar there is *an issue joined*. There is an issue of fact; and the admission in the answer raises an issue of law, also, that has been fully argued, and which the court is called upon to determine. And the court is of opinion, in the language of the statute, after a hearing in that behalf had, that, for a reason affecting the ground-work of the tax, and affecting all the property in the town, said assessment be set aside. There was an issue both of fact and law, and a hearing and trial thereon, followed by the opinion and determination of the court, and every inch of the case has been contested. I think the case comes within the language, as well as the meaning and intent, of the provision. Certainly, I can conceive of no good reason why the court should not order a stay in such a case as well as in one where there is a complete issue of fact joined upon all the allegations of the bill, and the principal contest and trial is upon an issue of fact instead of one mainly of law, and a finding of such issues from the evidence wholly, instead of finding them partly from the admissions in the answer. The answer was under oath, and the admission was made because the truth required that it should be made; but the defendant, as a matter of law, denies that any such effect should be given to the admission as was claimed for it upon the hearing, relying upon the evidence that such omission was not made designedly

or willfully, and that the assessment was in fact fair and equitable.

The court holds the assessment invalid, and orders a stay of proceedings in the case until a reassessment may be made according to the provisions of section 1210b, Rev. St., and subsequent amendments thereto.

HALE v. CONTINENTAL LIFE INS. CO.

(Circuit Court, D. Vermont. May 23, 1884.)

LIFE INSURANCE COMPANY—DIVIDENDS—POLICY OF DIRECTORS—FAILURE TO ANSWER—CONFESSION OF BILL.

When the question in a suit in equity, as shown by the bill, is whether the policy of the directors of an insurance company in declaring dividends has been lawful and right, and the defendant fails to answer this question after repeated allowances of exceptions for failure to answer the point, the orator is entitled to take the bill as confessed, so far as this point is concerned.

In Equity.

Gilbert A. Davis, for orator.

Charles W. Porter, for defendant.

WHEELER, J. The defendant has not yet answered and set forth its profits during the years in question out of which dividends were or might have been declared, nor any reason for not setting them forth. It has stated the policy of its directors in respect to dividends, and their reasons for adopting the policy which they did adopt; but those matters were not what were required for answer, nor the subject of the exceptions. The defendant assumed to make profits from its assets derived from premiums paid by policy-holders, in which some or all of the policy-holders were entitled to participate by way of dividends, and the orator was among those so entitled. The answer and its amendments show that the directors made dividends, but does not show the amount of profits from which the dividends were made. To make such dividends there must have been an ascertainment of the profits of the company as a basis of the dividends. This basis, as ascertained by the directors, with the declaration of dividends by them, would or should be matters of record, and be very easy of statement from the records. It is not shown that those are not full and complete records in all these respects ready to be answered from. The course and policy of the directors may have been lawful and right, and may not. Whether so or not, is not the question now. The orator is entitled to a statement of the facts in the answer as a part of his case as made and charged by his bill. This statement is not forthcoming after repeated allowance of exceptions to the want of these plain and obvious facts. The exceptions are substantially the same as those allowed before, and under the sixty-fourth rule in

equity the orator is entitled to take the bill, so far as the matter of these exceptions is concerned, as confessed.

The exceptions are again allowed, and leave to take so much of bill as confessed, granted.

FLETCHER and others v. NEW ORLEANS N. E. R. Co.¹

NEW ORLEANS N. E. R. Co. v. FLETCHER and others.¹

(Circuit Court, E. D. Louisiana. March, 1884.)

1. INJUNCTION.

A motion to dissolve an injunction restraining a forfeiture, for the enforcement of which an action at law has been instituted, must depend upon the result of the action at law; *i. e.*, upon whether it shall be finally determined in the suit at law that the forfeiture must be enforced.

2. EQUITY JURISDICTION.

A suit in equity cannot be maintained to have a forfeiture declared. The universal doctrine is that equity will relieve from, but never inflict, a forfeiture.

3. SAME—WASTE.

The commission of waste of every kind will be restrained in equity till the rights of the parties are determined.

4. EQUITY JURISDICTION.

The equitable jurisdiction of the circuit courts is the same in every state; it is not ousted by the fact that a local statute gives a peculiar remedy at law.

In Equity.

Thomas J. Semmes, J. Carroll Payne, Henry J. Levy, and Ernest B. Kruttschnitt, for complainants in first case, and respondents in the last case.

Robert Mott and Walter D. Denegre, for the respondents in the first case, and complainants in the last case.

BILLINGS, J. These cases are submitted on a motion to dissolve an injunction in the first case, and a motion for an injunction in the second case. The facts necessary to state are briefly these:

The complainants in the first cause hold a builder's contract with the respondents for the construction of some 20 miles of trestle-work upon their road. In round numbers, some million of dollars had been paid to them by the railroad company, the respondents, of which amount sixty or sixty-five thousand dollars had been retained under the contract. At this stage of the work, and when the same was nearly completed, a difference arose between the railroad and the builders upon two points or particulars: *First*, the railroad contended that some \$10,000 of the trestle-work should be rebuilt by the builders, inasmuch as they claimed that it had been destroyed by fire through their negligence, and before the road was accepted by the railroad company; and, *secondly*, that the fenders, the cost of which would be \$10,000, should, by the contract, be built by the builders. The railroad gave the seven days' notice required by the contract, and at the end of that time were about taking possession of the creosote works, the material, and the so-called plant, as

¹ Reported by Joseph P. Hornor, Esq., of the New Orleans bar.

forfeited under the contract, when the builders sued out an injunction in one of the district courts of the state in a cause which has since been transferred to this court. The builders also instituted a suit at law in this court for \$265,000, for work done and for damages for the defaults of the railroad company. This third suit was instituted by the railroad company, seeking to enforce the forfeiture, both as respects the money claimed by the builders and of the personal property, setting up the insolvency of the builders, and the apprehension that they will sell and dispose of the property against which the forfeiture is sought to be enforced, and asking an injunction, which is asked *pendente lite*, and which motion is the second submitted.

1. As to the suit in equity of the builders against the railroad company. It is conceded the creosote works and the land upon which they are located belong to the railroad company. As to that property the injunction must be dissolved as improvidently included in the petition or bill of complaint.

As to the residue of the property the motion to dissolve must depend upon the result of the action at law, i. e., upon whether it shall be finally determined in the suit at law that the forfeiture must be enforced.

2. As to the application of the railroad company for an injunction *pendente lite* in the second equity suit. So far as the general scope and object of this bill is concerned, it cannot be maintained. It is a suit in equity to have a forfeiture declared. The universal doctrine is that equity will relieve from but never inflict a forfeiture.

But there is a very limited part of the bill which is good. In so far as it seeks to preserve the property sought to be forfeited during the pendency of the suit at law it is maintainable. The general rule is laid down by Mr. Cooper in his Equity Pleadings as follows, (page 151:) "But if the right of the plaintiff is clearly shown by his bill, and is verified by affidavit, the commission of waste of every kind will be restrained in equity till the rights of the parties are determined." With reference to the application of this rule to cases where suits to enforce forfeiture are pending, in *Livingston v. Tompkins*, 4 Johns. Ch. 431, the chancellor says: "It (the loss of the defendant) is in the nature of a forfeiture, and produces the same penal result, and, so far from aiding the plaintiff to divest the defendant of his privilege, this court could only interfere to protect the property from waste, destruction, or removal out of the jurisdiction of the court pending the action at law to recover possession." And he quotes Lord Chancellor Baron COMYNS in *Jones v. Meredith*, 2 Com. 671, as holding that "equity will not assist in the recovery of a penalty or forfeiture where the plaintiff may proceed to recover it. It will only stay a party from making waste until it is seen whether he has any right to do so."

The plaintiff makes a case for this temporary interference in order to preserve the property. Indeed, the defendants, by their own bill, have already submitted themselves to the authority of the court with reference to the disposition of this property, and the court ought,

as a condition of the injunction order which they themselves have obtained, to require that they should not sell or remove the property before the question of forfeiture is determined. It is true that on the law side of the court there might be a sequestration of the property under the statute of Louisiana. But that does not defeat or impair the right of the complainant to an injunction in a case clearly authorizing that writ according to the principles of equity. "The equitable jurisdiction of the circuit courts is the same in every state; it is not ousted by the fact that a local statute gives a peculiar remedy at law." See *Brightly*, Dig. "Equity," II, vol. 1, p. 283, No. 77, and numerous cases cited.

The complainant cannot enforce the forfeiture in this suit, nor by any suit in equity. To do that he must seek it either in the suit at law which the defendant has instituted or a separate suit at law. He is entitled to an injunction to prevent defendant from selling, disposing of, or incumbering property, or removing it from the jurisdiction of this court, until the right to maintain the forfeiture is determined in a suit at law. To that extent alone the injunction is allowed, the complainant giving a bond with security in the sum of \$10,000. If it should be made to appear by either party that a sale of any of the property is requisite, the court will direct it, and will order the proceeds to be put into the registry of the court, or will allow the defendants to sell upon giving adequate security. The decree is made in this form because the defendants seemed to stand, in the argument, upon their suit at law, but if they shall so elect they will have leave to have the question as to the forfeiture determined in the suit in equity, in which case they must reform their bill so as to state fully the grounds upon which the equitable relief is sought.

NORTHERN R. CO. OF NEW HAMPSHIRE v. OGDENSBURG & L. C. R. CO.¹

(Circuit Court, D. New Hampshire. April 29, 1884.)

PRACTICE—CROSS-BILL IN LIEU OF ANSWER.

Permission given by court for a cross-bill to be filed, by consent, instead of the defendant bringing up the reformation of the contract between the companies by way of answer to the original bill. In the event of success in reforming the contract the plaintiff must pay costs up to this time.

In Equity.

J. H. Benton, Jr., for complainants.

S. Bartlett and Wallace Hackett, for defendants.

LOWELL, J. Both parties being of opinion that it is more regular to file a cross-bill than to bring up the proposed reformation of the

¹ See 18 FED. REP. 815, for former opinion on this question and statement of case.

contract by way of answer to the original bill in *Ogdensburg & L. C. R. Co. v. Northern R. Co. of N. H.* 5 FED. REP. 880, the plaintiffs in this case are hereby permitted to file their cross-bill, on terms that if they shall succeed in reforming the contract, and thereby prevail in the litigation, they shall take no costs to this time, and shall pay the costs in the original suit up to this time.

BLAIR v. ST. LOUIS, H. & K. R. Co. and others.¹

(Circuit Court, E. D. Missouri. April 30, 1884.)

1. LEGAL ADVISERS OF RECEIVERS—WHO ARE INCOMPETENT.

Where, during the pendency of foreclosure proceedings against a railroad company, a receiver is appointed, the attorney of the plaintiff should not be authorized to act as the receiver's legal adviser.

2. SAME.

Nor will an attorney be appointed legal adviser of a receiver who is related to him, and has come from abroad and become a member of the bar of the circuit for the purpose of securing the appointment.

3. SAME.

In the absence of any special reason for so doing, the court will not go outside of the bar of the circuit in selecting a legal adviser for a receiver.

4. RECEIVERS—WHEN APPOINTED.

Semble, that where a railroad company has failed to pay interest on its bonds when due, and foreclosure proceedings are commenced against it, a receiver should not be appointed, in the absence of fraud, incompetency, etc., to do what the corporate authorities could do better.

In Equity. Motion by receiver to have order appointing legal advisers rescinded, and to substitute for the attorneys then employed a Chicago attorney, who was already attorney for the bondholders, and the receiver's brother, who had lately come to St. Louis from Wisconsin, and had been admitted to the federal bar of this circuit.

Walter C. Larned, for complainant.

TREAT, J. A bill on the part of the mortgagee was filed in this case for the foreclosure of a mortgage and the appointment of a receiver *pendente lite*. The allegations of the bill were that the managers of the road had practically abandoned the control and conduct of the same, whereby the preservation of the property required a receiver *pendente lite*. A court should not, on mere default of interest on bonds, take possession of a railway and substitute a receiver of its appointment to do what the corporate authorities, more familiar with its interests, could better do. In the absence of fraud, incompetency, etc., the court, pending a proceeding for a foreclosure, under ordinary circumstances, will not take possession through its receiver of the corporate property and substitute its officer in the place of the corporate offi-

¹Reported by Benj. F. Rex, Esq., of the St. Louis bar.

cers. It may be that the view is creeping into administration of law that when a mortgagee asks for a foreclosure and receiver, if default of interest has occurred, the court must appoint a receiver and operate the road accordingly. Indeed, this view has been carried so far as to permit the receiver to build unfinished roads, supply feeders, etc., of the road which thus comes into his hands. It is true that there should be a more clearly defined view judicially of the rights and duties involved in such cases. It is not needed now that the whole subject should be reviewed, whereby what is an abuse of the forms of law have imposed upon courts the construction of railroads, their extension or operation for an indefinite period of time. Courts are not designed for such railroad operations, through its administrative officers or otherwise. The sole object in ordinary cases of foreclosure, if the corporate authorities in possession are incompetent, is to put the property in a receiver's hands for the interest of all concerned in the litigation, viz., stockholders, mortgagees, other lien creditors, creditors at large, etc. Courts should not interfere with the custody and management of the business of the corporation through its corporate officers pending litigation except for cause shown.

In the case under consideration, the court, for what it deemed adequate cause, appointed a receiver under terms stated in his appointment. He was requested to report as to assets, etc. He did so, and in so doing suggested to the court to name a fixed salary for an attorney to aid him in the discharge of his duties. That was not done, because the court was not then prepared to fasten upon the assets a salaried officer, and because it did not then know that legal services would be needed, or if so to what extent. It soon became evident that intervening demands required attention, and that some attorney of this court should represent the rights vested temporarily in the receiver, and that said attorney should be where he could attend to the business. Suggestions came from the receiver in that respect which did not meet approval, and do not now.

It is urged that the attorney for the plaintiff should be authorized to act for the receiver, inasmuch as the plaintiff is especially interested in defeating all claims adverse to plaintiff's rights, and securing an economical administration of the estate. To this it must be answered that he represents his own client, and the latter can employ him and pay him accordingly if desired, but cannot fasten his compensation on a fund in which he has not the sole interest, but often only a partial or adverse interest. His appointment might be wholly inconsistent with his duties as plaintiff's counsel.

Another name was suggested, and doubtless the attorney is competent; but he was a stranger to the bar of this circuit when suggested, and apparently has come here for the purpose, to some extent, to be placed in the position desired, and has now become a member of this bar. It seems that one who accepts the office of receiver under an appointment from this court ought to find some competent attorney

of this court, and responsible to it, to aid him with legal advice if needed. If the bar of this circuit is so poor in ability or integrity as to have no member thereof fit for the desired position, then it might be well to seek elsewhere for needed aid. This court is not prepared to make even impliedly such a reflection on the bar of this circuit, nor will it grant a motion which seeks to make one, however able, but who is not a member of this bar, or has just come here with respect to this case mainly, so far as I know, the appointee of this court as attorney and counselor of its officers; nor will it sanction by its appointment the introduction from abroad of any one, especially a kinsman of the receiver, through the latter's solicitation, under circumstances stated, to fill a position which others long known to the court are, to say the least, equally able to fill.

It is unpleasant thus to speak, but the court must guard the administration of this trust, and will do so despite questions of mere delicacy. If the thought obtains that the plaintiff is to control the receivership regardless of other than his own interests, the sooner that error is dispelled the better. If the receiver supposes he is at liberty to do whatever seems to him advisable, he must bear in mind that, while under the terms of his appointment large discretion is granted, his administration is subject to scrutiny and review.

The court will not name a legal adviser for him who is not equal to the position, nor would it have named any one if he had not come to the court with respect thereto. It was then seen, and is now seen, that his wishes in that respect omitted to consider what the court deems essential in such cases. If the needs of his office require legal advice, when the court comes thereafter to pass upon his expenditures, there may be such allowance therefor as the court may consider reasonable and proper. If he prefers to go forward without the immediate aid of the court, under the general instructions given, he is at liberty to do so; but as he asked the intermediate aid of the court, and now knows what its views are, if he did not know before, the court will rescind the order heretofore made, but will not substitute, for reasons here suggested, the names stated in the motion, nor will it appoint any one not an attorney and counselor of this court, nor consider that the receiver properly performs his duty by seeking foreign counsel to perform local duties. If special matters require aid of foreign counsel let him ask therefor. It is evident that many adverse interests will arise, each representative of which must employ his own attorney. If it is apparent that, *inter sese*, several other claimants than bondholders and stockholders are respectively adverse to each other, there is no reason in justice that all these conflicting interests should be subject to the attorney of one interested party rather than the attorney of another. The receiver should seek legal advice, if needed, from other than attorneys of parties litigant. His office is one of strict impartiality and he must act accordingly. The mortgagee, holders of statutory liens, creditors at large, and stockholders, are equally benefi-

ciaries, and they must respectively employ their own attorneys; and no one class have, through the aid of the court, the means of fastening on a common fund the expense of pursuing his special interests adversely to others who have an equal right to be heard.

The order heretofore entered will be rescinded, and the receiver must act in accordance with the views expressed.

BLAIR v. ST. LOUIS, H. & K. R. Co. and another.*

(Circuit Court, E. D. Missouri. May 12, 1884.)

RECEIVERS—COMPENSATION FOR SERVICES OF LEGAL ADVISER, RENDERED BEFORE AND AFTER RECEIVER'S APPOINTMENT—AGAINST WHAT FUNDS CHARGEABLE.

In a suit brought by A. against B. and C., two railroad companies, E. acted as attorney for the defendants. After services had been rendered by E., but before the case was disposed of, F. was appointed receiver of C. in a foreclosure suit. C. was appointed F.'s legal adviser, and continued to act in the case brought by A. until it was disposed of, and also rendered other legal services. Upon an application by E. for compensation for said services, *held*—

(1) That the fee allowed for services rendered after F.'s appointment was chargeable against F., and should be paid out of the funds in his hands.

(2) That the compensation allowed for services rendered in A.'s case before F. was appointed, was a charge against B. and C., and was payable out of whatever surplus might remain in the hands of the receiver after the lien, demands, and expenses were paid.

Application by Attorneys for a Receiver for compensation for legal services, part of which were rendered before and part after the receiver was appointed.

TREAT, J. This is an application by Smith & Harrison for compensation for legal services. When the receiver was appointed there was a case pending of *Fogg v. The Defendant et al.* The court thought that the receiver should defend said case in the interest of all concerned, and authorized him so to do. For all the services theretofore and subsequently rendered, the amount claimed, to-wit., \$1,000, may not be excessive. Shall the whole of said amount be charged against the funds in the hands of the receiver, or only such portion thereof as resulted from the defense by him as authorized by the court? The ordinary course of such proceedings, under the decree as rendered, would be a charge solely against the two corporations, defendants, to abide the final outcome of the estate. It seems, therefore, equitable that the receiver be ordered to pay to the petitioners the sum of \$500; the other \$500 claimed to be charged against whatever surplus may come to the hands of the receiver after the lien, demands, and expenses have been discharged.

As to the other demands for which services are claimed, the same

* Reported by Benj. F. Rex, Esq., of the St. Louis bar.

being chargeable against the receiver directly, the only question is as to what should be properly allowed therefor. Under some circumstances it might appear that the amount is moderate; but, in the interests of all concerned, the court thinks that \$200 is ample.

The court, therefore, orders the receiver to pay to the petitioners, Smith & Harrison, the sum of \$700, and that there be assessed against the defendant railroads the sum of \$500; the latter sum to abide the final determination of the case.

JOHN CROSSLEY SONS, Limited, v. CITY OF NEW ORLEANS.¹

(Circuit Court, E. D. Louisiana. April 21, 1884.)

EQUITY JURISDICTION—ACCOUNT.

An account, if complicated so as to be incapable of being had at law, of itself is ground of equity jurisdiction. Such an account, especially when it must be followed by the proportioning and distribution of a fund, can be taken in a court of equity.

' Cause Submitted on General Demurrer, the ground in support of it being that there is remedy at law.

Henry C. Miller, for complainants.

Charles F. Buck, City Atty., for defendant.

BILLINGS, J. The bill sets forth that in 1858 a system of drainage was established by the legislature of the state, whereby certain assessments were authorized to be made and recorded,—all of which was done,—whereby numerous tracts or pieces of land within the parish of Orleans became subject to liens. Under this first act the whole matter of drainage was committed to a board of commissioners. The bill then avers that in 1871 the legislature superseded the board of drainage commissioners by the Mississippi & Mexican Gulf Ship Canal Company. To this latter company was transferred all the rights and liens arising from the drainage assessments. The moneys collected therefrom were declared to be a trust fund, and the city of New Orleans was authorized and required to draw warrants for work done by said corporation in the matter of drainage. The bill then shows that in 1876 the city of New Orleans was substituted as the corporation to conduct the said drainage business,—was authorized to purchase all the franchises, tools, etc., of the Mississippi & Mexican Gulf Ship Canal Company, and to pay for the same by warrants to be drawn by said city against said trust fund. The bill then shows that the complainants are the holders of the warrants so drawn against the said trust fund by said city for such work, and for the price of the said purchase to the amount of \$436,000. The bill is

¹Reported by Joseph P. Hornor, Esq., of the New Orleans bar.

filed in behalf of the complainants and "all who hold obligations of the class held by them," and asks, among other things, "an account of all warrants entitled to payment from and out of said fund."

For the purposes of this hearing there is no question made or submitted as to the legality or validity of the complainant's demands. The sole question now to be determined is, does the complainants' bill show a cause of action over which a court of equity can take cognizance? Its first object, as demanded, is an account or disclosure of all the warrants drawn against these alleged mortgage liens. An account, if complicated so as to be incapable of being had at law, of itself is ground of equity jurisdiction. Such an account, especially when it must be followed by proportioning and distribution of a fund, can be taken in a court of equity. The bill of complainant, therefore, presents a cause of action which can be dealt with, at least to the extent of the accounting, by a court of equity, and the demurrer must therefore be overruled, and let the defendant answer the bill on or before the second Monday of the next succeeding rule-day.

MUNDY and others v. DAVIS.¹

(Circuit Court, D. Kentucky. April 1, 1884.)

CONTRACT—CONSTRUCTION OF.

A. holding less stock than B. in a railroad corporation, they agree, in order to equalize their respective holdings, that the stock held by them shall be common property, and that A. shall give his note to B. for the amount necessary to equalize the joint-stock account, the cost of the stock being computed as of the date of the contract. Three years afterwards B. renders an account of the cost of the stock, with interest to date, takes A.'s note at one year for the cost of enough stock to equalize their respective holdings, and gives a receipt for the note, reciting that "said note is given me for the purchase of 391½ shares * * * now held by me, and to be delivered, upon payment of his note," to A. Shortly before maturity of the note, A. is notified that, if it is not paid at maturity, his right to the stock will not be recognized. The note is not paid at maturity, and B. destroys it. Nearly six years after date of receipt, A.'s assignee tenders to B. the amount due on note and demands stock. *Held*, that the title to stock did not vest in A., and that he did not pledge it to B. as security for payment of note, but that, by the terms of the receipt, B. retained the title until the purchase price should be paid; that the suit is for a specific performance of a contract, and not a bill to redeem; and that, by reason of the delay and changed condition of the parties and of the value of stock, specific performance must be denied.

In Equity.

Wm. Lindsay, for complainants.

A. P. Humphrey and St. John Boyle, for defendant.

BARR, J. Prior to November, 1873, Charles G. Davison and Alexander H. Davis were largely interested in the Louisville City

¹ Reported by Geo. Du Relle, Asst. U. S. Atty.

Street Railway, and on the tenth of November, 1873, they entered into a contract as follows:

"Memorandum of an agreement made this tenth day of November, 1873, between Charles G. Davison, of the city of Louisville, Kentucky, and Alexander Henry Davis, of the city of New York, New York, witnesseth:

"Whereas, the said parties of the first and second part, respectively, are the actual and equitable owners of certain shares of the capital stock of the Louisville City Railway, the said Davison holding or being entitled to hold about eight hundred, and the said Davis holding or being equitably entitled to hold about twelve hundred, shares of the said stock; and whereas, the said parties of the first and second part are desirous of equalizing their respective interests as between themselves, and also of acquiring possession of a greater amount of the said stock: Now, therefore, it is hereby agreed that the stock now actually or equitably held by the parties of the first and second part, respectively, shall be regarded as common property, each party being entitled to the one-half ownership of said stock for the consideration hereinafter to be mentioned. It is also agreed that all purchases of the said stock that may be made hereafter shall be thus made for the joint account of the parties to this contract, and shall be likewise held by them in common. It is furthermore agreed, as the consideration for the equalization of their respective interests by the said parties to this contract, that the actual cost of the stock held by each party shall be computed as of this date, and a note given by the said Davison at any time, upon demand, for the amount which would be due from him for the equalization of said joint-stock account; it being understood that two hundred and fifteen (215) shares of said stock now held by the said second party shall offset in the account a like number of shares held by the said first party. And it is furthermore agreed that in case of the death of either of the parties to this contract, the survivor shall be entitled to purchase the stock of said deceased party within one year from the time of such decease at a price not exceeding twenty-five (25) dollars per share if within twelve months from the date of this agreement, with an advance of ten (10) dollars per share for each succeeding twelve months.

"In witness hereof, the parties of the first and second parts hereby attach their hands and seals this tenth day of November, 1873.

"Witness: E. H. SPOONER.

ALEX. HENRY DAVIS.

"C. G. DAVISON."

Davison, who resided in Louisville, was the president of the railway, and Davis, who resided in New York, was its vice-president. These two seemed to have had a controlling interest in the stock, and the road continued under their general control until after November, 1876. On the eleventh of November, 1876, Davis rendered to Davison an account of their stock transactions, in which each party's stock is charged at its cost price, and interest added up to November 10, 1876. This statement shows that Davis then held 1,571 shares, and Davison 812 shares, the entire stock costing, with interest,—2,383 shares,—\$52,404.10. One-half—1,191½—would cost \$26,202.05. Davis' 1,571 shares, by this account, cost \$32,723.41, being \$6,521.36 more than one-half of the cost of the entire stock. Davison was entitled to 379½ shares of the stock which was in the name of Davis, and owed therefor the \$6,521.36. Davison executed his note to Davis for this \$6,521.36, payable one year after date, November 10, 1876,

bearing 7 per cent. interest, and Davis retained the stock, and executed a receipt in these words, viz.:

"SYRACUSE, N. Y., Jan. 29, 1877.

"Received of C. G. Davison his note, dated November 10, 1876, for \$6,521.36, payable one year from date, with interest at 7 per cent. Said note is given me for the purchase of three hundred and seventy-nine and one-half shares of stock of the Louisville City Railway Company, now held by me, and to be delivered, upon payment of his note, to said Davison.

"ALEX. HENRY DAVIS."

This receipt was delivered about the time of the delivery of the note. This note has not been paid, nor any demand of the stock or tender of the amount of the note made until after the transfer of Davison's claim, in September, 1882, to complainant Mundy. After this transfer, in January, 1883, Mundy tendered the amount due on the note and demanded the stock, which was refused by Davis. Mundy, with whom is united Davison, has brought this suit, and the depositions of both Davis and Davison have been taken.

The only material facts in addition to those already stated are that Davis testifies that, shortly before the maturity of the note, he wrote to Davison, saying he would not continue to recognize Davison's right to this stock after the maturity of the note, if it remained unpaid, and that he subsequently destroyed the note; that the market value of the stock did not materially advance until after 1878; and that since then, under the management of Davis, the market and intrinsic value has increased, and that, at the time of the demand by complainant of this stock, it was worth more than twice as much in the market as at the maturity of the note. Davison went out of the directory and presidency in February, 1878, and was succeeded by Davis, and, so far as the record shows, made no personal demand for the stock, or tender of the amount of the note, and has long since transferred his stock in the company for debt, and was unable to pay this note.

If this bill be for the purpose of having a specific performance of an agreement to deliver this stock upon the payment of the purchase money, it cannot be sustained, because of the long delay in making a tender of the purchase money, and the change in the value of the stock. It would be inequitable to allow Davison or his assignee to lie by more than five years after this money was due, and the stock was deliverable, and then obtain a specific performance when the relations of the parties have changed and the stock has greatly appreciated in value. *Brashier v. Gratz*, 6 Wheat. 530; *Benedict v. Lynch*, 1 Johns. Ch. 375; *Alley v. Deschamps*, 13 Ves. 228; *Rogers v. Saunders*, 16 Me. 92. The learned counsel concedes this, but insists that at the time of the execution of the note, Davison was already the equitable owner of the 379½ shares of stock, and, being the owner, pledged the stock to Davis to secure the payment of the note, and that, as Davis has not taken the proper legal steps to divest Davison of his interest, the right of redemption still continues, notwithstanding

ing the lapse of time. The receipt which Davis gave, and Davison accepted, states that the note was executed for the purchase of the 379½ shares of stock, and that it was to be delivered to Davison upon the payment of the note. It is true that the receipt does not state that the purchase was *then* made, but it does state that the stock was then held by Davis, and the fair construction of this receipt must be that the note was the purchase price of the stock owned by Davis and sold to Davison, and that he retained it for the price. The complainants insist that this receipt should be read with the agreement of November 10, 1873, and that that agreement invested Davison with the equitable ownership of one-half of the stock they (Davis and Davison) then owned, or might thereafter purchase, and that, although Davison was by the agreement to pay Davis the cost of the stock, with interest, which was necessary to equalize him with Davis, this obligation did not prevent the investing of the equitable ownership in Davison by force of that agreement, although it was not paid for. The agreement of November, 1873, states that—

"It is hereby agreed that the stock now actually or equitably held by the parties of the first and second part, respectively, shall be regarded as common property, each party being entitled to the one-half ownership of said stock for the consideration hereafter to be mentioned. It is also agreed that all purchases of said stock that may be made hereafter shall be thus made for the joint account of the parties to this contract, and shall be likewise held by them in common. It is furthermore agreed, as the consideration for the equalization of their respective interests by the said parties to this contract, that the actual cost of the stock held by each party shall be computed as of this date, and a note given by the said Davison, at any time, upon demand, for the amount which would be due from him for the equalization of said joint-stock account."

It is not clear, from the language of this agreement, whether the equalization of interest in the stock was to be by a joint holding, each having an undivided half of the whole, or by a separate holding of one-half by each party. The parties, however, construed the contract as meaning the separate holding of one-half by each party. But it is clear that Davison was to pay to Davis the average actual cost of the stock which was necessary to make him the owner of an equal number of shares with Davis. This sum, with interest from that date, would be the purchase price of the stock necessary to make the equalization, and although the number of shares could not have been accurately ascertained at the instant of the agreement, still, had there been a dividend thereafter declared on this stock, Davis would have had to account with Davison for it. This, however, would have been by the terms of the contract, and not by reason that the title was then in Davison. This contract did not distinctly provide whether the evidence of title should remain in Davis' possession, and the title in his name of the whole 1,200 shares, until the purchase price of the shares which Davison was to have to equalize him was paid, but both parties construed the agreement as meaning this, and that when

Davis thereafter purchased stock the certificates should be in his name. I mean their conduct indicated such a construction. If, therefore, Davison had, on the tenth of November, 1876, tendered Davis his note for the cost of the 379½ shares of stock, with interest from November 10, 1883, and demanded an immediate transfer of the stock to him, I doubt if a court of equity should have decreed a specific performance of such a demand without the payment of the note for the purchase price. The contract was silent, but the conduct of the parties had been such as would have given Davis, in the absence of any express agreement, the right to retain the title to the stock until the purchase price was paid, and hence there would have been no occasion for Davison to have pledged this stock for the payment of the purchase price. The giving of this stock as security for the payment of its purchase price by Davison would have been an affirmative act, which would require the acceptance of Davis. It is clear this was not done, but instead Davis retained ("held") the stock as of right, and only agreed to deliver it when the purchase price was paid, and that Davison, by the acceptance of the receipt, admitted this was Davis' right. Davison did not pledge to Davis his (Davison's) stock for a debt for which it was not previously bound. On the contrary, Davis held the stock which he had sold to Davison for the purchase price, and agreed to deliver this stock when the purchase price was paid. The question is, therefore, whether a specific performance for the delivery of the stock upon the payment of the purchase price, as provided in the receipt of January 29, 1877, will now be decreed. This, for the reasons already given, should not be decreed.

The bill should be dismissed and the defendant have costs; and it is so ordered.

SHUENFELDT and others v. JUNKERMANN and another.

(Circuit Court, N. D. Iowa, E. D. April Term, 1884.)

1. LEX LOCI—CONTRACTS VOID IN ONE STATE AND GOOD IN ANOTHER—SCOPE OF INVESTIGATION ALLOWED TO COURTS.

In a question involving the validity of a contract *as such* the court may consider the very time and place when and where the act was done that gave life to the contract.

2. SAME—THE PLACE OF THE CONTRACT IS DETERMINED BY THE QUESTION, WHERE WAS THE CONTRACT COMPLETED?

The contract of a traveling agent, which required ratification by his principal, is deemed to have been made at the place where the ratification was given.

At Law.

Henderson, Hurd & Daniels, for plaintiffs.

Fouke & Lyon, for defendants.

SHIRAS, J. On the trial of this cause before a jury, it appeared that the plaintiffs were wholesale liquor dealers, residing and doing business in Chicago, Illinois, and the defendants were druggists, residing and doing business in Dubuque, Iowa. The action was based upon acceptances of defendants, and upon an open account. The defendants pleaded that the acceptances, as well as the account, were for intoxicating liquors sold in violation of the statute of Iowa, commonly known as the prohibitory liquor law. On the part of the defendants it was claimed that the liquors were sold in pursuance of a contract entered into between one Connors, an agent of plaintiffs, and the defendants, at Dubuque, Iowa, by which it was agreed that plaintiffs were to furnish to defendants, from time to time, various kinds of liquors at certain prices, and put up in packages to suit the market. On the part of plaintiffs it was denied that Connors made any such agreement, and, further, that if he did he had no authority to make any contract for plaintiffs, he being merely a traveling agent, with power to solicit trade and orders, which were to be forwarded to Chicago for approval or disapproval by plaintiffs. The evidence showed that the liquors were furnished by plaintiffs upon the orders of defendants, two of which were given to Connors in person when at Dubuque, and the others were by letters directed to plaintiffs, the goods being delivered to the railroad company at Chicago. The court instructed the jury that if the agent, Connors, had authority to make a completed contract of sale, and did in fact make a contract at Dubuque, under which the liquors in question were furnished, then the sale was a violation of the statute of Iowa, it not being questioned that the liquors were intoxicating, and intended to be used as a beverage. See *Second Nat. Bank v. Curren*, 36 Iowa, 555; *Taylor v. Pickett*, 52 Iowa, 467; S. C. 3 N. W. Rep. 514. The jury was further instructed that if the agent, Connors, merely procured or arranged for the forwarding of orders from time to time by defendants, which orders, when received by plaintiffs, were subject to their approval or disapproval, and which they were under no obligation to fill unless approved, then the sale would be deemed to be a sale made in Illinois. See *Tegler v. Shipman*, 33 Iowa, 194. The court also ruled that if Connors, not having authority to make a completed contract of sale on behalf of plaintiffs, nevertheless did in form enter into a contract at Dubuque with defendants, whereby he assumed to bind plaintiffs for the future delivery of liquors in quantities to be fixed by defendants, which contract was not binding upon plaintiffs by reason of the want of authority on the part of Connors, and the plaintiffs approved or ratified the contract by forwarding the goods from time to time to defendants as ordered by them, the act of affirmance which gave binding force to the contract being done in Chicago, the contract will be deemed to be made in Chicago, and being valid there would be enforced in Iowa, unless it was shown that the sale was made with intent to enable defendants to violate the laws of Iowa. The jury found a verdict

for plaintiffs, and defendants move for a new trial, on the ground that there was error in the ruling of the court upon the last point named.

On the part of the defendants it is claimed that the act of ratification has relation back to the time, place, and circumstance when and where the terms of the proposed contract were arranged between the agent and the defendants, and supplied the authority then wanting, thereby rendering the contract as binding as though the agent originally possessed the authority to make it. In support of this proposition, counsel cite the cases of *Beidman v. Goodell*, 56 Iowa, 592; *S. C. 9 N. W. Rep. 900*; *Eadie v. Ashbaugh*, 44 Iowa, 519; *Lowry v. Harris*, 12 Minn. 255, (Gil. 166;) *Hankins v. Baker*, 46 N. Y. 670; *Moss v. Rossie Lead Co.* 5 Hill, 137; *Forsyth v. Day*, 46 Me. 176; and *Story*, Ag. § 244,—all of which recognize and enforce the general rule as given by *Story*, that—

“A ratification, also, when fairly made,—will have the same effect as an original authority has, to bind a principal, not only in regard to the agent himself, but in regard to third persons. * * * In short, the act is treated throughout as if it were originally authorized by the principal, for the ratification relates back to the time of the inception of the transaction, and has a complete retroactive efficacy.”

That this is the general and the correct rule to be applied to cases requiring the construction and application of the contract to its subject-matter, for the purpose of ascertaining and protecting the rights of the parties thereto, cannot be questioned, as it is sustained by authorities without number; but the point now presented is whether this rule is properly applicable to the question involved in the instruction given to the jury and excepted to by defendants. In the case at bar the court is not called upon to determine the rights of the parties as defined by the terms of the contract itself. The defendants are not asserting, as against the plaintiffs, any rights or benefits conferred upon them by the express provisions of the contract itself. On the contrary, their defense is that the contract is not binding upon them, and never took effect, because it is, as they allege, illegal and void, in that it was made in Iowa in violation of the statutes of this state. The defendants, having received all the benefits conferred upon them by the contract, are now seeking to defeat its enforcement, not upon any question arising on the terms of the contract, but upon the ground that, at the time and place the contract was made, it was invalid and void. Upon such an issue, is there any reason why the court shall not ascertain the very facts of the case and decide accordingly? Is there any reason why the plaintiffs are estopped from proving the exact truth of the transaction? The point of inquiry is, when and where was the contract of sale entered into? “A contract is an agreement in which a party undertakes to do, or not to do, a particular thing.” *Sturges v. Crowninshield*, 4 Wheat. 197. A contract does not become such until the minds of the contracting parties meet.

When and where did the plaintiffs agree to sell the liquors in question to the defendants? Connors certainly did not make or complete a contract with defendants, for it is admitted, in the aspect of the case now under consideration, that he had no authority to make a contract or to bind plaintiffs. The utmost that can be said is that he, not having authority to make a contract, undertook to agree upon the terms of sale, which did not, however, bind plaintiffs until they had given their assent thereto. The contract was made when plaintiffs, by approval, acceptance, or ratification, assented thereto. Then, in fact, for the first time, did the minds of the contracting parties meet, and thereby render binding and obligatory that which before was, in effect, only a proposition for a contract. The rule is well settled that where orders are given for the purchase of goods to an agent who has not authority to sell, but which are forwarded to the principal for his approval, the contract is deemed to be made at the place of approval. *Tegler v. Shipman*, 33 Iowa, 194; *Taylor v. Pickett*, 52 Iowa, 469; S. C. 3 N. W. Rep. 514. The principle recognized in these cases is applicable to the question presented in the case under consideration, and no good reason is perceived for making a distinction in the rule to be applied.

The same doctrine is enforced in cases of contracts entered into on Sunday, where, by the law of the state, such a contract would be void. A ratification thereof on a week-day is held good. Thus, in *Harrison v. Colton*, 31 Iowa, 16, the supreme court of Iowa cite approvingly the rule given in *Story, Cont. § 619*, "that any ratification of a contract on a week-day, such as a new promise to pay, a refusal to rescind on demand made, a partial payment, and the like, would render the contract binding, though originally made on Sunday." If the ratification of a contract must, under all circumstances, be held to revert back to the time and place of its inception, and only that effect can be given to it, it would follow that a Sunday contract could not be ratified on a week-day, because, if that were the rule, the ratification must be held to have taken effect at the time the original contract was entered into, and a ratification taking effect on Sunday would be open to the same objection that invalidated the original contract. The ratification is held good, however, because it takes effect on a week-day, and the courts recognize that fact, and, in consequence thereof, give effect to the contract originally void. The true rule is that when the question involves the validity of the contract, as such, the court may consider the very time and place where and when the act was done that gave life to the contract. In the case at bar this act took place in Chicago, and the contract must be held to have been made at that place, and not in Dubuque. Consequently, there was no error in the instructions given to the jury upon this point, and the motion for new trial must be overruled.

HEIRS OF SZYMANSKI v. ZUNTS.¹*(Circuit Court, E. D. Louisiana. April 10, 1884.)***1. CONFISCATION ACT OF 1862, (12 St. 589.)**

The effect of the statute of confiscation of 1862, (12 St. 589,) modified by the joint resolution, (12 St. 627,) is to take, by the decree of condemnation, from the offender all estate, leaving him only the naked capacity to transmit to his heirs.

2. SAME—WARRANTY.

The decree of confiscation of the property separated it from any power or dominion over it on the part of the offender after the commission of the act for which it was condemned. His warranty, therefore, has no effect upon the *res* which has vested in the plaintiffs because it had been once a portion of the estate of their ancestor.

3. SAME—INJUNCTION.

The only effect which could be invoked from the violation of the warranty would be, that, for reasons disconnected from the confiscated property, namely, because other property of the ancestor warrantor had come into the possession of the plaintiffs as heirs, a right of action against them exists in the defendant upon the ancestor's warranty. This, if it were all conceded, (and upon this no opinion is given,) would give no right to enjoin the suit at law. It would present the case of two parties having each a cause of action against the other, one at law and the other in equity, where each must take its natural course, and come to its conclusion without any interference springing up from the existence or progress of the other.

4. PRACTICE.

The provisions of article 375 of the Code of Practice of Louisiana are merely regulations of procedure operative upon the courts of the state alone, and not applicable in the courts of the United States, where, as here, the demand in the first suit is a demand upon the law side of the court, and the counter demand on the part of the defendant is one which is of equity cognizance. In such a case, the question whether a stay will be granted will be controlled by the rules which determine the action of courts of equity in the United States courts.

5. SAME—INJUNCTIONS.

It is a rule of practice in the circuit courts of the United States not to allow an injunction to stay an ejectment until it can be investigated in equity, unless a judgment be entered therein. *Turner v. American Missionary Society*, 5 McLean, 344, followed.

On Motion to Stay Proceedings.

E. H. Farrar, for plaintiffs.

Wm. F. & Delos C. Mellon and James E. Zunts, Jr., for defendant.

BILLINGS, J. A motion is submitted to stay proceedings in this action until the plaintiffs have entered an appearance and pleaded in a suit in equity, filed in this court by the defendant against the plaintiffs. This suit is an action of ejectment brought by the heirs of a person whose real estate had been confiscated under the act of 1862, and for rents and profits. The suit in equity is based upon a warranty which the plaintiffs' ancestor, whose property had been confiscated, and who subsequently acquired apparent title to the same, entered into with the remote grantors of the defendant, and seeks to discover and charge the plaintiffs with the amount and value of prop-

¹Reported by Joseph P. Hornor, Esq., of the New Orleans bar.

erty, independent of that confiscated, which descended to them, as heirs, from the estate of their ancestor, who is thus the remote warrantor of the defendant. What is the relation of these two demands to each other? The answer to this question, so far as concerns the demands intrinsically, depends in part upon the effect of the putting in operation of the statute of confiscation. Article 3, § 3, last paragraph, of the constitution of the United States declares that "no attainder of treason shall work corruption of blood or forfeiture, except during the life of the person attainted." The statute (vol. 12, p. 589) had in terms permitted the forfeiture of real estate absolutely. The object of the joint resolution (vol. 12, p. 627) was to limit the forfeiture by the article of the constitution above quoted with reference to the punishment of treason. The meaning of the constitution is determined by this object, and therefore was that the offense should work no corruption of blood, which, when applied to a specific piece of property, is but another form of the expression, "or forfeiture during the life" of the offender. For if the forfeiture stopped with the life of the person in whom the estate was vested, it would follow that there would be a transmission, upon his death, of the property as if there had been no forfeiture; i. e., there would remain in the offender no estate, but only the power to transmit. Blackstone says (book 4, p. 382) that the justice of the punishment of treason, by corrupting the blood, was founded upon the consideration that he who had violated the fundamental principles of government had broken his part of the compact between the king and the people, had abandoned his connections with society, and therefore had no right to those advantages which belonged to him purely as a member of society, among which social advantages the right of transferring or transmitting property to others is one of the chief. Subsequently, by the statutes of Anne, and upon the union with Scotland, this posthumous punishment of innocent heirs was abated upon principles of clemency, which undoubtedly moved the framers of the constitution to secure the prevention of attainder save by judicial sentence, and the restriction of any attempt or forfeiture to the life of the person attainted or punished.

The effect of the statute of confiscation of 1862, modified by the joint resolution, is to take by the decree of condemnation from the offender all estate, leaving him only the naked capacity to transmit to his heirs. The condemned property by the decree ceased to belong to the estate of the offender save for the single purpose of designating in whom it should vest upon his death. It follows that it separated it from any power or dominion over it on the part of the offender after the commission of the act for which it was condemned. His warranty, therefore, has no effect upon the *res* which has vested in the plaintiffs, because it had been once a portion of the estate of their ancestor. The only effect which could be invoked from the violation of the warranty would be that for reasons disconnected from the con-

fiscated property, namely, because other property of the ancestor warrantor had come into the possession of the plaintiffs as heirs, a right of action against them exists in the defendant upon the ancestor's warranty. This, if it were all conceded, (and upon this no opinion is given,) would give no right to enjoin the suit at law. It would present the case of two parties having each a cause of action against the other,—one at law, and the other in equity,—where each must take its natural course, and come to its conclusion without any interference springing up from the existence or progress of the other.

It remains next to be considered how far the statutes of the state of Louisiana affect this motion. It has been urged that the Code of Practice of this state, which authorized a reconventional demand in any cause or for any cause of action where the plaintiffs are, as here, non-residents and without the jurisdiction of the court, aids in establishing the right to maintain this rule on the part of plaintiffs. Code Pr. art. 375. It should be observed that the right to implead the plaintiffs for any demand is supplemented by the provision contained in article 194, which provides that "absent persons" shall be brought into court by service upon "a curator," whereas in the circuit courts of the United States jurisdiction is withheld unless the defendant be "an inhabitant of the district," or "be found" within the same. Nor do I find any enactment, either in the Code of Practice or Civil Code of this state, which creates any absolute right of set-off between two parties who are mutually indebted. The provisions contained in article 375 are therefore merely regulations of procedure operative upon the courts of the state alone, and not applicable in the courts of the United States, where, as here, the demand in the first suit is a demand upon the law side of the court, and the counter-demand on the part of the defendant is one which is of equity cognizance. In such a case the question whether a stay will be granted will be controlled by the rules which determine the action of courts of equity in the United States courts. These rules are not arbitrary. They are founded upon a further question, as to whether the offset is either a matter of legal right, made such by the law of the state, or is required in order to do justice between the parties. In this case there is no statutory offset. The case presents disconnected demands which are sought to be offset. In such a case the diligence of the parties, and the rules of the courts in which the respective claims must be presented, must work out the result. Neither suit can be accelerated nor retarded on account of the other. Especially must this be true when, as here, the suit sought to be stayed is a suit in ejectment; for it is a rule of practice in the circuit courts of the United States not to allow an injunction to stay an ejectment suit until it can be investigated in equity, unless a judgment be entered therein. *Turner v. American Missionary Society*, 5 McLean, 344. So far as I find precedents for this motion they are confined to cases where it is sought to compel an answer to a cross-bill, which, of course, must present a

matter necessarily connected with the demand of the plaintiff, and therefore necessarily involved in its just adjudication. Here the matters have no connection, except that they exist between the same parties.

The motion is denied.

KELLY v. HERRALL, Ex'r, etc.

(Circuit Court, D. Oregon. May 26, 1884.)

1. TAX DEED—EFFECT OF, AS EVIDENCE.

Notwithstanding the act of 1865, (Or. Laws, § 90,) making a tax deed conclusive evidence of the regularity and validity of the prior proceedings, in an action by the owner of the property to recover the possession from the grantee in such deed, or his assignee, it may be shown that no warrant issued for the collection of the tax levied on the property, or that there was no sale thereon on that account.

2. WARRANT FOR THE COLLECTION OF A DELINQUENT TAX.

A warrant for the collection of a delinquent tax was received by the sheriff on May 5th, and on Friday, July 6th, 62 days thereafter, he sold the same. *Held*, that the warrant was dead and the sale void; and that the sale could not be made after the return-day of the writ, which was either the first Monday in July, or the sixtieth day after its receipt by the sheriff, and possibly 30 days in addition, in case a prior appointed sale was postponed to some day within that period for sufficient cause, with the approval of the county court.

3. ASSESSMENT ROLL—DESCRIPTION OF PROPERTY THEREIN.

In 1876 there was only one place in Multnomah county laid out and recorded as the "Portland Homestead," containing a lot 3, in block B, of which Mary Kelly was the owner. The assessor entered the same on the assessment roll for taxation in her name, and described it as "lot 3, in block B, Port. Homstd. Ass.," and valued it for taxation at \$100. *Held*, that the description was sufficiently certain.

4. REVENUE LAWS—CONSTRUCTION OF.

Laws for raising revenue for the support of the state are remedial in their character, and proceedings taken under them for the purpose of ascertaining the amount a citizen ought to contribute to the common weal ought not to be considered as taken *in invitum*, or hostile to him or his interests, but rather as proceedings in his behalf, in which it is his duty to co-operate with the state, so as to enable it to reach a correct and just result.

Action to Recover Possession of Real Property.

H. B. Nicholas, for plaintiff.

Robert Bybee, for defendant.

DEADY, J. This action is brought by the plaintiff, a citizen of the state of California, to recover the possession of lot 3, in block B, in Portland Homestead. It was commenced against Jacob Fisher, a citizen of Oregon. After the cause was at issue, Fisher died, and on February 22, 1884, his death was suggested to the court and supported by the affidavit of the plaintiff's attorney, whereupon the action, on motion of the latter, was continued against the executor of the deceased, George Herrall. This is according to the practice pre-

scribed in such cases by the Oregon Code of Civil Procedure, § 37, but it is doubtful if the personal representative of a deceased defendant can be made a party to an action in this court in place of the latter, on the application of the plaintiff, otherwise than by a *scire facias* issued "twenty days beforehand," as provided in section 955 of the Revised Statutes. But, as the executor has since voluntarily appeared in the action, and by his counsel stipulated that the cause may be tried by the court without a jury upon the facts therein stated, in addition to those admitted by the pleadings, I suppose he is properly before the court as the defendant in the case, and that judgment may be given for or against him with the same effect as if he had been brought into the case by *scire facias*. See *Hatch v. Eustis*, 1 Gall. 160; *Barker v. Ladd*, 3 Sawy. 44.

It appears, from the admissions in the pleadings and the stipulations of the parties, that in 1876, and prior thereto, the plaintiff was the owner in fee of lot 3, in block B, in Portland Homestead, in the county of Multnomah and state of Oregon, according to the recorded plat thereof, and that in said year the assessor of said county entered on the assessment roll thereof for taxation, in the name and as the property of the plaintiff, "lot 3, in block B, Port. Homstd. Ass.," and valued the same thereon, for such purpose, at \$100, upon which valuation a tax was afterwards levied by the proper county court, for state, county, and school purposes, of \$1.50. The tax so levied upon said property not being paid or collected as provided by law, the same was returned by the sheriff before the first Monday in April, 1877, as delinquent, and thereafter entered by the county clerk on the list of unpaid taxes and "charged" to Mary Kelly, together with a description of the property as lot 3, in block B, in "P. H. Ass'n," which list was, on May 5, 1877, delivered to the sheriff, with a warrant attached thereto, dated May 3, 1877, "for the collection of the taxes therein mentioned and described," who, not being able to find any personal property belonging to the "delinquent," "thereupon" duly levied on the real property described in said list as follows: "Kelly, Mary, Portland H. Ass'n, lot 3, block B; tax, \$1.05,"—and duly advertised the same for sale at the court-house door on July 6, 1877, by the description last aforesaid, and then and there sold the same, subject to redemption, to said Fisher, he being the highest bidder therefor, for the amount of said tax—\$1.50—and \$2.90 costs,—in all, \$4.40,—and gave him a certificate thereof accordingly.

On July 12, 1879, the time for redemption having expired without any application being made to redeem the property, the sheriff executed a deed to the purchaser, in pursuance of said sale, for the following described property: "Lot 3, in block B, in the Portland Homestead Association, in Multnomah county, state of Oregon,"—who thereupon went into possession of the lot in controversy, and occupied the same until his death, in said county, on January 5, 1884, leaving a will in which George Herrall was named as executor, and to whom

letters testamentary were afterwards issued thereon by the proper court.

It also appears from said stipulation "that if evidence is admissible to show the meaning of the abbreviation, 'Port. Homstd. Ass.,' as it appears in said assessment roll, it means 'Portland Homestead Association.'"

Formerly, a party claiming under a tax deed was held to strict proof of the legality and regularity of every step in the prior proceeding, from the listing of the property down to and including the sale. The application of the conservative maxim, *omnia rite præsumentur*, was not allowed; and it was assumed that nothing was done, or rightly done, until the contrary was shown. Owing, probably, to the great disparity between the real value of the property, in many cases, as in this, and the amount paid for it by the purchaser at the tax sale, the courts were astute to find some flaw in the proceeding, on account of which they might hold the deed invalid, and thus prevent what might be considered as a forfeiture of the property. In this state of the law, taken in connection with the fact that the process of the assessment and collection of taxes is generally in the hands of inexperienced and untrained persons, selected by popular election for short periods, it is not surprising that the sale of property for the non-payment of taxes has usually been regarded as a mere admonitory formality, which, at most, could only involve the delinquent owner in a "lawsuit" with the purchaser, in which the latter was quite sure to come out second best.

In Blackw. Tax Titles, 72, it is said that out of 1,000 such titles that had found their way into the appellate courts (1869) not twenty of them had proved "legal and regular" according to this severe test.

The duty of the owner to return his property for taxation, and to assist and co-operate with the state in ascertaining the exact amount that he ought to contribute to the public revenue, seems to have been overlooked, and the proceeding regarded and treated as a hostile, if not a predatory, one on the part of the state against the citizen, in which the latter was justifiable in getting off as cheaply as possible, or lying by and allowing his property to be sold for taxes, and then avoiding the effect of the sale, and escaping the payment of the tax altogether, by showing some defect or irregularity in the proceeding, that in a like transaction between man and man would be regarded as altogether immaterial. Blackw. Tax Titles, 125. But the difficulty, not to say injustice, of raising revenues by a system which in effect only reaches the diligent and conscientious citizen, in time attracted public attention to the necessity, if not propriety, of treating the proceeding for raising the public revenue as a proceeding founded on remedial legislation, and designed to promote the public good,—as a proceeding in which it is the duty of the citizen to co-operate with the state, at least up to the point of ascertaining what is due from him, and which, in common with other public proceedings,

is to have the benefit of the presumption, declared in the Or. Code of Civil Procedure, § 766, sub. 15, "that official duty has been regularly performed."

In *Coolley*, Tax'n, the learned author (383, note) suggests that too much importance has been attached to this idea that a proceeding for the assessment and levy of a tax is "hostile" to the tax-payer, and adds the following judicious and sensible comments:

"The proceedings in the assessment of a tax are not, in any proper sense, hostile to the citizen. They are, on the other hand, proceedings necessary and indispensable to the determination of the exact share which each resident or property owner ought to take, and may and ought to be supposed desirous of taking, in meeting the public necessity for a revenue; proceedings which the willingness of the tax-payer cannot dispense with, and which only become hostile when the duty to pay, once fixed, fails to be performed by payment. Then, and then only, do the steps taken by the government assume a compulsory form. Until then, the reasonable presumption is that government and tax-payer will act together in harmony, and that the latter will meet his obligation to pay as soon as the former has performed its duty in determining the share to be paid."

In time the legislatures of many of the states interfered, and relieved the purchaser at a tax sale from the intolerable burden of proving the regularity and legality of every step in the proceeding by making the tax deed *prima facie* evidence of the title of the purchaser and the regularity of all the prior proceedings.

In *Pillow v. Roberts*, 13 How. 476, Mr. Justice GRIER, in considering an Arkansas statute of this character, says:

"The evil plainly intended to be remedied by this section [96th] of the act was the extreme difficulty and almost impossibility of proving that all the very numerous directions of the revenue act were fully complied with antecedent to the sale and conveyance by the collector. Experience has shown that when such conditions were enforced, a purchaser at tax sales, who had paid his money to the government, and expended his labor on the faith of such titles in improving the land, usually became the victim of his own credulity, and was evicted by the recusant owner or some shrewd speculator. The power of the legislature to make the deed of a public officer *prima facie* evidence of the regularity of the previous proceedings cannot be doubted. And the owner who neglects or refuses to pay his taxes or redeem his land has no right to complain of its injustice. If he had paid his taxes or redeemed his land, he is, no doubt, at liberty to prove it, and thus annul the sale. If he has not, he has no right to complain if he suffers the legal consequence of his own neglect."

But this change in the law only shifted the burden of proof onto the party who contested the title of the purchaser, and any defect or irregularity in the proceeding could still easily be shown by such contestant from the public records or writings. On this account the statute did not furnish the protection to the purchaser that was expected; and therefore some of the states—for instance, Iowa and Oregon—have gone further in that direction and declared, in effect, that a tax deed shall be conclusive evidence of the title of the purchaser and the regularity of the prior proceedings, except in certain speci-

fied and essential particulars, concerning which it may still be controverted by evidence to the contrary and overthrown. But Judge Cooley, in considering this subject, (Cooley, Tax'n, 356,) says that the authority of the legislature to pass such statutes has this plain limit: "It cannot deprive one of his property by making his adversary's claim to it, whatever that claim may be, conclusive of its own validity. It cannot, therefore, make the tax deed conclusive evidence of the holder's title to the land." See, also, Cooley, Const. Lim. 368. And in *McCready v. Sexton*, 29 Iowa, 356, the court held that a statute of that state making a tax deed conclusive evidence that all the prerequisites necessary to a valid sale, so as to vest the title in the purchaser, had been done, is unconstitutional, so far as the essential prerequisites to the exercise of the taxing power is concerned, and that the following are of that character: The listing and assessing of the property; the levy of the tax thereon; the warrant to sell the same; and a sale thereon. This ruling has been adhered to in subsequent cases, and the result is that the statute is allowed to be only *prima facie* evidence that these essential prerequisites have been done, but as to all other steps in the proceeding, and even the *time* and *manner* of doing these, including the notice to sell, the deed is held to be conclusive. *Martin v. Cole*, 38 Iowa, 141.

The act of December 18, 1865, (Or. Laws, p. 767, § 90,) provides that if land sold for taxes is not redeemed within two years from the date of the certificate of sale, the purchaser or his assigns shall receive a deed therefor from the sheriff, containing a description of the property sold, the amount bid, the year in which the tax was levied, a statement that the tax was unpaid at the time of the sale, and that no redemption has since been made, which deed shall operate to convey a "legal and equitable title" "in fee-simple to the grantee" therein; and upon the delivery thereof "all the proceedings required or directed by law in relation to the levy, assessment, and collection of the taxes and the sale of the property shall be presumed regular, and had and done in accordance with law; and such deed shall be *prima facie* evidence of title in the grantee, and such presumption and such *prima facie* evidence shall not be disputed or avoided except by proof of either (1) fraud in the assessment or collection of the tax; (2) payment of the tax before sale or redemption after the sale; (3) that the payment or redemption was prevented by the fraud of the purchaser; and (4) that the property was sold for taxes for which the owner of the property was not liable, and that no part of the tax was levied or assessed upon the property sold."

The plaintiff contends that this tax deed is void for several reasons, most of which are, in effect, that the property is not sufficiently described in the assessment roll and the subsequent proceedings. It is not claimed that there was any fraud in the assessment or collection of the tax, or that it was paid before the sale or the property redeemed therefrom, or that such payment or redemption was prevented by the

fraud of the purchaser, or that lot 3, in block B, in Portland Homestead, was not liable to assessment and taxation in 1876 as the property of the plaintiff. The only ground, then, according to this act, upon which the validity of this deed can be attacked for defects in the prior proceedings, not apparent upon the face of it, is that mentioned in the last clause of subdivision 4 of section 90, aforesaid,—“that no part of the tax was levied or assessed upon the property sold.” The terms “levied or assessed” are here used as convertible ones. But, strictly speaking, taxes are “levied,” not assessed. Under the law of this state the assessment, which consists of the listing and valuation of the property, is made by the assessor, (Or. Laws, p. 754, § 29; Rap. & Law. Law Dict. “Assessment,”) and upon this valuation the taxes are imposed or levied by the county court, and extended on the roll by its clerk. Or. Laws, 760–761. The assessment of land is made by entering, in the appropriate column in the assessment roll, the name of the owner and a description of the property, with its valuation, which, in case of a lot or block “situated in any city, village, or town,” a plat of which is recorded, may consist of the number of such lot and block, with the name of the “village or town in which the same is situated.” Id. p. 764, §§ 29, 30. In this case the assessment roll contains the name of the owner of the property in question, the number of the lot and block, the valuation of the same, and the amount of the tax levied thereon, and the only question is whether the place or village in which it is situated (“Portland Homestead”) is sufficiently indicated by the abbreviation “Port. Homstd. Ass.”

This statute has not been construed by the supreme court of the state. It does not go as far as the Iowa act, by any means, but still it does undertake, among other things, to make the tax-deed conclusive evidence of a warrant for the sale of the property and a sale thereon,—two things which the Iowa court holds are essential to the validity of the tax deed, and of which it can only be made *prima facie* evidence. For the purposes of this case, it will be assumed that the Oregon statute should be limited and restrained in its operation according to the rule laid down in the Iowa court.

Upon this construction of the statute, the deed must be considered as only *prima facie* evidence that the prior proceedings were duly had and done; at least, in these four particulars, namely: (1) The assessment of the property; (2) the levy of the tax thereon; (3) the issue of a warrant for the non-payment of the same; and (4) the sale of the property thereon. As to these facts, the deed is not conclusive, and the contrary may be shown, and its invalidity thereby established.

By the fourteenth amendment the state is forbidden “to deprive any person of property without due process of law.” And to make a tax deed conclusive evidence that the property which it purports to convey was assessed for taxation; that a tax was levied thereon, and

the same was sold upon a warrant issued for that purpose, for the non-payment of such tax, when in fact there was neither an assessment, levy, warrant, nor sale, or only any three of them,—is, in my judgment, such deprivation. If it is not, then a simple act of the legislature, declaring that the farm of A. is henceforth the farm of B., for no other or better reason than its sovereign pleasure, is “due process of law;” and the prohibition is nugatory in regard to the very authority it was intended to control. An assessment to Mary Kelly of lot 3, in block B, in “Salem Homestead,” is not an assessment of such lot in “Portland Homestead;” and therefore a tax levied upon the former is not a tax levied upon the latter, and the proceeding will not support a sale of the latter for the non-payment of such tax. This is self-evident. But between a case of clear mistake as to the description of the property and a perfectly accurate one, there are many cases of imperfect or ambiguous descriptions, in which it is difficult to decide whether the description is sufficient or not.

In *Cooley, Tax'n*, 282, it is said that in listing land for taxation “it must be described with particularity sufficient to afford the owner the means of identification, and not to mislead him;” and that “a description that would be sufficient in a conveyance between individuals would generally be sufficient here.”

Of course, the abbreviation “Port.” does not necessarily signify “Portland.” Indeed, it may be admitted that, abstracted from its surroundings, it is as likely as not to stand for something else. But the letters “Homstd.” come so near representing the word “Homestead,” both to the eye and ear, that it may well be regarded as a case of misspelling, by the omission of the silent or obscure letters, rather than an abbreviation. The description may then be read, to begin with, as “Port. Homestead.” And now take into consideration the fact that there is a “Portland Homestead” in this county, and only one, and that in the year 1876 Mary Kelly owned lot 3, in block B, therein, which was then liable to assessment and taxation, and it is apparent that “Portland Homestead” was meant and understood by the description used. Had the plaintiff examined the assessment roll it is difficult to see how she could have been misled by this description, or failed to learn from it that her lot 3, in block B, in Portland Homestead, was assessed for taxation.

The false addition “Ass.” may be rejected from the description of the place. It is evidently an abbreviation of “Association,” and its insertion in the description apparently arose from the fact that the name of the proprietor of the property includes the name of the homestead, and is so far identical with it. The property could not be situated in the association—the collection of persons or legal entity that laid out and named the town. The manifest falsity of this particular in the description, and the sufficiency of that which remains to indicate the location of the lot, brings the case within the operation of the maxim, *falsa demonstratio non nocet*—a mere false description

does not make an instrument inoperative. *Broom*, Leg. Max. 629. See, also, 1 Greenl. Ev. § 397.

My conclusion upon this point is that the proof furnished by the sheriff's deed of the assessment of the property, and the levy of the tax thereon, is not overcome by the introduction of the assessment roll. On the contrary, both these facts are sufficiently shown by the entries thereon. See *Mecklem v. Blake*, 19 Wis. 397.

The legality of the sale is questioned by the plaintiff, on the ground that it was not made during the life of the warrant, but after the return-day thereof.

By section 82, Or. Laws, 766, a warrant for the collection of a delinquent tax is made equivalent to an execution, except as in chapter 57 otherwise provided. By section 275 of the Code of Civil Procedure, an execution against property is made returnable within 60 days after its receipt by the sheriff; but by section 290 of the same it is provided that the sheriff may, "for want of purchasers, or other sufficient cause," postpone a sale, with the consent of the plaintiff in the execution, "not exceeding thirty days beyond the day at which the writ is made returnable." It appears from the sheriff's return in this case that he received the warrant on May 5th, and made the sale thereon 62 days thereafter, on July 6th. The return does not state distinctly when the levy was made, but it is clear that it was made during the life of the warrant, for it appears that upon the receipt of the writ the officer levied upon the property, and published a notice of the sale thereof for four weeks before the same took place.

At common law, when an officer has entered upon the execution of a writ, as by making a levy therewith, before the return-day thereof, he may sell the property thus levied on at any time thereafter. *Wheaton v. Sexton*, 4 Wheat. 504; *Remington v. Linthicum*, 14 Pet. 92; *Freem. Ex'ns*, § 106. But it seems this power is limited in this state by said section 290, the effect of which is, in my judgment, to require a sale on execution to be made within the life of the writ, or at most within 30 days after the return-day thereof. And this postponement for 30 days can only be made with the consent of the plaintiff indorsed on the writ, and for a cause thereon stated. Whether this provision concerning the postponement of a sale, and requiring the consent of the plaintiff to authorize it, is applicable to a warrant for the collection of a delinquent tax, may be doubted. But, if it is, the county, as represented by the county court, ought to be considered the plaintiff in the writ and give the consent to the postponement. But such postponement can only take place after a day appointed for the sale within the life of the writ, and for a cause then ascertained to exist by the officer, which fact ought to be stated in his return. In this case the return does not show that the case was postponed to July 6th, but that it was appointed and advertised for that day in the first instance; so that there is no doubt that the sale was made after the life of the warrant, and not upon an adjournment from an earlier day

within such life, as required by said section 290 in case of an execution.

And by section 81 (Or. Laws, 766) it is provided that within 10 days after the first Monday in April the county clerk shall make and deliver to the sheriff "a true and correct list of the taxes returned unpaid, and a correct description of the land or town lots, if the same can be made, and to whom such taxes are charged, * * * with a writ attached thereto," commanding him to collect the same out of the goods and chattels of the delinquent, and, if none be found, then to levy "upon the real property, as set forth in said tax-list," and to pay over all moneys so collected by the first Monday in July thereafter. In my judgment, there is in this provision a necessary implication that the warrant for the collection of the tax is not only returnable by the first Monday in July, with the "moneys" made thereon, but that it must be executed before that time by the sale, if need be, of the property mentioned therein, or an offer to sell the same at a time and place appointed for that purpose.

By the return in this case it appears that the day of sale—July 6th—was a Friday; from which it is shown that the first Monday in July of that year occurred on the second of the month, and that the sale took place four days after the time prescribed for that purpose by this statute. So that, whether this warrant, as to the time within which a sale could be made in pursuance of a levy under it, is to be considered an execution and subject to said section 290 of the Code, or controlled by said section 81 of the tax law, it appears that the sale of this property was made after the time limited by law therefor.

It being assumed, as has been said, that the act of 1865 must be construed so as to allow the tax deed to be overcome by showing that there was no sale of the premises, the question arises whether a sale upon a warrant, after the time within which it is required to be made, is a valid sale. If a sale is actually made upon or in pursuance of the authority of a lawful warrant, no mere irregularity in the manner and time of making such sale can be shown to avoid the deed. On the contrary, it is conclusive evidence of the regularity of the sale in all such respects. For instance, it cannot be shown that the sale was without or upon an insufficient notice, or that it was made elsewhere than at the court-house door, or otherwise than between the hours of 10 and 4 o'clock in the day-time, as prescribed by section 93, (Or. Laws, 768.) But where the sale is made without any authority in the officer for that purpose, as where there is no warrant for the collection of the tax, the fact may be shown to avoid the deed. And taking it for granted that the authority to sell under the warrant of May 3d was gone before July 6th, then the sale in this case was essentially illegal, and the deed made in pursuance thereof void.

There is also a question made in the case as to whether there ever was a warrant issued to collect a delinquent tax "charged" to Mary Kelly and levied upon this "town lot." The warrant is "attached"

to the "list" of "unpaid" taxes, and only authorizes the collection of a tax levied on "the lands or town lots" described therein. In the delinquent roll the only property which appears to have been assessed to Mary Kelly is lot 3, in block B, in "P. H. Ass'n." With our present knowledge of the subject it may be quite apparent that the letters "P. H." were intended to signify "Portland Homestead," and doubtless they were so intended by the officer who wrote them. But, reading them in the light of the proceeding alone, it is just as reasonable to infer that they stand for Pleasant, Prospect, or Plymouth Home or Hollow. If any weight is to be given in the direction contained in section 81, aforesaid, to the effect that the list of unpaid taxes shall contain a "correct description" of the property on which they are levied, it seems that the place in which a town lot is situated ought to be more certainly designated than by the initial letter of its name. And in this connection consideration ought to be given to section 33, (Or. Laws, 755,) in which it is declared that "it shall be sufficient to describe lands in all proceedings relative to assessing, advertising, or selling the same for taxes, by initial letters, abbreviations, and figures to designate the township, range, section, or part of section, and also the number of the lots and blocks." From the character of this provision and the nature of the subject there arises, in my judgment, a strong implication that, in describing lands for such purpose, initial letters shall not be sufficient otherwise or further than is here expressly permitted.

It is also objected to the warrant that it is illegal because it was not issued and delivered to the sheriff within ten days from the first Monday in April, as required by said section 81. But I think this is a matter of detail as to time or manner that the deed does and may conclude inquiry about. The description of the property in the deed is probably sufficient, notwithstanding the addition of the false particular, "Association," to the name of the place, "Portland Homestead," in which the lot is situated. Without this word the designation of the place is correct; and, in obedience to the maxim, *falsa demonstratio non nocet*, it should be disregarded. But even if this maxim is not applicable here, upon the ground, as some authorities hold, that the deed is not the voluntary conveyance of the owner of the lot, and therefore no intention can be imputed to him in the premises, (*Bosworth v. Danzien*, 25 Cal. 298,) still the deed may be upheld on the maxim, *ut res magis valeat quam pereat*; the spirit of which, it is said by SHAFER, J., in *Bosworth v. Danzien*, is that nothing should be destroyed merely for the sake of destruction. And, acting upon this view of the question, the court in that case held that neither an assessment nor a tax deed is necessarily void because of a false call in the description of the land, unless it was sufficient probably to mislead the owner; and decided that a description in that case consisting partly of a line commencing at a certain point, and running 200 feet east, was sufficient, although it contained the fur-

ther contradictory words, "along Corbett street," because it was manifestly impossible that a line laid in that direction would run along Corbett street. The false particular, "along Corbett street," was, therefore, rejected sooner than that which was truly and well said or done should perish. But on the ground already stated, that the sale of the lot was unauthorized and illegal, because it was made after the time limited by law, I must hold that the deed to Fisher is void.

The finding and judgment of the court will therefore be that the plaintiff is the owner in fee of the premises and entitled to the possession thereof, and that she recover the same, with costs and expenses.

It may be thought that I have given this case more consideration than the amount at stake on it demands. But my excuse is, if any is needed, the importance of the questions involved in it, the uncertain and confused state of the law on the subject, and the further fact that I am required to construe and apply the revenue laws of the state touching questions that have not yet been passed on by its supreme court. But, while sitting in this federal forum as a judge of the national government, I do not forget that the state is one of the pillars on which rests the fabric of that government; nor that I am a citizen of the former, and have as much interest in her well-being and respect for her authority as any who may profess more in this respect.

NINTH NAT. BANK OF THE CITY OF NEW YORK *v.* RALLS Co., in the
State of Missouri.¹

(Circuit Court, E. D. Missouri. April 29, 1884.)

1. MUNICIPAL BONDS—REAL PARTY IN INTEREST—JURISDICTION—EVIDENCE.

Where, in a suit upon municipal bonds, the defendant pleads that the plaintiff is not the real party in interest, the production of the bonds by the plaintiff is *prima facie* proof that he is the legal holder; and it then devolves upon the defendant to prove that the bonds have been transferred to the plaintiff collusively, or without value, in a way to operate a fraud upon the jurisdiction of the United States courts.

2. SAME.

Where the proof is that the bonds were transferred to the plaintiff to secure existing and accruing indebtedness to him, he is the real party in interest for the purpose of maintaining a suit thereon, irrespective of the rights of parties *inter se* prior to the transfer.

At Law.

This was an action upon certain coupon bonds alleged to have been issued by the defendant and to be owned by the plaintiff. The defendant by its answer denies the allegations of the petition, and alleges that the plaintiff is not the real party in interest.

¹Reported by Benj. F. Rex, Esq., of the St. Louis bar.

J. B. Henderson and James M. Lewis for plaintiff.

Henry A. Cunningham for defendant.

TREAT, J. This case being tried without the intervention of a jury, the court finds that the bonds and coupons sued on were duly executed by the defendant. By receiving full proof of the execution thereof, it became unnecessary to decide whether said bonds, being under the defendant's corporate seal, did not prove themselves, despite the local statutes, and without the detailed proof made. The court further finds, under the objection of plaintiff as to the competency of evidence thereto, the same having been heard, that the facts as proved are: That said bonds and coupons are the real property of one Hardin, a citizen of Missouri, who had deposited the same for collection with a bank in said state; that said bank transferred the same to the plaintiff in this case as collateral to indebtedness then existing between said bank, and for the personal indebtedness of the president of said bank, and for accruing indebtedness, the amount of which was largely in excess of said bonds and coupons at the date of suit brought, and at the time of said transfer.

As the plaintiff bank held such bonds and coupons as collateral under the general facts stated, and produced the same as holder thereof, the court received the same as if the plaintiff was the innocent holder, despite inquiry as to the antecedent rights of prior parties. The evidence with respect thereto has been received under objection, in order that the proposition of law involved may be fully considered; that is, when defendant pleads that the plaintiff is not the real party in interest, what should be the proper course of proceeding? The court holds that the production of the bonds and coupons by plaintiff shows *prima facie* that it is the legal holder thereof; that it devolves upon the defendant to prove that the transfer to plaintiff was collusive, or without value, in a way to operate a fraud upon the jurisdiction of the United States court. When the proof is that the transfer is for value to secure existing and accruing indebtedness to the plaintiff, the latter is the real party in interest for the purpose of maintaining the suit, irrespective of the rights of parties *inter sese* prior to said transfer.

Judgment for plaintiff.

ANSCHUTZ v. MILLER and another.¹*(Circuit Court, E. D. Missouri. April 9, 1884.)***SALES—MISREPRESENTATIONS AS TO QUALITY—COUNTER-CLAIM.**

Where A. sold B. a lot of ice at an agreed price, to be delivered when called for, and went to expense, at B.'s request, in getting the ice out of the house in which it was stored, and B. paid part of the agreed price and part of the sum expended by B. at his request, and went to expense in sending for the ice, but only received about half of it, and refused to receive the balance, on the ground that he had been deceived into purchasing it by B.'s misrepresentations as to its quality, *held*, in a suit by A. for the balance of the contract price and the balance of money expended as aforesaid, that A. was entitled to recover, notwithstanding any misrepresentations he might have made, if B. had been given a fair opportunity to inspect the ice before he closed the bargain; but that if B. had not been given an opportunity to inspect it, and had relied entirely upon A.'s representations as to its quality, and it was in fact of a poorer quality than represented, then A. was only entitled to recover the value of the ice received by B., and that B. was entitled to be allowed as a counter-claim and to recover back from A. all the money he had paid A. in excess of the value of the ice received.

At Law.

Hagerman, McCrary & Hagerman, for plaintiff.

Johnson, Lodge & Johnson, for defendant.

TREAT, J., (*charging jury*.) Though the pleadings are not quite so distinct as they might be, yet they sufficiently show what the controversy between the parties is. It is alleged that 843½ tons of ice were contracted for between the parties, plaintiff and defendant, at the price of three dollars per ton. On that there had been paid all that, at the contract price, would be required, except the sum of \$1,030.50. That appears in the pleadings, and is embraced in the first count. It also appears, and is admitted by defendant's counsel, with respect to the second count, that the defendant did make the expenditures and perform the labor set out in that count, on which he has been paid the sum of \$240, leaving \$237.15 still due with respect to those charges.

It is contended on the part of the defendant that there should be no recovery against him in this case, because he bought this ice on the representations made by the plaintiff, relying thereon, and that the ice was not what he bargained for. The rule of law with regard to these matters, in the light of which you must examine this testimony, is this: A party having an article to sell represents what he thinks the article to be. If he submits it to the inspection of the other party, and the other party has ample opportunity to examine it, and, having done so, or refused so to do, when opportunity is given him, accepts it, he is bound by the bargain he thus makes, so that there are no after inquiries in respect to it. Hence the primary question, and the strain of this controversy, is, did the defendant ac-

¹ Reported by Benj. F. Rex, Esq., of the St. Louis bar.

cept this ice on the representations of the plaintiff, not having an opportunity to examine it himself, and thereby necessarily relying upon what the plaintiff said? If that be the case, then whatever reclamation he may have, should be allowed him. If it be not the case, then there should be no allowance, and the only thing is to give to the plaintiff his demand of what is due on the ice, \$1,080.50, and his \$287.15 on the second count. On the other hand, if he did rely upon these representations, having no opportunity to examine for himself, and the ice was not what was represented, the inquiry will be what you will allow him on what is here termed the "counter-claim." He says that he paid the cost of sending the steamer Dolphin and barges up to Keokuk to receive this ice, and he wishes the jury to allow him for the whole of that cost, giving no credit whatsoever for the amount of ice that he received, and which was caused to be transmitted by that steamer and its barges; and he also wishes you to allow him, by way of counter-claim,—he having been deceived, as he says, within the rule laid down,—the amount of \$240 for these ordinary charges, which the plaintiff incurred at his request; and also to pay him back (for I have been making some arithmetical calculations here) his \$1,500, which he did pay on this ice, and not charge him with anything for the ice which he actually received; for nothing has been said during the whole of this trial in regard to the price of the ice received, which produces some confusion. If you reach the conclusion that this counter-claim has been established, you will be left in the condition indicated, namely, of determining what is the value of the ice which he did get,—400 and some tons, as indicated here. He gives no credit for that at all. It stands in this condition, and hence the confusion, that he wishes you to allow him the \$1,500 which he paid towards this ice, and all the costs and expenses to which he was put for sending up the steamer and barges to Keokuk, and to allow nothing for the ice that he actually received. As I say, we are left in this confusion in regard to the matter; for so far as my memory serves me there has been no testimony introduced on that subject at all; hence you will have to get at it the best way you can if you reach that point.

The transaction here is one familiar to the law and to business men. This plaintiff proposed to sell a certain quantity of ice, and he represented it to be of a certain description. The party was to come or send and have it measured, and examine and accept it. That acceptance implies that if full opportunity was given him to examine it, he would do so. He did it. Now, unless there was some fraud or connivance whereby he could not examine it, and full opportunity was given him to do so, he can have no counter-claim in this case. He must stand to the bargain, as he made it with his eyes wide open, with full opportunity to determine for himself in regard to it. If, on the other hand, there was concealment or fraud practiced on him whereby he could not ascertain fully about it, and the ice was other than repre-

sented, he being cheated into the supposition that it was what was represented, then he should receive allowances accordingly; in other words, his counter-claim. If you reach that point with regard to the counter-claim, the difficulties that I have stated may occur to you, and if the parties have not presented them in a way that you can understand them, you will have to do the best you can with regard to the amount thereof.

UNITED STATES *v.* BRISTOW and others.¹

(Circuit Court, D. Kentucky. April 1, 1884.)

1. INTERNAL REVENUE.

Taxes assessed by the commissioner of internal revenue under Rev. St. § 3309, may be sued for under Rev. St. § 3213.

2. SAME—ASSESSMENT.

The notice provided for in section 3184 is not a condition precedent to an assessment, but must be given before the tax can be distrained for, or penalty charged.

3. SAME—EVIDENCE OF ASSESSMENT.

The original assessment list signed by the commissioner, and on file in office of collector, is evidence of assessment.

4. SAME—SURVEY—EVIDENCE.

Original report of survey, and certificate of collector of delivery of one of the triplicate copies to distiller, *held* competent evidence.

At Law. Motion for new trial.

Geo. M. Thomas and *Geo. Du Relle*, for plaintiff.

O. H. Harrison, for defendants.

BARR, J. The obligation of the distiller's bond is that if the distiller "shall in all respects faithfully comply with all the provisions of law and regulations in relation to the duties and business of distillers of brandy from apples, peaches, or grapes, exclusively, and shall pay all penalties incurred or fines imposed on him for a violation of any of said provisions, then this obligation shall be void; otherwise it shall remain in full force." This was a suit on this bond for the amount assessed for a deficiency in the amount of spirits reported, being less than 80 per centum of the surveyed capacity. The commissioner of internal revenue had the right to make this assessment under section 3309, and did so in this case, as was shown by the original tax-list on the trial. The right to bring suit for taxes is expressly given by section 3213. Section 3184 provides for notice to be given the person liable to pay the tax within 10 days after the collector receives the list of taxes from the commissioner of internal revenue; but this notice is not part of the assessment, nor a condition precedent to an assessment, but is necessary by the terms of the stat-

¹ Reported by *Geo. Du Relle*, Asst. U. S. Atty.

ute before the tax-payer can be charged with the penalty of 5 per centum, and 1 per centum interest. This notice is also necessary before the collector can distrain for the taxes. See *U. S. v. Halloran*, 14 Blatchf. 1; *Savings Bank v. U. S.* 19 Wall. 234; *Clinkinbeard v. U. S.* 21 Wall. 65; *Cooley, Tax'n*, 303.

The obligation of the bond is that the distiller will, "in all respects, faithfully comply with all the provisions of law in relation to the duties and business of distillers of brandy from apples," etc., and the law requires the distiller shall make at least 80 per cent. of the surveyed capacity of the distillery, and pay tax thereon. The distiller is liable for this tax when assessed against him by the commissioner of internal revenue, although he is not liable for the penalty, nor his property to be distrained for the tax, until the law as to notice is complied with. The original lists, which were signed by the commissioner of internal revenue and by the collector, and which were records in the collector's office, were good evidence, if not the best, of the assessment. The survey of the distillery which was kept in the collector's office, and the certificate of the collector that a copy had been delivered to distiller, were, I still think, competent evidence.

Motion for new trial overruled.

In re MARSHALSHIP FOR THE SOUTHERN AND MIDDLE DISTRICTS OF ALABAMA.

(District Court, M. D. Alabama. February, 1884.)

1. NOMINATION FOR OFFICE BY THE PRESIDENT—REJECTION BY THE SENATE CONCLUSIVE—REV. ST. § 1768.

Where the senate of the United States rejects the nomination of a person for an office made by the president its action is conclusive. Rev. St. § 1768.

2. PRESIDENT OF THE UNITED STATES—POWER TO SUSPEND OFFICERS AND TO MAKE TEMPORARY APPOINTMENTS.—REV. ST. § 1768.

Rev. St. § 1768, authorizes the president to suspend an officer, and to make a temporary appointment to fill the vacancy thus created until the end of the next session of the senate.

3. PERIOD OF TEMPORARY APPOINTMENT BY PRESIDENT OF UNITED STATES TO FILL VACANCY IN OFFICE—RULE WHEN VACANCY OCCURS THROUGH SUSPENSION OF OFFICER.

A commission issued by the president of the United States to fill a vacancy in an office, during a recess of the senate, continues until the end of the next session of congress, unless sooner determined by the president, even though the person commissioned shall have been in the mean time nominated to the office, and his nomination rejected by the senate; and this rule applies where the vacancy occurs through the suspension of an officer.

4. TEMPORARY APPOINTMENT BY PRESIDENT OF THE UNITED STATES—EFFECT OF REFUSAL OF SENATE TO CONFIRM TEMPORARY APPOINTEE FOR PERMANENT APPOINTMENT—EFFECT OF REFUSAL ON SUSPENDED OFFICER.

The temporary appointment of a person to an office by the president of the United States is not terminated by the refusal of the senate to confirm him for the permanent appointment, and the powers of a suspended officer whose position he occupies are not revived by such refusal.

5. SUSPENSION OF OFFICER BY PRESIDENT OF THE UNITED STATES—SUFFICIENT REASON PRESUMED.

When the president of the United States suspends a person from office, his reasons will be presumed to be sufficient.

Heard on Motion of Mathias C. Osborn, former marshal, to be recognized and held by the court as now entitled to resume the duties of that office.

Saml. F. Rice, for motion.

Geo. Turner and *Geo. H. Patrick*, *contra*.

BRUCE, J. Mathias C. Osborn was nominated by the then president of the United States to the senate for the office of marshal of the Middle and Southern districts of Alabama, and was confirmed by the senate in the year 1880. He qualified by taking the oath and giving the bond, as required by law, and continued to hold and exercise the duties of the office of United States marshal for the Middle and Southern districts of Alabama until the seventeenth day of March, 1883, when he was suspended from the office by the order of the president of the United States, and Paul Strobach was designated to perform the duties of the office in the mean time. Paul Strobach qualified by giving the bond and taking the oath of office required by law, and entered upon the discharge of the duties of the office, and has continued to discharge the duties of the office from that date until the present time. The suspension of Osborn, and the designation of Strobach to perform the duties of the office, occurred during the recess of the senate; and the suspension of Osborn was on terms until the end of the next session of the senate, and the designation of Paul Strobach was to perform the duties of the office in the mean time, subject to all the provisions of law applicable thereto.

The president of the United States, within 30 days after the commencement of the present session of the senate, in December last, nominated Paul Strobach to the senate for the marshalship, in the place of the suspended officer, Osborn; and on the fifth day of the present month of February, 1884, the senate rejected the nomination of Paul Strobach for the office to which the president had nominated him to the senate. That this rejection is conclusive against Mr. Strobach for the office of marshal, under what may be called a permanent appointment, meaning by that a nomination by the president and confirmation by the senate, is quite clear, because the statute provides (section 1768) that "if the senate, during such session, shall refuse to advise and consent to an appointment in the place of any suspended officer, then, and not otherwise, the president shall nominate *another person*, as soon as practicable, to the same session of the senate for the office." But the question is, what effect has this rejection of the senate of the nomination of Paul Strobach to the office of marshal, at and during the present session of the senate, upon what may be called his temporary appointment, or his designation by the president to perform the duties of the office during the suspension

of Marshal Osborn? The president's power to suspend is not questioned, and his power to make what is called a temporary appointment is not questioned. The first clause of section 1768 of the Revised Statutes provides:

"During any recess of the senate, the president is authorized, in his discretion, to suspend any civil officer, appointed by and with the advice and consent of the senate, * * * until the end of the next session of the senate, and to designate some suitable person * * * to perform the duties of such suspended officer in the mean time. * * *

The statute then authorizes the president to suspend and make a temporary appointment until the end of the next session of the senate, and he has done so, Mr. Strobach being that appointee, and he holds the office now under such appointment. The senate has not acted upon that temporary appointment, nor does it appear that the senate has any power or authority, under existing law, to act directly upon such temporary appointment or designation. True, if the president nominates, and the senate confirms the nomination, then the person so nominated and confirmed to the office could qualify, take the office, and so cut short the term of the temporary appointee, and Mr. Strobach could not hold the office against such appointee. But Mr. Osborn does not stand in that position to the office, for, though he has been nominated and confirmed to the office, yet he has also, since then and during a recess of the senate, been suspended by the president of the United States from the office of marshal until the end of the present session of the senate, and, in doing so, the president was acting clearly within the authority conferred upon him by law. This power given by law to the president was, no doubt, given for good reasons. It will occur to any one, on a moment's reflection, that the good of the public service might very often render it imperative that the president should have and exercise such power; and, under existing law, the senate, when it convenes, has no more power or authority to act upon the president's order suspending an officer under section 1767, than it had to act upon the designation of the person by the president to perform the duties of the office in the mean time.

The idea that seems to underlie the argument of counsel for the motion is that when the president suspends an officer and makes a temporary appointment in the recess of the senate, then, upon the meeting of the senate, it must act upon such suspension and temporary appointment; and if the senate declines concurrence in such suspension and appointment, then the suspended officer forthwith resumes the functions of the office, and the temporary appointment is at once terminated. That is an error, perhaps a popular one, and may grow out of the fact that such was the provision of the first tenure of office act of congress, approved March 2, 1867. But that act was materially modified and changed by a subsequent act of

congress, approved April 5, 1869, which is the law as we now have it in sections 1767-1769 of the Revised Statutes of the United States.

An examination of the act of April 5, 1869, shows that the clauses restrictive of the president's power, in the act of March, 1867, were omitted from the later act, which does not provide that the president, when he suspends an officer and designates some suitable person to perform temporarily the duties of such office, that it shall be until *the next meeting of the senate, and until the case shall be voted on* by the senate, but the language is, until the end of the next session of the senate; nor does the present act require the president, within 20 days after the first day of the meeting of the senate, to report to the senate such suspension, with the evidence and reasons for his action in the case; nor is it provided in the present law that if the senate shall refuse to concur in such suspension, such officer so suspended *shall forthwith resume the functions of his office*, and the powers of the person so performing the duties in his stead shall cease. These clauses restrictive of the president's power, found in the first tenure of office act, were repealed by the later act and are not now the law; and the original act was passed, and subsequently modified and changed, for reasons familiar to those who were actors in, or are students of the history of, that time.

These acts to which reference has just been made are of comparatively recent date, and there is, perhaps, but little judicial authority upon their construction; but a number of authorities have been cited upon the power of the president under article 2 of section 2 of the constitution of the United States, which provides that "the president shall have power to fill up all vacancies that may happen during the recess of the senate, by granting commissions which shall expire at the end of their next session." Section 1769 of the Revised Statutes of the United States provides: "The president is authorized to fill all vacancies which may happen during the recess of the senate, by reason of death or resignation or expiration of term of office, by granting commissions which shall expire at the end of their next session thereafter. * * *" The language used in the constitution and in section 1769, in reference to the power of the president to fill vacancies, is very much the same language used in the act under consideration, authorizing the president to make temporary appointments in cases of suspended officers. The authorities on this subject—that is, the nature and duration of a temporary appointment made by the president to fill a vacancy—are that a commission issued by the president during a recess of the senate continues until the end of the next session of congress, unless sooner determined by the president, even though the person commissioned shall have been in the mean time nominated by the president to the office and his nomination rejected. *U. S. v. Kirkpatrick*, 9 Wheat. 721; *Case of Isaac Hill*, 2 Op. Attys. Gen. 336; *Gilpin v. O'Neil*, 8 Int. Rev. Rec. 137; *Ex parte Hennen*, 13 Pet. 230.

It is said this is not a vacancy, and it is true that it is not a vacancy in the absolute sense, such as results from the death, resignation, or expiration of term of office of the incumbent of the office, as contemplated by section 1769 of the Revised Statutes. In a case of the suspension of an officer there are contingencies upon the happening of which the suspended officer may resume the duties of the office; that is, where the senate fails or refuses consent and advice to the nominations for office made by the president, and if this failure or refusal continues until the end of the session, and the former incumbent's time has not then expired, he will then, and not till then, resume the duties of the office. Whether it be a vacancy caused by the death, resignation, or expiration of term of office of the incumbent of the office, or whether it be a suspension of an officer by the president under section 1768, in either case the duration of the temporary appointment is the same; it is to the close of the session of the senate, subject, as we have seen, to a concurrence of opinion and action by the president and the senate, by the nomination and confirmation of a person other than the rejected nominee to the position.

Some confusion arises because the same person designated for the temporary appointment was in this case nominated to the senate for the permanent appointment; but suppose the president, after having designated Mr. Strobach for the temporary appointment, had nominated Mr. T. for the permanent appointment, and the senate had rejected Mr. T., just as it has rejected Mr. Strobach, for the permanent appointment, could it be held that the rejection by the senate of Mr. T. for the permanent appointment affected the temporary appointment of Mr. S.? To ask the court to terminate the temporary appointment of Mr. Strobach because the United States senate has rejected him for the permanent appointment, is to ask the court to act without law or logic; and the proposition is not only to do that, but also to terminate the suspension of Mr. Osborn, and authorize him to resume the duties of the office, which is equally without the authority of law. The answer to all that is that the president of the United States has, for reasons which the court will presume to have been sufficient, suspended Mr. Osborn until the close of the present session of the senate, and has designated Mr. Strobach as a suitable person to perform the duties of the office in the mean time. The *Case of Embry*, 100 U. S. 680, is relied on by both sides in support of their respective positions. That case is not conclusive here, because the question here was not involved, and barely touched upon in the opinion of the court.

The result of these views is that the motion is denied.

THE OLE OLESON.

(District Court, E. D. Wisconsin. May 12, 1884.)

1. LIBEL—INTERVENORS—SEAMEN'S WAGES—MARITIME SERVICE.

Where intervenors are mere landsmen, who procure cargoes for a vessel and assist in loading them, they do not perform a maritime service, and are not entitled to recover upon a libel for seamen's wages.

2. MARITIME LIEN—PURCHASE OF CARGO BY MASTER OF VESSEL.

The master and part owner of a vessel cannot purchase a cargo on credit and thereby create a maritime lien upon the vessel for the purchase money.

3. SHIP'S HUSBAND—DUTIES AND POWERS.

The duties of a ship's husband are to provide for the seaworthiness of the ship, to take care of her in port, to see that she has on board necessary and proper papers, to make contracts for freight, and to collect the returns therefor; but he cannot borrow money, give a lien on the freight, make insurance, or purchase a cargo, without special authority.

In Admiralty.

Markham & Noyes, for intervenors.

J. E. Wildish, for mortgagee.

DYER, J. Objections are filed to claims made by Bernard Kienast and August Walkowski to a share of the proceeds arising from the sale of the schooner *Ole Oleson* upon a libel for seamen's wages. The intervenors were employed as stone-pickers by the master of the vessel, who was also managing owner, to gather stone on the shore of Lake Michigan at or near Alpena, and to assist in loading the stone on board as cargo to be carried to Chicago. While engaged in this service they lived and slept on the vessel as she laid off shore; and the master testifies that when the weather was such that stone could not be gathered, the schooner would run into Alpena, and the intervenors would then lend a hand in hoisting sail. But they did not accompany the vessel on her voyages, and were not employed as seamen, the vessel having a full crew without them. The only question is, was the service which they rendered in picking up stone for the vessel a maritime service, and I am constrained to hold that it was not.

Three cases are relied on in support of the alleged right of these claimants to payment from the fund in the registry, namely: *The Canton*, 1 Spr. Dec. 437; *The Ocean Spray*, 4 Sawy. 105; and *The Minna*, 11 Fed. Rep. 759. These cases are all distinguishable from this.

In the case of *The Canton*, the employment of the libelants was to load the vessel at Quincy with stone, not as quarrymen, but to take the stone on board from a wharf, to navigate the vessel to Boston, and there to unload her. As was said by Judge SPRAGUE, they must have been able to "hand-reef and steer," the ordinary test of seamanship. These duties they performed, and so they were not landsmen merely, but actually participated in the navigation of the vessel.

In the case of *The Ocean Spray*, the vessel went upon a voyage for seal. The libelants shipped as sealers, and were hired to take seal for the vessel at a stipulated sum per month, and their shipping agreement bound them also "to lend a hand on board whenever they were wanted." On the voyage they helped make and reef sail, heave the anchor, and clear decks, but did not stand watch. They also procured drift-wood and water for the use of the vessel. They thus aided in the navigation and preservation of the vessel, and, as Judge DEADY well states the case, they were co-laborers in the leading purpose of the voyage. Upon the principle applicable to surgeons, stewards, cooks, and cabin boys, they were to be considered as mariners. They engaged for the voyage, were employed in promoting the purpose of the voyage, and aided in the navigation of the vessel; and, as Judge DEADY says, without their services the voyage must have been profitless, because the purpose of it could not have been accomplished. Moreover, the vessel was expressly pledged as security for the payment of the wages of the sealers for the round trip.

The case of *The Minna* seems at first sight to rub the case in hand more closely. The *Minna* was engaged exclusively in fishing. As the case is stated, she ran out from Alpena every morning to the fishing grounds, threw her nets, made a catch of fish, and returned to port, where the fish were discharged and prepared for market. Her crew consisted of a master and engineer. The libelant was employed as a fisherman, and though he took no part in the navigation of the tug, his contract required him to go out with the tug every day, to set and lift the nets, clean the fish, discharging the catch and reeling the nets on shore, where he lodged at night. His services were, therefore, as Judge BROWN decided, in furtherance of the main object of the enterprise in which the vessel was engaged. He assisted in the main purpose of the vessel's employment. His services were mainly performed on board the tug, and were necessarily connected with, and part of, the service in which the tug was engaged. They were, therefore, maritime in their character.

In the case in hand the intervenors were mere landsmen. They procured cargoes on shore for the vessel, and assisted in loading them on board. In a general sense their services were in furtherance of the vessel's employment, but not more so than the services of stevedores, and the present weight of authority is that stevedores have no maritime lien upon a ship for services in loading and stowing her cargo. *Paul v. Bark Ilex*, 2 Woods, 229, and cases there cited. The services of the intervenors were completed before the voyages of the vessel were begun. They did not attend her upon her voyages. They were laborers on shore, and the nature of their contract was not affected by the fact that they obtained their meals and at night slept on board the vessel as she laid off shore or harbor. In material respects, the case, I think, differs from that of *The Minna* and the other cases cited, and I shall sustain the objections to these claims on the

ground that the services of the intervenors stand on the same footing as those of stevedores. I thus rule, not without some hesitation, for, as an original question, I must confess I have never been able to see why the employment of a stevedore should not be regarded entitling him to a maritime lien.

Objections are also filed to a claim against the proceeds, in the registry of the court, of \$248.30, made by one Robert Peacock, which claim arose upon the following state of facts: The Oleson, being at Bay de Noquette, in Michigan, her master, who was half owner of the vessel, purchased from Peacock a cargo of culled lumber to carry to Racine, Wisconsin, the home port of the vessel. The contract of purchase was in writing, and was as follows:

"BAY DE NOQUETTE, September 3, 1883.

"When schr. Ole Oleson unloads the load of culls, she, by her captain, promises to pay to the order of R. Peacock the sum of two hundred forty-eight 30-100 dollars, being the amount due for the cargo now loaded. This lumber was sold the vessel so she could make a freight. Interest after due until paid.

SCHR. OLE OLESON. OF RACINE,

"By her Captain, JOHN SCHULTZ."

The cargo was carried to Racine, was there attached and sold, and the demand of the vendor, Peacock, for the purchase price has ever since remained unpaid. The question is, did Peacock acquire a maritime lien on the vessel, for the amount due him for the lumber, which took precedence of a prior mortgage on the vessel? The instrument executed by the master does not, by its terms, purport to create a lien. It is true that in the last clause it is stated that the lumber "was sold the vessel so that she could make a freight;" but it does not, in terms, assume to give the vendor of the lumber a lien. The only question, then, is, does the maritime law give the vendor a lien on the vessel from the mere fact that the master bought the cargo for the purpose of earning freight? Or, to state the proposition in another and more general form, can a master and part owner of a vessel purchase a cargo on credit and thereby create a maritime lien for the purchase money, on the vessel? So far as the power of the master, acting simply in that character, to bind the owners of a vessel in the purchase of cargo, is concerned, adjudged cases seem to have settled the question, beyond controversy, in the negative.

In *Hathorn v. Curtis*, 8 Greenl. 360, the court said:

"The master, in his capacity as such, has power to bind the owners of the ship in contracts relative to her usual employment only. This power relates merely to the carriage of goods and the supplies requisite for the ship; but the owners of the ship cannot be bound by any contract of the master concerning the purchase of cargo. To bind the owner in such a contract the master must be clothed with powers other than those which are necessarily incident to his office as commander of the ship. He may, indeed, act in the double character of master and supercargo or consignee, but his power to sell, cases of necessity excepted, or to purchase cargo, flows, not from his official character as master, but from special authority conferred for that purpose."

In *Hewett v. Buck*, 17 Me. 153, Judge SHEPLEY held that—

"The master may bind the owners by his contracts relating to the usual employment of the vessel in the carriage of goods, but has no power as such to purchase a cargo on their account. The ship's husband or managing owner may bind the owners for the outfit, care, and employment of the vessel, but has no power to purchase a cargo on the credit of the owners." Citing, in support of the last proposition, *Bell v. Humphries*, 2 Starkie, 286.

The rule thus laid down in 8 Greenl. and 17 Me. is also asserted without qualification in *Newhall v. Dunlap*, 14 Me. 180, and *Lyman v. Redman*, 23 Me. 289.

In *Naylor v. Baltzell*, Taney, Dec. 55, Chief Justice TANEY said:

"The master has a right to contract for the employment of the vessel under circumstances of necessity, and the owners will be bound by it; but this right is derived from the Maritime Code, which is founded on the general usage and convenience of trade, and which has been adopted to a certain extent by all commercial nations. The authority of the master is limited to objects connected with the voyage, and if he transcends the prescribed limits, his acts become, in legal contemplation, mere nullities, and it is incumbent on the creditor to prove the actual existence of the necessity of those things which gave rise to his demand."

If, then, the master, acting in his official character of master, has not the power to make a purchase of cargo, and bind the owners of the vessel, it would seem quite logically to follow that he could not, in such a transaction, bind the vessel. This right to make engagements on the credit of the vessel being restricted to cases of necessity, he would seem to have no greater authority to purchase a cargo, and thereby create a lien on the vessel, than by the same act to bind the owners. The rule in the one case has not been more unqualifiedly laid down than in the other. "The master, acting as an agent, is limited and restricted in his power, and can pledge his vessel only in case of necessity for the purpose of repairs, and other things indispensable to the prosecution of the voyage. It is for the convenience of commerce that he should have authority to pledge his vessel for the security of a foreign creditor who might furnish the means of relieving his necessities. But such power ought to be well guarded, and confined to cases coming within the reason of the rule. It is, therefore, incumbent on the creditor to show that the advances were made for repairs and supplies necessary for effectuating the objects of the voyage, or the safety and security of the vessel. The master would, therefore, have no right to pledge the vessel for advances to purchase a cargo." *The Mary*, 1 Paine, 674. And, certainly, if he could not create a lien on the vessel for advances to purchase a cargo, he could not create such lien by a direct purchase of the cargo on credit, in favor of the vendor.

Attempt was made on argument to liken this case by analogy to one of bottomry. But the analogy fails, because some of the well-known essentials of a marine hypothecation of that character are not here shown. Moreover, so far as the power of the master to execute

an instrument of bottomry is concerned, it is limited to the necessities of the ship. If, then, according to the rule laid down in the adjudged cases, it was beyond the power of the master, acting in that capacity alone, to create a lien on the vessel for the purchase price of the cargo, is the rule changed or affected by the fact that the master was part owner of the vessel? It is to be observed that the other part owner was not present and did not participate in the transaction. We have seen that the ship's husband or managing owner has no power, *virtute officii*, to purchase a cargo on the credit of the owners. In the case of *The Mary, supra*, it was held that the owner of the ship, having absolute control over his property, has a right to pledge his vessel for money borrowed for any purpose to be applied to repairs, outfit, or other necessities, or to the purchase of a cargo. This was held in a case where the owner had executed a bottomry bond for the payment of money advanced for repairs, outfit, and other disbursements for the use of the vessel, and to enable her to perform her voyage. But the duties of the ship's husband are in general to provide for the seaworthiness of the ship, to take care of her in port, to see that she has on board all necessary and proper papers, to make contracts for freight, and collect the freight and all returns. 1 Bell, Comm. (4th Ed.) p. 410, § 428; Id. (5th Ed.) 504. But he cannot borrow money, nor give up the lien for freight, nor insure, nor purchase a cargo for the owners without special authority. 1 Pars. Shipp. & Adm. 110. Part owners are not, by virtue of such ownership, copartners. The general rules of co-tenancy apply, and controlling authority would have to be produced before I could be persuaded to hold that a part owner can by implication bind the vessel for the purchase price of a cargo, thereby displacing other existing liens. It would be a dangerous power to lodge either in the master, or managing or part owner, for in carrying such a cargo the vessel would be simply carrying the property of her owner, and if he chose not to pay for it, the result would be, according to the doctrine here contended for, that prior liens would be entirely defeated, or at best outranked, by a demand that had its origin in private speculation, rather than in such necessities of the vessel as arise in her employment in navigation, and as constitute the basis of a lien in admiralty.

The objections to the claim of the intervenor Peacock are sustained.

THE HATTIE M. BAIN.

(District Court, S. D. New York. May 21, 1884.)

1. MARITIME LIEN—STEVEDORES—WORKMEN—COLLATERAL PROMISE.

The work of a stevedore in loading or unloading cargo is a maritime service, within the definition of the supreme court in *Ins. Co. v. Dunham*, 11 Wall. 26. It is maritime because it "relates to a maritime transaction," and is rendered in the discharge of the maritime obligation which the ship owes to the goods. *Held, therefore*, that a lien should no longer be denied to workmen rendering stevedore's service to foreign vessels.

2. SAME—WORKMEN—COLLATERAL PROMISE.

Workmen employed solely by the head stevedore, under the modern usages of business, are presumed to know that they must look to him only for their pay, and hence have no lien upon the ship, nor have they a lien on the captain's collateral promise as to past services; but where they work, either upon the captain's direct employment, or upon the faith of his promise that he will see them paid, the workmen are entitled to a lien, as provided by the *Consulat de la Mer*.

In Admiralty.

J. A. Hyland, for libelants.

Benedict, Taft & Benedict, for claimants.

BROWN, J. This libel was filed by several persons claiming wages due them for stevedore work in unloading a cargo of logwood from the brig *Hattie M. Bain*, in September, 1881. The head stevedore was one McAllister, by whom most of the libelants were originally employed. In their behalf it is claimed, however, and the testimony shows, that a number of them, at least, being informed that McAllister was not to be trusted to pay them, went to the captain and told him that they could not trust McAllister, and would stop work unless the captain would see them paid; and that the captain, being in haste for the discharge of the cargo, promised that he would see that they were paid. The captain admits that on the last day he employed two of the men, but he denies that he employed or promised to pay any others.

As respects those workmen to whom the captain's promise, if any, was collateral only to the obligation of McAllister, and who did not work on the faith of the captain's promise, no recovery can be had; for it was McAllister's debt, and it is impossible, under the present known customs, that workmen engaged by the head stevedore should not understand that they must look to him for their pay. The old law of the *Consulado* expressly provided that where the workmen knew the work was done by a contractor by the job the ship could not be seized. Vol. 2, c. 54, § 83; *The Mark Lane*, 13 FED. REP. 800. But the *Consulado* also declares that if the patron (captain) promise to pay the workmen, and they work on the faith of it, though the work be let out to a contractor by the job, that promise must be made good. Chapter 54, § 85. Where the original employment is by another, and the alleged promise by the master is disputed, no liability of the ship can

be admitted, unless the court is clearly satisfied that the work itself was done on the faith of the master's promise; a subsequent promise by the master to see the men paid is a mere collateral promise, and insufficient. In the present case, I think this is made out in regard to only five of the libelants, and I therefore allow as follows: Grant, \$2.70; Boyle, \$33.50; Kehoe, \$11.50; John Hammill, \$1.95; Thomas Hammill, \$1.95; and I disallow the other claims.

The other defense is that no lien exists for stevedores' services, on the ground that the service is not a maritime service. That was formerly the rule followed in this district. It is not to be denied that the supreme court has sanctioned a more enlarged view of what is comprehended under a maritime service than that which formerly prevailed in this country. In *Ins. Co. v. Dunham*, 11 Wall. 26, the court say:

"As to *contracts* it has been equally well settled that the English rule, which concedes jurisdiction, with a few exceptions, only to contracts made upon the sea, and to be executed thereon, (making locality the test,) is entirely inadmissible, and that the true criterion is the nature and subject-matter of the contract; as whether it was a maritime contract, having reference to maritime service or maritime transactions."

The ship is bound to make proper stowage, and proper discharge of the cargo; for any breach of duty in either the ship is liable, and a maritime lien arises, because the obligation is maritime. Suits for the enforcement of liens arising from the breach of these obligations are of frequent occurrence; and there is no dispute either as to the lien in such cases, or as to the maritime character of the ship's obligation properly to stow and discharge cargo. But if the ship's obligation is maritime, the service rendered to the ship in discharging that obligation must be maritime also. In the language of the supreme court, it "has reference" exclusively "to a maritime transaction." Every service rendered to the ship in discharging her own maritime obligations must be held to be maritime, and, if the vessel is in a foreign port, will give a maritime lien for such service. The subject has been so fully discussed by CHOATE, J., in the case of *The Windermere*, 2 FED. REP. 722; by BENEDICT, J., in *The Circassian*, 1 Ben. 209, and *The Kate Tremaine*, 5 Ben. 60; by LOWELL, J., in *The G. T. Kemp*, 2 Low. 482; and by DEADY, J., in *The Canada*, 7 FED. REP. 119,—that I have nothing to add beyond what is there stated in support of a stevedore's lien.

In the case of *The Thames*, 10 FED. REP. 848, this court held that a shipping broker has no lien for services in procuring a charter-party, on the ground that this was clearly separable, as a preliminary service leading to a maritime contract, and was not of itself a maritime service. The services of such a broker are no part of the obligation of the ship to the goods, and therefore separated by a clear line of division from services like those of a stevedore, which are rendered in the discharge of a maritime obligation.

Entertaining no doubt that stevedores' services are maritime within the definition of the supreme court, the lien to which they who render such services are justly entitled, by the general principles of the marine law, should no longer be denied them when the services are rendered, as in this case, to a foreign vessel. The libelants are, therefore, entitled to a decree for the amounts above specified; but as the case is the first in which this lien has been directly allowed in this district, it will be without costs, except the clerk's and marshal's fees.

HOWARD and others v. THE MANHATTAN No. 12 and her Cargo.

SAME v. THE TWO BROTHERS and her Cargo.

(District Court, D. Connecticut. May 15, 1864.)

1. SALVAGE.

Where a tug incurs not the slightest danger, and very little trouble, in rescuing a barge that is in no immediate danger, and will be aided by some other boat, the compensation for salvage service should be as small as possible, but it must be more than would be allowed for mere towage service.

2. LIBEL—SALVAGE.

When an unemployed tug happened to meet a barge accidentally adrift in a harbor, and performed the common service of picking her up and towing her to a convenient wharf, *held*, that nothing like excessive compensation would be allowed as salvage, and that, the captain having rendered a bill indicating his and the tug-owner's estimate of the value of the service, a greater amount would not be allowed in a libel proceeding *in rem*.

In Admiralty.

Alexander & Ash, for libelants.

Carpenter & Mosher, for claimants.

SHIPMAN, J. These are two libels *in rem* by the owners, master, and crew of the N. S. Briggs, to recover salvage for services rendered at the same time to two barges owned by different persons. The two cases were tried at the same time, and the facts are as follows:

On September 13, 1883, the steam-tug James McMahon, having in tow the canal-boat Manhattan No. 12 on her starboard side, and the canal-boat Two Brothers, and the chunker L. C. & Nav. Co. 2104 on her port side, was proceeding through Hell Gate, bound east. When near what is marked on the chart as "Scaly Rock," on the Long island shore, and heading towards Ward's island, the McMahon was run into by the iron steam-boat Cepheus, which came up astern. The force of the collision broke the tow loose from the tug. The tug-boat, in a sinking condition, proceeded to Port Morris. The Two Brothers and the chunker remained fastened together and drifted up in the channel. The Manhattan No. 12 drifted towards the Long island shore. The collision happened about 3:45 or 4 P. M. The day was fine, and there was a slight breeze from the west or south-west, and the tide was strong flood. At this time the libelants' tug N. S. Briggs was coming through the gate, bound for New York. She was returning after taking a bark to Whitestone, and had no tow. She first started to pick up the Two Brothers and the

chunker, which were drifting together up in the tide. But when her captain saw the position of the Manhattan No. 12 he altered his course and went towards her, because he judged that the other two boats would not come to harm before he got back, "if he was not too long." The Manhattan No. 12 by this time was close in shore. The shore was rocky, and she touched a rock once and injured herself somewhat. The Briggs backed her stern up to the Manhattan's bow, got a line out and worked her off until the Briggs could safely take the boat along-side, when she did so and made fast. The tug was skillfully managed by an experienced captain, and by careful handling succeeded in doing the work without damage to herself or to the barge. She then picked up the other two boats without difficulty, took them along-side, and went with the three boats to Port Morris, where they arrived about 4:30 p. m. The time occupied in the service was about three-quarters of an hour. If the Briggs had not picked up the Two Brothers she was in no danger of getting ashore before assistance would have been furnished.

The owners of the Briggs presented bills on September 14, 1833, for saving the three boats, to Daniel McWilliams, the owner of the James McMahon, whom at the time the owners of the Briggs supposed to be the owner of the three saved boats. The bills against the chunker and the Two Brothers were \$50 each, and the bill against the Manhattan was \$200. The owners of the Two Brothers and of the Manhattan had their office in the same building which Daniel McWilliams occupied. He did not tell the libelants, when the bills were presented, who the respective owners were, although he knew, but told the collector to see the iron-steam-boat company. The libels were brought on September 15th, in order to hold the cargoes. The value of the Two Brothers was \$1,200, and the value of her cargo was \$1,160. The value of the Manhattan was \$2,600, and the value of her cargo was \$1,350. Each barge was drifting without motive power, and was helpless. The service to each was a salvage service.

The Briggs incurred not the slightest danger and very little trouble in the service to the Two Brothers. She was in no immediate danger, and if the Briggs had not helped her, some other boat would have furnished the necessary aid. The compensation should be more than would be allowed for a mere towage service, but should be as small as possible for a salvage service. If no one had promptly gone to the relief of the Manhattan she would probably have drifted upon the rocks and would have been seriously damaged. An effort is made to show that the Briggs was in peril; that her engine was in danger of stopping or catching upon the center, and that she might have struck upon a rock. I do not think that she was, or that her captain considered himself to be in any danger which his good judgment could not avoid or overcome. The amount of the bill which was presented by one of the owners, and which was made out by the captain, indicated his and the owner's estimate at the time of the value of the service. The libelants now seek to recover \$500. If the bill had been paid, I think that all claims both against barge and cargo would have been thereby paid in full. The amount named in the bill is allowed upon the ground that the Manhattan was close inshore when she was picked up. I do not think, when an unemployed tug happens to meet a barge accidentally adrift in or about the harbor of New York, and performs the common service of picking her up and tow-

ing her to a convenient wharf, that anything like excessive compensation should be allowed.

Let there be a decree in favor of the libelants against the Manhattan No. 12 and her cargo for the sum of \$200 and costs, and a decree in favor of the libelants against the Two Brothers and her cargo for \$25 and costs.

The owners, masters, and crew are all represented by one proctor, and I think that no apportionment of these sums need be made, because they will probably easily agree. If no agreement is reached, application for an apportionment may be made hereafter.

THE HETTIE ELLIS.¹

(District Court, E. D. Louisiana. March, 1884.)

DECK-LOAD.

With reference to cargo stowed on deck, the ship is not liable as a common carrier, but its liability in this case is limited to ordinary care, *i. e.*, such degree of care as a prudent owner would exercise. If the loss was the result of the negligence, want of skill and care of the master, the liability of the vessel is established. *Lawrence v. Minturn*, 17 How. 111, followed.

In Admiralty.

E. H. Farrar, for libelants.

James R. Beckwith, for claimants.

BILLINGS, J. This is a suit to recover the value of lumber shipped from Tensas river or Bay Minette, Mississippi, to this port. The lumber was, with the knowledge of the libelants, who were owners, stowed on deck. There was a storm, and the preponderance of evidence establishes that the lumber was jettisoned. There was no bill of lading or other contract in writing. The testimony as to usage, with reference to the liability, fails to establish any custom which could vary the liability which the law imposes upon the vessel as to property thus stowed. With reference to cargo stowed on the deck the ship is not liable as a common carrier, but its liability in this case is limited to ordinary care; *i. e.*, such degree of care as a prudent owner would exercise. *Lawrence v. Minturn*, 17 How. 111. The case shows the jettison occurred to save the vessel and the mariners from destruction, and leaves the sole question of fact to be decided: Did the unskillfulness of the master expose the vessel and cargo to the danger or peril from which the loss arose? The allegation in the libel is that "the loss was the result of the negligence, want of skill and care of the master." If this allegation is maintained, the liability of the vessel is established. *Lawrence v. Minturn*, *supra*.

¹ Reported by Joseph P. Hornor, Esq., of the New Orleans bar.

In *Shackelford v. Wilcox*, 9 La. 33, 39, the court says: "In relation to underwriters without special agreement, and in relation to other owners of the cargo under deck, in case of jettison, it is well settled that goods on deck form no part of the cargo. * * * As between the owner and the carrier, it is otherwise, and the carrier is bound by the same obligation as for the rest of the cargo, save only the damage which may result from its exposed situation."

In *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. 344, 383, the court say "the vessel was not exempt from ordinary care in the management of the vessel by the master and hands."

These last two cases establish the law to be that when the cargo is stored on the deck, the burden of proof is on the shipper. Does, then, the evidence establish want of ordinary skill in the management of the vessel? The facts, as detailed by the master and the witness, John Brown, are that the schooner came through Grant's Pass Saturday morning. Towards night a heavy fog came on, with increasing wind. At Round island they took in the mainsail and sailed on before and after dark, the master being uncertain of his whereabouts, or even his direction or course. In the night the vessel went upon Dog keys, where the lumber was jettisoned. It was easy for the schooner to have anchored in closed waters and to have waited until the fog broke, and not to have sailed on without knowledge of locality, and not have attempted to navigate the vessel square bowed in an open sound full of shoals. But for this want of skill or care the loss would not have occurred.

Let there be judgment for the libellant.

THE NARRAGANSETT.

(Circuit Court, D. Rhode Island. May 21, 1884.)

LIBEL—NEGLIGENCE—PREPONDERANCE OF TESTIMONY.

When a libellant makes out a case of negligence by a clear preponderance of testimony, a decree will be entered in his favor.

In Admiralty.

Miner & Roelker, for libellants.

Thurston, Ripley & Co., for claimant.

COLT, J. On October 15, 1882, the steam-tug *Narragansett*, having the barges *Manhattan* and *Union* in tow, when near and to the westward of Point Judith, deeming it imprudent to round the point owing to the force of the wind, determined to turn back and seek the nearest harbor. The turn was made inshore. The tug turned about, and was heading to the westward, but the barge *Manhattan*, when

nearly around, struck something. She was towed until within two miles of Watch Hill, and then sank in shallow water. On board was a cargo of coal, valued at \$6,500, which was almost a total loss. The coal was shipped by W. H. Jourdan, and insured against loss in the Providence Washington Insurance Company. The company, having paid the loss, now brings this libel against the tug Narragansett, alleging negligence and unskillful conduct on the part of those navigating her.

About two miles to the westward of Point Judith lies a reef of rocks nearly three-quarters of a mile long, well known to mariners, and marked upon the charts, called Squid's ledge, and the libelant charges that the barge was negligently towed upon this ledge. This is denied by the claimant, the Eastern Transportation Company. On the part of the libelant the evidence has been mainly directed towards proving that the barge ran upon Squid's ledge. The claimant, on the other hand, seeks to show that the position of the tug and barges at the time of the accident was west and south of the ledge, and that the Manhattan must have struck some unknown obstruction, probably the sunken wreck of a mud-digger.

The libelant undertakes to establish, by numerous eye-witnesses at different points on the shore, that from the location of the barge at the time she must have been on Squid's ledge. Some nine witnesses are called who saw the occurrence from Point Judith, whose testimony clearly locates the barge in the range of the ledge looking west. A large number of witnesses on the Rhode Island shore, to the northward, place the barge in the range of the ledge looking south. By the first class of witnesses it is said an east and west range is shown, by the second a north and south, and thus by a cross-range it is claimed the location is fixed with great certainty. In our opinion, the libelant has submitted an amount of evidence to establish this point which is neither met nor overcome by any proof offered by the claimant. The testimony of these observers, more than 20 in number, who saw the accident from different positions, though disagreeing in some respects, and perhaps the more honest for that, leave but little doubt that the barge struck the ledge. We do not deem it necessary to take up this testimony in detail. The witnesses on Point Judith locate Squid's ledge by ranges from objects on the point, and the fact is shown that at the time of turning back the tug and tow were in range of it. Most of the witnesses on the point think the tug came down over the southerly end of the ledge and went back about the center; one witness is positive she came down outside, but went back in range of it. Whatever may be these differences in the opinion of individual witnesses, the substance of their testimony, taken as a whole, proves that the barge at the time of the accident was in the direct range of the ledge. And so of the witnesses to the northward, on the Rhode Island shore. Their testimony does not agree in particulars. They locate the ledge by different means. Some had no

particular ranges to go by; others had ranges. Some locate the ledge by the water breaking; other witnesses, especially those at Point Judith, do not think the water broke on the ledge that morning. Be this as it may, taking the two classes of testimony as a whole, we cannot but come to the conclusion that the libelant has fairly made out by cross-ranges that the barge was on the ledge when the accident occurred.

We do not think this mass of testimony is overthrown by the claimant's witnesses. Horace Tucker, an eye-witness, says the vessels were in the vicinity of Squid's ledge, but outshore of it. Walter J. Watson, who lives at Point Judith, testified that in his judgment they had not got up as far as the ledge, but he does not say they were not in range of it looking-west. George C. Whaley, called by the libelant, first thought they were east of the ledge, but afterwards finds he was mistaken, and thinks they were west of it. Wanton R. Carpenter testifies that the tug and barges were on a range of the telegraph pole and bath-house from a point on the piazza of his hotel at Rocky Point, and that this range would bring them south-west of Squid's ledge. Subsequently, George T. Lamphear, surveyor, on behalf of the libelant, took the bearings from the same point on the hotel piazza of the range over the telegraph pole and bath-house, the result being as indicated by him on the chart, that the Carpenter range in fact crosses the ledge. After this, Mr. Carpenter and Capt. Leete, of the Manhattan, again took an observation one morning in January last, after a severe storm, when the water was breaking on the ledge. They found the water did not break in the range testified to by Mr. Carpenter, and therefore it is claimed the ledge is not located in that range, so that the tug and barges must have been outside the ledge, as first stated by him. This is the extent of the claimant's evidence from eye-witnesses on the shore. The most important witness for the defense is Mr. Carpenter. It must be admitted, however, that doubt is thrown upon the accuracy of his judgment as to the location of the ledge by the surveyor, Lamphear. Taking the claimant's evidence of this class as a whole, it can hardly be said to seriously affect the full and positive testimony of the libelant.

The statements of those on board the tug and barges are conflicting. Owing to the interest of the parties, and for other reasons, we ought not to attach to it the same weight as to the class of testimony we have just considered. The captain and mate of the tug and the captains of the barges testify, in substance, that they are familiar with Squid's ledge, and that when the accident happened they were to the south and west of it, and about two to two and one-half miles from Point Judith. It is a significant fact, however, that Capt. Beckwith, of the Narragansett, stated just after the accident that he thought the barge struck Squid's ledge. The libelant calls the mate of the barge Union, whose testimony is unimportant; also Van Wart, a deck hand on the Narragansett, and Bennett, a deck hand on the Manhat-

tan, whose evidence tends to prove the location of the vessels at the time on the ledge. It is manifest the barge struck something. If she was south and west of the ledge, what did she strike? Testimony is introduced to prove that a mud-digger was wrecked in that locality some months before, and the inference is, no other obstruction being shown, that the barge came in contact with it. The location of the mud-digger varies. Edward Luckenbach, who had it in tow, says it broke apart and sank about a mile and a half westward of Point Judith, off Squid's ledge somewhere. George W. Wootton, who struck it in October or November, 1882, and made a memorandum at the time, places it also about a mile and a half west of Point Judith. Capt. Hoch saw the wreck in September, and thinks it was two miles, probably two and one-half, from the point, and Tucker thinks it about the same distance. It is clear that Luckenbach, who had the mud-digger in tow when it sank, and Wootton, who made a memorandum of the bearings, are probably more nearly correct as to the position of the sunken wreck than the two other witnesses, and they locate it not more than a mile and a half from Point Judith; but if the officers of the tug and barges are correct, they were from two to two and one-half miles from Point Judith when they turned back.

Again, this wreck, neither before nor since, seems to have done any damage to vessels, although it would appear from the evidence it was directly in their path when rounding Point Judith. No attempt has been made to show, by an examination of the barge after she sank in shallow water, that she came in contact with a projecting timber or the frame of the mud-digger. Nor does it appear that any effort has been put forth by the claimant since the accident to locate, with certainty, the wreck of the mud-digger, further than the testimony noticed. Under these circumstances, and as opposed to the libellant's testimony, we cannot think the mud-digger theory sustained by the evidence, or the probabilities of the case. It is reasonable to conclude from the evidence that the tug and tow, keeping well to the northward on account of the wind, on turning inshore, when approaching within a short distance of Point Judith, naturally struck Squid's ledge, which stretches north and south for nearly three-fourths of a mile. But it is said that the barge striking the ledge would have sunk almost immediately, and could not afterwards have been towed for miles. The chart shows 13 feet of water at the northerly and southerly ends of Squid's ledge, and 16, 17, and 18 feet at low water along the center. As it was high tide in the morning at the time of the accident, we may add about three feet to the depth as delineated on the chart. The Narragansett drew 12 feet of water, the Union, 16 feet 3 inches, while the Manhattan drew over 18 feet. It is easy to see that the Narragansett and Union might pass safely where the Manhattan could not. With the sea running as it was, the Manhattan might scrape upon the reef, or settle upon it until the sea lifted her off, while the tug and other barge would escape. From an acci-

dent of this kind she might not sink immediately, but would float a greater or less time, according to the extent of her injury.

Again, it is urged with great earnestness by the claimant that the theory of the libelant involves an impossibility, because it proves that the tug and tow crossed the ledge twice,—once in approaching Point Judith, and again in turning back; that this is impossible from the fact that the first passage was over the south end of the ledge, where the water is more shallow, and where the Manhattan would have struck. It is, however, by no means to be concluded from the evidence that the tug and barges passed over the ledge twice. It is true that most of the witnesses on Point Judith say that the tug came down on a range with the southerly end of the ledge, but they could not, from their position, tell how far to the east the tug came before turning. Again, the tug was in advance of the tow, and it may be she crossed twice. The probability is that the turn was made just after the ledge was reached by the tug, or, possibly, the tug and tow came down just south of the ledge and then turned back upon it. However this may be, there is nothing which makes the theory of the libelant, that the Manhattan, in some way, in turning; struck the ledge, either impossible or improbable upon the evidence. By the great weight of testimony the tug and tow were located at the time of the accident where Squid's ledge lies.

In our opinion, the libelant has made out a case of negligence by a clear preponderance of testimony, which makes the question of the burden of proof raised on the argument immaterial. Under these circumstances a decree should be entered in favor of the libelant. *The Mohler*, 21 Wall. 280; *The Lady Pike*, Id. 1; *The Brooklyn*, 2 Ben. 547; *The Deer*, 4 Ben. 352.

THE MODOC.

(District Court, W. D. Pennsylvania. October Term, 1883.)

SEAMEN'S WAGES—LIBEL BY MINOR SONS OF A DECEASED PART OWNER—ALLOWANCE REFUSED.

The minor sons of a deceased part owner of a boat libeled her for wages for their services upon her during their father's life-time, when the boat was run by him, the other owner taking no part in her running. The libelants gave evidence to show that there was an understanding between their father and themselves that they were to receive wages, but in fact none of them had been emancipated, and they were supported by their father. When he died he had in his hands earnings of the boat unaccounted for in excess of these wages claims. The surviving owner, who took defense, had no knowledge of the arrangement between the father and his infant sons, and its enforcement against the boat would have prejudiced him. *Held*, that the claims must be disallowed, and the libels dismissed.

In Admiralty.

Morton Hunter, for libelants.

Barton & Sons, for respondents.

ACHESON, J. The libelants, who are minor children of Capt. J. A. Moore, deceased, and respectively of the ages of 19, 16, and 15 years, suing in the name of W. D. Thomas, their next friend, have filed libels against the steam-tug *Modoc* for wages. Their father was half owner of the boat, and her master, and by him she was run; his co-owner, R. B. Kendall, taking no part in her running. The entire business of the boat, which was that of towing, was transacted by Capt. Moore. He put the libelants on the boat, and for a period of about eight months, and until his death, two of the libelants worked on her as deck hands and one acted as steward. Capt. Moore's death left the financial condition of the boat in this plight, viz.: He had collected for towing \$3,528.95, and had disbursed \$2,114.17, the balance in his hands being \$1,414.78, no part of which has been accounted for, while the boat proved to be incumbered with liens of his creation for supplies, etc., to the amount of \$1,098.87, which Kendall, the surviving owner, has been compelled to pay. When Capt. Moore died he had about him \$425, which sum it is morally certain (though this is not positively shown) was the boat's money. This fund his widow, who is now a principal witness for the libelants, took possession of and treated as her husband's individual money. Furthermore, it appears that the original cost of the *Modoc* was \$2,300, of which Kendall paid not only his own half, but also \$920 of Capt. Moore's share. The united claims of these libelants are \$546.80, and, if sustained, it is certain that they must be paid out of Mr. Kendall's own pocket. Of these claims he had no knowledge during Capt. Moore's life-time, the libels being filed after his death.

In view of the foregoing facts this attempt of Capt. Moore's family to charge the *Modoc* strikes me as most ungracious, and deserving of no favor. Must these demands be sustained as valid liens? The libelants, as we have seen, were all infants, and none of them had been emancipated by their father. When not on the boat, they all lived with their father as one family, they paying no boarding, it is shown. Presumably they were supplied by him with clothing and other necessities. He was, then, entitled to their services; and their earnings, although for maritime services, were legally his. *Plummer v. Webb*, 4 Mason, 380. The libelants endeavor to remove this legal obstacle out of their way, and their mother testifies that she heard her husband repeatedly say to the libelants "that he intended to let their wages stand for an interest in the boat,—he did not want to make any use of it for himself; that he wanted to let it stand that the boys could get an interest in the boat for themselves." The libelants severally testify that their father often told them during their service on the boat that when they earned and got their money they could do with it what they pleased; that they were to have it to do what they liked,—either to take an interest in the boat or otherwise

use it. And Thomas Donovan testifies that on one occasion, when the libelants were complaining of late work, their father said to them, "If you don't do it I will have to get some others who will, as I have to pay you the same as any one else;" and that at other times, when the boys were indulging in "a little growl," their father would say "that their money was in the office, the same as mine, whenever they wanted it;" and this witness adds that Capt. Moore told him "he did not want the boys' wages; that he would pay them the same as me, and that they could do what they liked with it." But, if all this be true, what does it amount to? What have we here but expressions of the father's intentions in respect to the earnings of his sons? Those earnings were none the less his after these declarations than they were before. An express promise by the father, under the circumstances of this case, to pay these infants their wages while in his employ upon the boat, would have lacked the element of consideration, and, it seems to me, could not have been enforced against him. Much less should the alleged understanding be enforced in this proceeding *in rem* to the prejudice of the surviving owner of the boat, who was in total ignorance of such arrangement. *Kauffelt v. Moderwell*, 21 Pa. St. 222, 224. When Capt. Moore died he had in his hands of the boat's moneys over \$1,400, which were applicable to the wages earned by his infant sons, and the justice of the case requires, at least as between Kendall and the libelants, that their wages should be treated as paid. *Id.*

I have not overlooked the fact that in the boat's time-book, as kept by Capt. Moore, accounts with the libelants, respectively, appear, similar to the other hands' accounts. But this was necessary for proper settlements between the owners of the boat, and is not at all inconsistent with the father's claim to the earnings of his infant sons.

Let a decree be drawn dismissing the original and intervening libels, with costs.

DORIAN, Adm'r, v. CITY OF SHREVEPORT.¹

(Circuit Court, W. D. Louisiana. May, 1884.)

JURISDICTION OF UNITED STATES COURT—OBLIGATION OF CONTRACT—REPEAL OF LAW AN IMPAIRMENT, WITHIN THE MEANING OF THE CONSTITUTION.

A petition that alleges the repeal of laws which were constituent and material parts of the obligation of the contract of certain bonds at the time of their issue, presents a case within the jurisdiction of a federal court.

Matter of Jurisdiction.

Hicks & Hicks, for plaintiff.

W. A. Seay, City Atty., for defendant.

BOARMAN, J. The plaintiff, administering the succession of James Dorian, sues the city for a sum of money which she claims that the defendant corporation owes said succession, because in A. D, 1870 the city contracted with Robson & Baer to do certain work on the streets; that, the work having been performed and accepted, an obligation arises out of the said contract, binding the city to pay for the work; and that the money, or a part of it, which the city obligated itself to pay Robson & Baer, is in law due plaintiff, because plaintiff holds three certain city bonds for \$1,000 each, payable 10 years after date, which were given to the said contractors by the defendant in settling with them for the said work. All the parties to the suit are citizens of Louisiana; and the plaintiff, having set up the above demand against the defendant, alleges, in order to show jurisdiction in this court, that the obligation of the contract between Robson & Baer and the city has been violated and impaired, contrary to the prohibitions in the constitution of the United States, in this: that at the time the said contract was entered into certain laws, which she recites in the petition, were vital and constituent part of said contract; that these laws, after the rights under the contract had accrued, were repealed, and plaintiff's rights and remedies impaired, denied, and taken away, in violation of said constitution. It is not deemed important to recite here the laws, the repeal of which, it is alleged, impaired the said obligation.

If the public work was performed as alleged, and the obligation is a subsisting one, this statement of the case, together with the charge as to the jurisdictional facts, shows—if the plaintiff is competent to sue—a suit in which there is involved a constitutional question; but it is not at all clear that this plaintiff, under those allegations of her petition which set forth the demand which she makes in consequence of her being the holder of the particular bonds that were given by the city to Robson & Baer, in settlement for said public work, presents a suit which she is competent in law to maintain. The allegations in

¹ We are indebted to Talbot Stillman, Esq., of the Monroe, Louisiana, bar, for this opinion.

relation to the fact that the three bonds were given to Robson & Baer for public work on the streets, performed by them under a contract, do not show that Dorian is, or was at any time, subrogated to the rights of Robson & Baer under that contract; nor do they show such an assignment of the obligations arising out of the said contract as will in law vest Dorian with the right to sue for their enforcement against the defendant; for the mere fact that these bonds, which came, as the petitioner alleges, into Dorian's hands by purchase from some one to whom Robson & Baer, or their assigns, had delivered them, were given to Robson & Baer in settling with them for certain public work, is not sufficient to show a legal right in plaintiff to sue on the said contract. Besides, there is nothing to show that Robson & Baer have not long since been paid for their work on the streets. The bonds evidence an indebtedness which the city promises to pay to blank or bearer. There are some recitals on the bonds which pledge certain revenues of the city, irrevocably, for their payment; but, in disposing of this motion, it is not deemed necessary to particularly mention those recitals.

In addition to the statement I have so far made of this suit, the plaintiff alleges, as the holder of these bonds, that they were issued by the defendant corporation, acting within the scope of its lawful powers; that in issuing the said bonds the city entered into a contract to pay the sum and interest stated in them; that the obligation of this contract binds the city to pay the amount to plaintiff as the bearer or holder of the bonds. On this part of the case plaintiff's suit is to recover against the defendant because of the lawful contract these bonds show between the holder thereof and the corporation. The allegations setting forth the cause of action, based on the contract, which the bonds evidence, show an impairment of the obligations of that contract, in the fact that certain laws, which were constituent and material parts of the obligation of the contract when the bonds were issued, were repealed.

I think the petition presents a suit within the jurisdiction of this court, and the motion is overruled.

CRANE v. CHICAGO & N. W. Ry. Co. and others.

(Circuit Court, S. D. Iowa, C. D. February 1, 1884.)

1. BILL FOR SPECIFIC PERFORMANCE MUST BE BASED UPON SOME CERTAIN CONTRACT OR AGREEMENT.

In order to sustain an action for specific performance against a railroad company, to compel it to construct its line through a certain city, and for other relief, it is necessary for the complainant to prove that he had an agreement with the railroad company whereby that company was bound to construct and operate the main line of its road through that city.

2. RESIDENCE OF A LEASED RAILROAD COMPANY AS REGARDS ITS RIGHT OF REMOVAL OF ACTION TO FEDERAL COURT.

A railroad company under a perpetual lease to a foreign corporation is not, by that fact, a resident of the same place as the latter; therefore, an action against it and its lessor cannot be removed to a federal court on the ground of its residence being in a state other than that of the complainant, unless it can be shown that it is not a material party.

Motion to Remand.

Barcroft, Bowen & Sickmon and Collender & Smith, for complainant.

W. S. Clark and N. M. Hubbard, for defendants.

SHIRAS, J. The petitioner in the above cause filed in the circuit court of Polk county, Iowa, a petition wherein he averred and set forth that he was a resident and property owner in Polk City, Iowa; that the Des Moines & Minnesota Railroad Company, formerly called the Des Moines & Minneapolis Railroad Company, is a corporation created and organized under the laws of the state of Iowa, for the purpose of constructing and operating a line of railway from the city of Des Moines, in Iowa, to the state line in the direction of Minnesota; that the original line surveyed and constructed passed through Polk City; that said company caused the necessary steps to be taken to procure the voting of a tax of 3 per cent. in aid of said railway in Madison township, wherein Polk City is located, the condition upon which said tax was voted being that the line of railroad should be built from the city of Des Moines via Polk City through Polk county; that the tax was voted and paid to the railroad company, which constructed and operated its line through Polk City; that Polk county, through its board of supervisors, in consideration of the agreement of the company to build and operate its line through Polk county via Polk City, granted to said company some 15,000 acres of swamp lands belonging to the county; that many citizens of Polk City and county subscribed to the capital stock of the company on condition that the line of said road should pass through Polk City; that said company constructed its line of railroad from Des Moines through Polk City to Ames, in Story county, and operated the same until 1880; that in the year 1879 the Chicago & Northwestern Railway Company leased said line of railway from the Des Moines & Minnesota Company, and thereafter changed the line and location of the railroad, so that its main line passes about two miles east of Polk City, and not upon the line upon which it was originally constructed, whereby complainant and other property owners in Polk City have been greatly damaged.

The Des Moines & Minnesota Railroad Company and the Chicago & Northwestern Railway Company were both made parties defendant to the petition, and the prayer for relief is as follows:

"Wherefore, plaintiff demands that defendants be required to reconstruct and operate the main line of said railroad upon the line originally constructed, running from the city of Des Moines, in Polk county, Iowa, north, via Polk City, to Ames, in Story county, Iowa, making Polk City a station on said main and continuous line of railroad from the city of Des Moines, Iowa, to

Ames, Iowa, and that the same be constructed and operated in full compliance with the terms and conditions upon which the taxes were voted and paid, swamp lands conveyed, and subscriptions paid as aforesaid, and prays a peremptory writ of *mandamus*, commanding the said defendants to forthwith comply with the above demands, and for such other remedy and relief as may be lawful and proper in the premises."

Both defendants appeared in the state court and filed a joint answer, wherein they admit that the line of the railway as originally built was located through Polk City, and that the tax aid was voted and the swamp lands were granted as charged in the petition. The defendants then aver that the Chicago & Northwestern has leased the line of road in question of its co-defendant, and has become the owner of the stock, franchise, privileges, and property of the Des Moines & Minnesota Railroad Company; that the line as originally constructed via Polk City was narrow gauge, badly built, with high grades and many curves; that the Chicago & Northwestern Railway Company, desiring to change the road to a broad-gauge line, and to improve it in other particulars, and to shorten the distance, and for other reasons, made overtures to the citizens of Polk City for liberty to change the location of its line, and finally entered into a written contract with some 85 citizens of Polk City, wherein it was provided that the line might be changed upon certain terms and conditions in the contract set forth, all of which, with the acts of the company in fulfillment thereof, are set forth at length in the answer. Thereupon the Chicago & Northwestern Railway Company filed a petition for the removal of the cause to the federal court, averring therein that complainant was a citizen of Iowa, the Chicago & Northwestern a corporation created under the laws of the state of Illinois; that the Des Moines & Minnesota Railroad Company, a corporation created under the laws of the state of Iowa, was merely a nominal party in the suit, for the reason that the Chicago & Northwestern Company was the owner of all the stock and franchise of the Des Moines & Minnesota Company, and the lessee in perpetuity of said railway, and, as such, is charged with the duty of operating said railway, and subject to the payment of all claims and demands made against the Des Moines & Minnesota Railroad Company, and also solely liable to obey any orders and perform any judgment made in this cause; and that the controversy can be fully determined between complainant and the Chicago & Northwestern Railway Company, who are citizens of different states, without the presence of the Des Moines & Minnesota Railroad Company, and further averring that the amount in controversy exceeds \$500 in value. The state court granted the prayer of this petition, and the record has been filed in this court. The complainant moves to remand, on the ground that complainant and one of the defendants, the Des Moines & Minnesota Railroad Company, are citizens of the state of Iowa, and were such when the suit was brought.

On the part of the Chicago & Northwestern Railway Company it is claimed that the Des Moines & Minnesota Company is merely a nominal party to the suit, whose presence as a co-defendant does not defeat the right of the Chicago & Northwestern Company to a removal of the controversy from the state to the federal court. It is not claimed that there is a separable controversy wherein complainant and the Chicago & Northwestern are alone interested. There is but one controversy involved in the matters set forth in the pleadings; and therefore, to justify a removal to this court, it must be held that the Des Moines & Minnesota Railroad Company is not a material, but only a nominal, party defendant to the petition. The contract for the construction and operation of the line of railway through Polk City, for the alleged breach of which this suit is brought, was entered into by the Des Moines & Minnesota Company. It was that company which received the tax aid and the swamp lands, which, according to the averments of the petition, were given it in consideration of the agreement on its part to construct and operate the line of railroad through Polk City. The prayer of the bill in the first instance is for a decree enforcing specific performance, and, failing in that, for such other relief as may be proper. To obtain relief in either form it is incumbent upon complainant to prove that he had a contract or agreement with the Des Moines & Minnesota Railroad Company whereby that company was and is bound to construct and operate the main line of its road through Polk City. The whole equity and right of complainant is based upon the existence of such an agreement, and therefore its existence, its validity, the true construction thereof, and the rights and equities conferred thereby, are matters absolutely and essentially necessary to be shown on behalf of complainant. A decree to the effect that the Des Moines & Minnesota Railroad Company had bound itself to construct and operate the main line of its road through Polk City would certainly affect the rights and interests of that company. That company is still the owner of the road, subject to the lease executed to the Chicago & Northwestern Railway Company. A decree requiring a change in the present location of the railway would affect the property, therefore, of the Des Moines & Minnesota Railroad Company. The contract which is sought to be established and enforced is the contract of the latter company, and that company has an interest in the property to be affected by the decree. As is said by the supreme court of the United States in *Mallow v. Hinde*, 12 Wheat. 193:

"How can a court of equity decide that these contracts ought to be specifically decreed without hearing the parties to them? Such a proceeding would be contrary to the rules which govern courts of equity, and against the principles of natural justice."

It is urged in argument that, by reason of the leasing of the property in perpetuity to the Chicago & Northwestern Company, the Des Moines & Minnesota has parted with all interest in the property. The

fact that it is a lease and not an absolute sale of the property shows that the Des Moines & Minnesota Company still retains a title and a legal interest in the property. The court cannot know but what the Chicago & Northwestern Company may in the future forfeit the lease, so that the possession and use of the property may revert to the lessor and owner. It does not appear but what the Des Moines & Minnesota is still vitally interested in the management and success of the road, as the rental paid may be dependent upon the amount of the earnings and expenses, and these will, in all probability, be affected in some degree by the result of this litigation. But, aside from these considerations, the fact remains undoubted that the very foundation of complainant's case is the existence of the alleged contract with the Des Moines & Minnesota Railroad Company, binding that company to operate its main line through Polk City; and the necessity of establishing this contract imposed the duty on complainant of making the company that is alleged to have made it, a party defendant to the suit.

In *Findlay v. Hinde*, 1 Pet. 241, it was ruled that "to a bill for specific performance of a contract to convey land the vendor is a necessary party, *though he has parted with his title and his grantees are made parties.*" In that case it was claimed that one Garrison had bound himself to convey certain land to William and Michael Jones, and that he had afterwards conveyed the land to other parties. The latter parties were made defendants to a bill for specific performance, and it was pleaded that there was a defect of parties, because Garrison was not a party. In answer thereto it was urged that as Garrison had conveyed the land to others, and as these parties were defendants, and the decree for conveyance of title would operate against them, it was not necessary to make Garrison a party to the bill. The supreme court held that he was a necessary party, saying that complainant "can have no claim to it in equity but through and under the executory contract of Garrison with the Joneses. Garrison has a right to contest the equitable obligation of that contract. No decree can be made for the complainants without first deciding that the contract of Garrison ought to be specifically decreed. He might insist that the purchase money had not been paid, or make various other defenses. It is not true that if he were made a party no decree could be made against him. It might not be necessary to require him to do any act, but it would be indispensable to decide against him the validity of his obligation to convey and overrule such defense as he might make."

Under the doctrine thus announced it is clear that, in the present case, the Des Moines & Minnesota Company has the right to contest the existence of the contract alleged against it. As already said, the existence, the true construction, and binding force of the alleged contract, and the right of complainant to demand a specific performance of its terms, are the questions material to the determination of this

litigation, and their decision requires the presence of the party who, it is alleged, made and entered into the contract and against whom it is sought to be enforced.

When the petition for removal was filed, the Des Moines & Minnesota Railroad Company had appeared in the cause, and, by joining in the answer filed, had put in issue complainant's right of recovery. The record shows upon its face that there was then pending a controversy between complainant and the Des Moines & Minnesota Company. In that controversy the latter company would be entitled, if the proofs and the law justified it, to a decree in its favor, and the complainant, in like manner, would be entitled to a decree establishing the existence of the contract, its breach, and for the appropriate remedy. Under these circumstances it cannot be held that the Des Moines & Minnesota Company is merely a nominal party. The decree sought affects its rights, and on principle it should be heard before a decree is passed affecting those rights. Having been made a party, the record shows that it is seeking to defend itself, and to that end is seeking to defeat the entire claim and remedy sought by complainant. It is, therefore, both a proper and an active party to the controversy. The fact alleged in the petition for removal, that the Chicago & Northwestern Railway Company owns the stock and other property of the Des Moines & Minnesota Company, cannot change this result.

It is not claimed that there has been a merger of the one corporation into the other. The Des Moines & Minnesota Company is still a distinct and separate company, and the court cannot take cognizance, upon questions of this character, of the ownership of the stock in the corporation. The Chicago & Northwestern Company may sell all the stock owned by it in the Des Moines & Minnesota Company, but that would not change the legal *status* of the latter company. The controversy of complainant is with the company, and not with its stockholders.

Having reached the conclusion that the Des Moines & Minnesota Railroad Company cannot be held to be a nominal party in this controversy, but, on the contrary, is a material and active participant therein, it follows that this case is not one properly removable into this court, and the motion to remand must be sustained; and it is so ordered.

McCABY, J., concurs.

Petition for Rehearing on Motion to Remand.

SHIRAS, J. A rehearing on the motion to remand is asked on two grounds:

1. It is urged that the authorities show that *mandamus* will not lie to enforce an ordinary personal contract, and hence that this remedy

cannot be granted in the present case against the Des Moines & Minnesota Company. If it is not an appropriate remedy against the Des Moines & Minnesota, neither is it appropriate against the Chicago & Northwestern. Whether or not it is a proper remedy, under the facts in this case, is a question made upon the pleadings, and is to be determined and decreed upon the hearing. This court, upon a motion to remand, based upon the ground that this court has not jurisdiction of the cause, cannot pass upon a question at issue in the cause, of the character of that raised by counsel.

2. The bill in this cause not only prays for a *mandamus*, but for other appropriate relief. It is based upon two general facts: (1) That the Des Moines & Minnesota Railroad Company bound itself by a contract, to the benefit of which plaintiff is entitled, to build and operate the main line of its road through Polk City; (2) that the Des Moines & Minnesota and its lessee, the Chicago & Northwestern, have violated this contract to the injury of complainant.

The relief sought is specific performance, to which end a *mandamus* is prayed, and other relief. The essential fact necessary to be shown to sustain the bill is that the Des Moines & Minnesota Company entered into the contract alleged. This is as essential to relief against the Chicago & Northwestern as against the Des Moines & Minnesota. The latter company defends the action, and denies the existence of the contract, and the right of complainant to enforce same. In passing upon the issue, whether such a contract as is alleged in the bill was made by the Des Moines & Minnesota Company, the latter company is a material and not a nominal party. If it is shown that such a contract was not made, that ends the case, and in settling this issue the complainant has the right to make the Des Moines & Minnesota Company a party, so as to bind it by the conclusion reached, and the latter company has a right to contest the claim made against it. If it is decided that such a contract exists, and that it has been violated, then the question will arise as to the remedy, if any, that can be given. If *mandamus* is not a proper remedy, a decree for specific performance, aided by injunction, may be proper, and it may be that the Des Moines & Minnesota should be included therein. It certainly should be included in so much of the decree as determines the question of the existence of the alleged contract and its breach.

The line of reasoning employed in the petition for rehearing requires this court to determine questions presented on the record as it now stands, it being claimed that, if properly decided according to the weight of authority, it will appear that relief by *mandamus* cannot be given against the Des Moines & Minnesota Railroad Company, and therefore that company is merely a nominal party. To determine these questions requires the court to examine and pass upon part of the issues presented on the record, which can hardly be expected upon a motion to remand. But admitting that relief by *mandamus* may not be proper, some other form of relief may be grantable, and hence the

court must hear and determine the issue made by the bill and answer of the Des Moines & Minnesota Railroad Company, to-wit, was there a contract made by the latter company regarding the line of the railroad, and, if so, has there been a breach thereof? To this issue made by the pleadings, and which is essential to the final decision of the cause, the Des Moines & Minnesota Railroad Company is an active and material party, and cannot be held to be a nominal party.

Petition for rehearing overruled.

MALLORY MANUF'G CO. v. Fox and others.

(Circuit Court, S. D. New York. May 30, 1884.)

1. EQUITY RULE No. 82—NOT TO BE INVOKED TO COLLECT DISBURSEMENTS TAXABLE AS COSTS.

The eighty-second equity rule cannot be invoked by a party to enable him to collect of the opposite party disbursements which can be taxed as part of the costs in a final decree.

2. CONTEMPT—PUNISHMENT—IMPRISONMENT FOR NON-PAYMENT OF MONEY JUDGMENT—POWERS OF UNITED STATES COURTS—CONTROLLED BY STATE COURTS.

The power of United States courts to punish for contempt and imprison for non-payment of money judgments is circumscribed and controlled by state laws.

3. SAME—NON-PAYMENT OF MONEY—EXECUTION—ORDER OF COURT IN NATURE OF JUDGMENT—WHEN NOT ENFORCED ON THEORY THAT DISOBEDIENCE IS A CONTEMPT.

In a state where proceedings for contempt for the non-payment of money ordered by the court to be paid cannot be had when the payment can be enforced by execution, and imprisonment for non-payment of costs is abolished, when an order of the court is in the nature of a judgment or decree for the payment of money, it cannot be enforced on the theory that disobedience is a contempt.

In Equity.

Eugene Treadwell, for complainant.

Wyllys Hodges, for defendants.

WALLACE, J. The complainant moves for an order fixing the master's compensation for his services upon an accounting under an interlocutory decree, and directing the same to be paid by the defendants. The bill of the master, as certified by him, is not deemed unreasonable by either party, but the contention is as to what portion of it should be borne by each. The eighty-second equity rule contemplates that the court shall charge the master's compensation upon such of the parties as the circumstances of the case render proper, but that rule is for the benefit of the master, and is to be enforced upon his application and for his protection. It cannot be invoked by a party to enable him to collect of the opposite party disbursements which he may have incurred, and which can be taxed as part of the costs in the final decree. By the laws of this state proceedings can-

not be had as for a contempt for the non-payment of money ordered by the court to be paid when the payment can be enforced by execution, and imprisonment for non-payment of costs is abolished. The power of the courts of the United States to punish for contempt and imprison for non-payment of money judgments is circumscribed and controlled by the laws of the state; and where an order made in the progress of the cause is of the character in substance of a judgment or decree for the payment of money, it cannot be enforced upon the theory that disobedience is a contempt. Rev. St. §§ 725, 990; *In re Atlantic Mutual Ins. Co.* 17 N. B. R. 368; *The Blanche Page*, 16 Blatchf. 1; *Catherwood v. Gapete*, 2 Curt. 94; *U. S. v. Tetlow*, 2 Low. 159; *Low v. Durfee* 5 FED. REP. 256.

The motion is denied.

ANDREWS v. COLE.

(*Circuit Court, N. D. New York.* May 30, 1884.)

1. ORDER PRO CONFESSO—DOES NOT ENTITLE COMPLAINANT TO FINAL DECREE AS OF COURSE.

A complainant is not entitled as of course to a final decree when he has obtained an order *pro confesso*, he not being permitted to take at his discretion such a decree as he may be willing to abide by.

2. FINAL HEARING—RIGHT TO DOCKET FEE—REV. ST. § 824

The consideration of a bill is a hearing, and is final when it results in the final disposition of a cause, and entitles a party to a docket fee under Rev. St. § 824.

In Equity.

Thos. D. Richardson, for complainant.

R. A. Stanton, for defendant.

WALLACE, J. The defendant objects to the taxation by the clerk of a docket fee of \$20 as part of the costs of the complainant upon a final decree herein. The defendant did not answer or demur to the bill, and complainant took an order for a decree *pro confesso*, and subsequently obtained a final decree. As the cause has been finally determined, and as its determination involved a hearing by the court, there has been a final hearing within the meaning of section 824, Rev. St., which authorizes a docket fee of \$20 to be taxed. There has been much discussion of the meaning of the term "final hearing," as used in this section, and a diversity of opinion is found in the decisions. Several cases decide that any order or determination which results in a final disposition of the cause, including a dismissal of the bill on the motion of the complainant, or the dismissal of an appeal by the appellee for irregularity on the part of the appellant in bringing it to a hearing, is a final hearing. *Hayford v. Griffiths*, 3 Blatchf. 79; *The Alert*, 15 FED. REP. 620; *Goodyear v. Sawyer*, 17 FED. REP. 2. Other

cases hold that there is a final hearing only when some question of law or fact has been submitted to the court requiring not merely formal action but consideration. *Coy v. Perkins*, 13 FED. REP. 112; *Yale Lock Co. v. Colvin*, 14 FED. REP. 269.

The defendant relies upon the authority of these latter decisions, but they are not decisive here, because a complainant is not entitled, as of course to a final decree when he has obtained an order *pro confesso*. The matter of the bill is still to be decreed by the court, and then only when it is proper to be decreed. The bill is to be examined to see if the facts alleged entitle the complainant to relief. According to the earlier practice of the English chancery a bill would not be taken *pro confesso* without putting the complainant to prove its material allegations. *Johnson v. Desmoneere*, 1 Vern. 223. The later practice is to set down the bill for hearing, upon an order previously obtained that the bill be taken *pro confesso*, whereupon the record is produced, and the court hears the pleadings and pronounces the decree. The complainant is not permitted to take at his discretion such a decree as he may be willing to abide by. *Geary v. Sheridan*, 8 Ves. 192. This is the practice which obtains under the equity rules of this court. The consideration of the bill is a hearing, and is final when it results in the final disposition of the cause.

The taxation was correct.

HARVEY and another v. COMMONWEALTH OF VIRGINIA.

(Circuit Court, E. D. Virginia. May 12, 1884.)

1. CONSTITUTIONAL LAW—STATE STATUTE MAKING COUPONS ON BONDS RECEIVABLE FOR TAXES—SUBSEQUENT STATUTE.

Where a state contracts, in terms, that the coupons attached to its bonds shall be receivable in payment of "all debts, dues, and demands due the state," the contract embraces license taxes; and if, in a subsequent law, it prescribes such conditions precedent to the issuing of licenses as to enforce the payment of license taxes in money, and to preclude their payment in coupons, she violates that clause of the tenth section of the first article of the constitution of the United States which forbids any state from passing any law impairing the obligation of contracts.

2. SAME—RIGHT OF CITIZEN TO SUE STATE—JURISDICTION OF CIRCUIT COURT.

Quere, whether the first clause of the second section of the third article of the United States constitution, which extends the judicial power of the United States to *all* cases in law and equity arising under the constitution and laws of the United States, as this clause is put in force by the first section of the judiciary act of congress of March 3, 1875, giving jurisdiction of all such cases to the circuit courts of the United States, authorizes a citizen to sue his own state, in such a case, in a federal court.

3. SAME—CONFORMITY TO PRACTICE IN STATE COURT—REPEAL BY STATE OF SPECIAL ACT AUTHORIZING SUIT.

Even though (under section 914 of the Revised Statutes, requiring proceedings at law in courts of the United States to be conformed to proceedings in similar cases in state courts) an anomalous proceeding at law may be brought

in a federal court in the manner in which it is authorized by special act to be brought in a state court, yet if the state has repealed such special act, then the special proceeding is no longer maintainable in the federal court, and must be dismissed if brought.

4. SAME — UNCONSTITUTIONAL CLAUSES IN STATUTE — EFFECT OF REPEALING CLAUSE.

If any act of legislation, which is unconstitutional in many of its provisions, repeals all acts and parts of acts inconsistent with such provisions, the repealing clause is effective, although such provisions be null and void.

Petition.

Wm. L. Royall, for petitioners.

Frank S. Blair, Atty. Gen., and *Wyndham Meredith*, for the State of Virginia.

HUGHES, J. The petitioners are wholesale grocers in the city of Richmond. Their petition sets out, by reference and recital, the following facts:

By a recent act of the assembly of Virginia, that of March 15, 1884, relating to assessments and licenses, petitioners are required to pay to the state a license tax of \$504, for the privilege of carrying on their business for the year beginning on the first day of the present month. In pursuance of this law, petitioners paid to the collector of the city of Richmond the aforementioned sum of money, and duly received from the commissioner of revenue in Richmond a license to carry on their business. Under an act of assembly, commonly called the funding act, approved on the thirtieth of March, 1871, the state issued bonds, with coupons attached, which latter bear on their face the declaration of the state, that they shall be receivable, after they mature, for "all taxes, debts, dues, and demands due the state." See acts of Assembly of 1870 and 1871, c. 282, § 2, p. 379.

Petitioners claim that this was a contract which entitled them to pay their license tax of \$504 in coupons. They aver that they endeavored to obtain the benefit of this contract in the manner prescribed by the third section of another act of assembly of Virginia, viz., that relating to frauds upon the commonwealth, etc., approved January 14, 1882. See acts of Assembly of 1881-82, c. 7, § 3, p. 10. That is to say, they paid the \$504 in money to the collector of taxes for Richmond, and at the same time tendered to that officer an equivalent amount of past-due coupons, coupling this tender with the request that he would take possession of the coupons and deliver the same to the judge of the hustings court of Richmond for identification and verification by a jury, as provided by the third section of the said last-named act, with a view to their being received by the state in payment of petitioners' license tax, and to the return to them of the money (\$504) which they had paid for their license. Petitioners aver that the collector refused to receive the coupons thus tendered, for this or any other purpose, and also refused to give petitioners a certificate in writing of their tender, as required by the third section of the last-named act; justifying his refusal by the terms of section 112 of the aforementioned act of assembly of Virginia, relating to the assessment of taxes and prescribing the mode of applying for licenses, approved March 15, 1884, which forbids collectors from receiving aught but gold, silver, United States treasury notes, or United States national bank-notes for license taxes, in any case.

Petitioners, therefore, come into this court, and complain that the act of assembly of Virginia last named is repugnant to the tenth section of the first article of the constitution of the United States, which declares, among other things, that "no state shall pass any law impairing the obligation of contracts," and is therefore unconstitutional, null, and void; and that by the

conduct of the collector of Richmond, above described, they have been deprived of a right thus secured to them by the constitution of the United States, to-wit, their right to pay the license tax aforesaid due the state of Virginia in coupons of the state. They accordingly ask the intervention of this court, and pray that it will grant them the remedy furnished to tax-payers who wish to pay their taxes in coupons by the aforesaid act of assembly of the fourteenth of January, 1882, by summoning the state before it, and impaneling a jury to identify and verify as genuine the coupons which they tendered to the collector of Richmond; and that this court, when such genuineness is shown, shall certify the fact to the proper officer of the state, and require the acceptance of the coupons in payment of the said tax and the return of the \$504 of money which they have paid to the collector.

Upon motion, this court, by an order of the sixth instant, directed a rule to issue against the state, returnable to-day, reserving all questions of jurisdiction; and the state now appears in the persons of the attorney general and of special counsel assigned by law for the purpose

On the merits of the case, I do not think there ought to be any difference of opinion. Any pecuniary charge imposed by the government, for the privilege of residence, or of holding property, or of exercising a calling, or engaging in a business, within its jurisdiction, is a tax. No refinements in lexicography, nor hypercriticisms upon the purport of words or phrases, can make such a charge anything else but a tax. There are taxes *per capita* levied upon persons exercising the privilege of residence in a state. There are taxes *ad valorem* levied upon persons exercising the privilege of holding property in the state. There are license taxes levied upon persons exercising the privilege of carrying on the business of merchants, or manufacturers, or other callings. They are all essentially the same in their fundamental nature; they are a charge imposed by the state for the exercise of privileges, as a compensation to herself for the protection which she affords by her laws alike to persons, to property, and to honest occupation. It is useless to say that such a charge is only a tax, when levied for the purpose of revenue; for there are such things as prohibitory taxes, the object of which is the opposite of revenue, which are taxes nevertheless. It is unavailing to refine upon such a subject. It is offensive, if not insulting, to the common sense of every candid citizen to pretend that the charge which the state may see fit to impose on merchants for the privilege of carrying on their business is anything else than the commonplace thing which practical men call a tax. The right of residence, of holding property, of conducting a business, may be a natural right, but the enjoyment of it under the protection of law is a privilege granted by the state, and therefore, for short, I have called it a privilege. Nor is there any essential difference between a tax *per capita*, levied for the privilege of residence, a tax *ad valorem*, levied for the privilege of holding property, and a license tax, levied for the privilege of conducting a particular calling. And therefore, when a legislature, by statute, singles out the privilege of carrying on trades, professions, and occupations, as has been done in the act of March 15, 1884, and requires a tax to be paid for

that privilege, and, instead of allowing it to be paid, as the state has pledged her faith that all taxes may be paid, viz., with coupons, forbids such payment by the most positive and stringent prohibitions, and absolutely requires its payment exclusively in money, the evasion of the state's obligation is manifest, the repudiation of its compact with the tax-payer tendering coupons is palpable, and the statute is unconstitutional so far as it prevents the payment of license taxes in verified coupons.

How can there be a rational doubt that the petitioners in this case had a right to pay their license tax in coupons after they had been identified and verified in the manner defined by law? They have been denied that unquestionable right; and therefore, on the merits alone, this case is a plain one for relief. The difficulty is the always important one in federal practice of jurisdiction. By the proceeding resorted to in the present case the state is summoned, in her sovereign character, before a federal court to answer a petition, on a week's notice. She appears in the persons of her law officers. It matters not how obviously just the prayer of the petitioners may be; that cannot make good the jurisdiction; for the meritorious character of a demand can never cure defects in procedure if that be essentially faulty. The question, therefore, is whether this court has power to administer relief to these petitioners *in this proceeding*. It will be seen from what follows that this is a difficult question, and involves a necessary, and, I fear, a somewhat tedious, review of the law of jurisdiction as applicable to the federal courts.

The remedy by summary petition, commencing originally with a rule *nisi*, is exceptional in the practice of the federal courts as an original proceeding, and is anomalous in all systems of judicature. The practice is more questionable when sovereign states are the parties defendant. In general, a sovereign state cannot be sued except in a manner and a forum consented to and chosen by itself. See the opinion of Lord SOMERS in the great case of *The Banker's Case*, 5 Mod. Rep. 29-62. If there be an exception to this general rule it is found in the terms of the second section of the third article of the constitution of the United States, which declares that "the judicial power of the United States shall extend to all cases in law and equity, arising under this constitution, the laws of the United States, and treaties," etc. This grant is without limitation, in terms, as to parties to such suits, and does not, in terms, except suits brought against the sovereign states of this Union. That the states are contemplated by it is inferred from the fact that this section is to be construed in connection with the clause of the constitution before referred to, which forbids a state to pass any law impairing the obligation of contracts. As illustrating the full purport of this grant of jurisdiction in respect to states, it may be mentioned that, further on in the same section of the constitution, jurisdiction is given of controversies between a state and citizens of another state, and that in pursuance of this latter

grant the supreme court of the United States, in the case of *Chisholm v. Georgia*, 2 Dall. 419, held that a suit brought by a citizen of South Carolina against the state of Georgia had been properly brought in the supreme court of the United States. This decision led to a repeal of the grant by the speedy adoption of the eleventh amendment of the constitution, which declares that the federal courts shall not entertain any suit brought against any state "by citizens of another state, or by citizens or subjects of any foreign state." This amendment would seem to have a strong bearing on the question whether a state may be sued in a federal court by one of its own citizens. The first clause of the jurisdictional section of the constitution had left that right of the citizen to inference; and if that inference had not been legitimate it must be supposed that the eleventh amendment would have been made to embrace a denial of the right of a citizen to sue his own state in the federal courts, as well as his right to sue other states of the Union. The express denial of the latter right, and omission to deny the former, would seem, on the principle, *expressio unius est exclusio alterius*, to interpret affirmatively the section in favor of the right of a citizen to sue his own state in a federal court.

The ordinary rules of construction would therefore seem to sustain the proposition that of suits against states by their own citizens for rights arising under any clause of the constitution or laws of the United States, the federal courts have jurisdiction, to be regulated in its exercise by such laws as congress may prescribe as to practice and forms of procedure; especially in cases in which those citizens are allowed by state laws to sue their own state in state courts.

Passing now to the legislation of congress on this subject, that body in its latest General Statutes relating to the jurisdiction of federal courts, has enacted that the circuit courts of the United States shall have cognizance, among other things, of "all suits of a civil nature at common law or in equity," where the matter in controversy exceeds the sum of \$500, and "arises under the constitution or laws of the United States." The language of this statute, so far as it regards parties to suits, is just as broad as that of the constitution itself. It makes no exception of suits in which states are parties defendant, and would seem to leave the citizen of any state at liberty to sue his own state in a federal court for any right secured to him, as petitioners in this case have, by the constitution or laws of the United States of which his state has deprived him. If, therefore, a citizen's claim against his state involves the value of \$500, and is founded on the constitution or a law of the United States, it would seem that he may bring his suit in a circuit court of the United States, provided it be a "suit at common law or in equity," in the ordinary acceptation of that technical phrase.

The next question to be considered is whether the summary proceeding, by petition now under consideration, is such a proceeding as

the constitution and the statute putting it in force contemplate in the phrase "suit at common law;" for no one pretends that this is a suit in equity.

In regard to suits in equity, the states have no power, direct or indirect, over the procedure in federal courts; and it is questioned whether congress can confer it to any material extent. But the states have been clothed by congress with a large, though indirect, control over the practice of the federal courts in common-law cases. Section 914 of the Revised Statutes of the United States provides, in regard to suits other than those in equity and admiralty, brought in the federal courts, that "the practice, pleadings, and forms and modes of proceeding in civil causes" shall conform as near as may be to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the state within which the United States courts are held. This court is therefore authorized to look into the laws of Virginia relating to the practice prescribed to its courts in cases at law, and to determine from those laws whether it has jurisdiction to entertain a proceeding like the one now under consideration.

This proceeding is evidently, and I believe admittedly, founded on the third section of the act of assembly of January 14, 1882, relating to frauds upon the commonwealth, which has already been referred to. That section, as before stated, authorized the method of proceeding which has been pursued in this case to be used in the courts of the state by tax-payers who wished to pay their dues with coupons; and therefore the same procedure, if now admissible in the state courts, would be admissible in this court. The section allowed the tax-payer to sue the state herself, in her own name and person. Accordingly, when this case was first called at bar, and I issued the rule under which the state of Virginia has now appeared, I supposed that the petition could be entertained. But I am confronted to-day by the 114th section of the act for assessing taxes, and for providing a mode of applying for licenses, approved March 15, 1884, heretofore mentioned, which repeals in general terms, as to license taxes, the third section of the act of January 14, 1882, creating this procedure. The conclusion that this 114th section does effect such repeal is inevitable. For section 112 of the same act is in the following words:

"All applications for licenses shall be made, and all taxes assessed by chapter 1 of this act shall be paid, in lawful money of the United States, in the mode and subject to the provisions of an act to regulate the granting of licenses, approved the seventh of February, 1884, and any act amendatory thereto, before any corporation, firm, or person shall be entitled to receive said license, or to transact any business, profession, or calling for which a license is required by chapter 1 of this act."

The act to which this section refers, and which it adopts and makes part of itself, is the act for regulating the granting of licenses, etc., approved February 7, 1884, as amended by another act for the same purpose, approved February 25, 1884. This act, as amended, con-

tains sundry provisions, the object of which is to require the payment of all license taxes exclusively in gold or silver coin, United States treasury notes, or national bank-notes, and stringently forbids the issuing of licenses except upon the payment of the license taxes in the money it describes. It forbids the receiving of coupons, either in payment or for verification, or for any purpose, by forbidding any application for a license to be considered or granted unless all its requirements in regard to payment in money shall have been first fully complied with.

The act of March 30, 1884, having in its 112th section adopted the provisions of the acts of February just described, then goes on, in its 114th section, to repeal the general tax law of 1882, and also to repeal "all acts and parts of acts inconsistent with this act,"—that is to say, inconsistent with any of its own provisions; inconsistent with its 112th section; inconsistent, as a consequence, with the acts of February, 1884. Can this 112th section, adopting the February law, stand and be enforced without rendering null and wholly inoperative the third section of the act of January, 1882, which provides for the verification of coupons and for their reception by the state in payment of license taxes? The two laws are utterly repugnant to and radically inconsistent with each other. A formal repeal was hardly necessary, inasmuch as the law of 1882 was already completely nullified as to license taxes. Yet the 114th section of the law of March gives it the *coup de grace* by repealing it in terms, and thereby abolishing, as to license taxes, the proceeding by summary petition which the law of 1882 gave to license tax-payers who wished to pay their taxes with verified coupons. The law giving this summary remedy in the state courts being abolished, it follows that this procedure, *ipso facto*, ceases to be admissible in the federal courts.

It may be suggested that a repealing clause, embodied in an unconstitutional act, may itself be unconstitutional by reason of the association in which it is found. The authorities on the subject, however, are to the contrary of this. Judge COOLEY says, in his Constitutional Limitations, (3d Ed. p. 186,) that "where the repealing clause in an unconstitutional statute repeals all inconsistent acts, the repealing clause is to stand and have effect, notwithstanding the invalidity of the rest." See, to the same effect, Dwarries, St. (Potter's Ed. of 1874,) p. 154.

The present proceeding must, therefore, be dismissed for want of jurisdiction in this court to entertain it; and it is so ordered.

See *Baltimore & O. R. Co. v. Allen*, 17 FED. REP. 171, and note, 188.—[ED.]

NOTE BY JUDGE HUGHES.

The proposition, stated *arguendo* in the foregoing opinion, that a citizen may sue his own state in a circuit court of the United States, on a right given him by the constitution of the Union, of which his state has deprived him,
v.20,no.7—27

has naturally given rise to much discussion in Virginia, where there has been recent legislation taking away or affecting the right which she had granted of paying state taxes in coupons cut from her public bonds. In consequence of that *dictum* many suits have been already brought, and many more are likely to be brought, directly against the state in the United States circuit courts held in the judicial districts of Virginia. It is therefore proper that a more detailed statement of the grounds of the opinion should be appended to it.

The proposition that a citizen, who has been injured in a constitutional right by his own state, may sue that state in an inferior federal court is a novel if not a startling one. It is probable that such a suit has never before been brought. It is certain that it could not have been brought before the passage of the judiciary act of March 3, 1875, (Supp. Rev. St. 173, and 18 St. 470;) yet the language of section 2 of article 3 of the constitution of the United States seems to extend the judicial power of the United States to such suits. That language is that this power shall extend to "all cases in law and equity arising under this constitution, the laws of the United States, and treaties," etc. There is not, in the clause itself, or in any other provision of the constitution, an exception from this grant of suits brought against states by their own citizens. It is true that the second paragraph of the same section of the constitution provides that, in cases in which a state shall be a party, the supreme court of the United States shall have original jurisdiction; and Mr. Alexander Hamilton, in the eighty-first number of the *Federalist*, indicated the belief that the jurisdiction granted by this clause was intended to be an *exclusive* "original jurisdiction." But the first congress, that of 1789, construed the grant otherwise in section 13 of the first judiciary act; and the supreme and circuit courts of the United States have in repeated decisions held that the constitution, in giving original jurisdiction to the supreme court of causes in which states are parties, did not intend that that jurisdiction should be exclusive. These decisions are reviewed in the very recent case of *Ames v. Kansas*, 111 U. S. 449, and 4 Sup. Ct. Rep. 437, in a decision in which the supreme court of the United States reiterated that proposition.

Section 2 of article 3 of the constitution having granted the jurisdiction under consideration, the only question is whether congress by legislation has authorized the federal courts to exercise it. Let it be borne in mind that as to the appellate jurisdiction of the supreme court, and all the jurisdiction of the circuit and district courts of the United States, the constitution does not, *proprio vigore*, confer jurisdiction, but has granted a large fund of it which congress may or not bring into exercise. Although congress was slow to utilize all the jurisdiction authorized by the constitution, yet, since 1875, it may be said to have well nigh brought the whole into requisition.

As early as 1789 congress granted appellate jurisdiction to the supreme court in all cases authorized by section 2 of article 3; that is to say, by the twenty-fifth section of the judiciary act of 1789, (now modified into section 709, Rev. St.), congress authorized the supreme court to review on appeal all judgments and decrees of the courts of highest resort in the states, in cases where is drawn in question the validity of any state statute alleged to be repugnant to the constitution, or to a law or to a treaty of the United States, in which the decision of such court was in favor of the validity of such state statute. This is but the gist of the principal clause of the section, which is very comprehensive in its grant of jurisdiction. The effect and intent of this section, as affecting suits brought against their own states by citizens appealing under it to the supreme court of the United States, was carefully discussed by Chief Justice MARSHALL in the case of *Cohen v. Virginia*, 6 Wheat. 378 *et seq.*, extracts from which are given below. The learned chief justice maintained in that case, as early as 1821, that under the section of the constitution which we are considering, as put in force by section 25 of the judi-

ciary act of 1789, a citizen might sue his own state by appeal in the supreme court of the United States, when deprived by her of a constitutional right.

It was not until the passage of the judiciary act of March 3, 1875, that congress gave to the circuit courts of the United States jurisdiction, as authorized by section 2 of article 3, of all cases arising under the constitution, or a law or treaty of the United States. In this act such jurisdiction was given without exception as to the parties to suits, or their character. The act of 1789 had given jurisdiction to the supreme court in all cases of this class, without respect to amounts (which might be ever so small) or as to parties. The jurisdiction given by the act of 1875 to the circuit courts is equally without exception as to parties, but as to amounts is limited to suits where the matters in controversy are not less than \$500 in value. The effect and intent of the act of 1875, in respect to states or parties, was discussed with care by Chief Justice WAITE in the case, before mentioned as very recently decided, of *Ames v. Kansas*, extracts from which are given below.

First, let us see what was said on the question whether a citizen could sue his own state in a federal court for a federal right of which she had deprived him, in the case of *Cohen v. Virginia*. The state of Virginia had proceeded against her own citizen in one of her own courts by indictment, and deprived him of a right given him by a law of congress. Whereupon the citizen sued the state by appeal in the supreme court of the United States, under section 25 of the judiciary act of 1789. One of the objections urged against the jurisdiction was that a state was a party. Chief Justice MARSHALL, among other things, said, (page 378:) "The first question to be considered is whether the jurisdiction of this court is excluded by the character of the parties, one of them being a state and the other a citizen of that state. The second section of the third article of the constitution defines the extent of the judicial power of the United States. It gives jurisdiction to the courts of the Union in two classes of cases. In the first their jurisdiction depends on the character of the cause; whoever may be the parties. This class comprehends all cases in law and equity arising under this constitution, the laws of the United States, and treaties made under their authority. This clause extends the jurisdiction of the court to all cases described, without making in its terms any exception whatever, and without any regard to the condition of the party. If there be any exception, it is to be implied against the express words of the article. In the second class the jurisdiction depends entirely on the character of the parties."

On page 391 of the opinion this passage occurs: "It is to give jurisdiction, where the character of the parties would not give it, that the important part of the clause which extends the judicial power to all cases arising under the constitution and laws of the United States was inserted. If jurisdiction depended entirely on the character of the parties, and was not given where the parties have not an original right to come into court, that clause would be mere surplusage."

Page 382: The judicial power of the United States "is authorized to decide all cases of every description arising under the constitution or laws of the United States. From this general grant of jurisdiction no exception is made of those cases in which a state may be a party. When we consider the situation of the government of the Union and of a state, in relation to each other; the nature of our constitution; the subordination of the state government to that constitution; the great purpose for which jurisdiction over all cases arising under the constitution and laws of the United States is confided to the judicial department,—are we at liberty to insert, in this general grant, an exception of those cases in which a state may be a party? Will the spirit of the constitution justify this attempt to control its words? We think it will not. We think a case arising under the constitution or laws of the United

States is cognizable in the courts of the Union, *whoever may be the parties.*
* * *

Page 383: "The constitution gives to every person having a claim upon a state a right to submit his case to the courts of the nation. However unimportant his claim may be, however little the community may be interested in its decision, the framers of our constitution thought it necessary for the purposes of justice to provide a tribunal, as superior to influence as possible, in which that claim might be decided. Can it be imagined that the same persons considered a case involving the constitution of our country and the majesty of the laws, questions in which every American citizen must be deeply interested, as withdrawn from this tribunal because a state is a party?
* * *

Page 390: "It has been urged, as an additional objection to the jurisdiction of this court, that cases between a state and one of its own citizens do not come within the general scope of the constitution, and were obviously never intended to be made cognizable in the federal courts. * * * It may be true that the partiality of the state tribunals, in ordinary controversies between a state and its citizens, was not apprehended, and therefore the judicial power of the Union was not extended to such cases; but this was not the sole nor the greatest object for which this department was created. A more important and much more interesting object was the preservation of the constitution and laws of the United States, so far as they can be preserved by judicial authority; and therefore the jurisdiction of the courts of the Union was expressly extended to all cases arising under that constitution and those laws. If the constitution or laws may be violated by proceedings instituted by a state against its own citizens, and if that violation may be such as essentially to affect the constitution and the laws, such as to arrest the progress of government in its constitutional course, why should these cases be excepted from that provision which expressly extends the judicial power of the Union to *all* cases arising under the constitution and laws? After bestowing on this subject the most attentive consideration, the court can perceive no reason, founded on the character of the parties, for introducing an exception which the constitution has not made; and we think that the judicial power, as originally given, extends to all cases arising under the constitution, or a law of the United States, *whoever may be the parties.*"

This language is too explicit to admit of doubtful interpretation. So far as the authority of Chief Justice MARSHALL can establish it, the doctrine is true that the constitution does authorize a citizen to sue his own state in a federal court for a right given him by the constitution or a law of the United States of which his state has deprived him.

The language of the court in the late case of *Ames v. Kansas* is equally as explicit. It refers to and adopts the language of Judge MARSHALL in *Cohen v. Virginia*. That was a case in which Kansas had sued its own citizen (a railway company) in one of its own courts to question a right claimed by the company under a law of congress. The company removed the case into the circuit court of the United States, under the act of March 3, 1875. On denial by this court of a motion to remand, appeal was taken by the state to the supreme court of the United States. As to the removal, the company was in the relation of actor or plaintiff, and the state in that of defendant. The question was whether the federal court could take cognizance, as against the state and against her will, of a suit in which the state was a party. The supreme court, following the reasoning of Judge MARSHALL in *Cohen v. Virginia*, held that the circuit court had, after removal, rightful cognizance of the suit. After discussing at length the question whether, in the second paragraph of section 2, art. 3, of the constitution, which gives "original jurisdiction" to the supreme court of cases in which a state is a party, it was intended that that jurisdiction should be *exclusive*, and after reviewing section

13 of the judiciary act of 1789, and the cases in which the contrary view had been held, Chief Justice WAITE, in the concluding paragraphs of the decision, said:

"In view of the practical construction put upon this provision of the constitution by congress at the moment of the organization of the government, and of the significant fact that from 1789 until now no court of the United States has ever, in its actual adjudication, determined to the contrary, we are unable to say that it is not within the power of congress to grant to the inferior courts of the United States jurisdiction in cases where the supreme court has been vested by congress with original jurisdiction. It rests with the legislative department of the government to say to what extent such grants shall be made. * * * We are unwilling to say that the power does not exist.

"It remains to consider whether jurisdiction has been given to circuit courts of the United States in cases of this kind. As has been seen, it was not given by the judiciary act of 1789, and it did not exist in 1873, when the case of *Wisconsin v. Duluth*, 2 Dill. 406, was decided by Mr. Justice MILLER on the circuit. But the act of March 3, 1875, c. 137, (18 St. 470,) 'to determine the jurisdiction of circuit courts, and to regulate the removal of causes from the state courts, and for other purposes,' does, in express terms, provide that 'the circuit courts of the United States shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature, at common law or in equity, * * * arising under the constitution or laws of the United States;' and also that suits of the same nature, begun in a state court, may be removed to the circuit courts. * * * The only question we have to consider, therefore, is whether suits cognizable in the courts of the United States on account of the nature of the controversy, and which need not be brought originally in the supreme court, may now be brought in or removed to the circuit courts, without regard to the character of the parties. All admit that the act does give the requisite jurisdiction in suits where a state is not a party; so that the real question is whether the constitution exempts the states from its operation. The same exemption was claimed in *Cohen v. Virginia* to show that the appellate jurisdiction of this court did not extend to the review of the judgment of a state court [rendered] in a suit by a state against one of its own citizens; but Chief Justice MARSHALL said: [here quoting some of the passages already quoted above.] The language of the act of 1875, in this particular, is identical with that of the constitution, and the evident purpose of congress was to make the original jurisdiction of the circuit courts co-extensive with the judicial power in all cases where the supreme court had not already been invested by law with exclusive cognizance. * * * The judicial power of the United States extends to *all* cases arising under the constitution and laws, and the act of 1875 commits the exercise of that power to the circuit courts. It rests, therefore, on those who would withdraw any case within that power from the cognizance of the circuit courts, to sustain their exception on the spirit and true meaning of the act, which spirit and true meaning must be so apparent as to overrule the words its framers have employed. To the extent that the words conflict with other laws giving exclusive jurisdiction to this court, this has been done, *but no more.*"

The court accordingly gave judgment sustaining the jurisdiction of the circuit court of the United States in Kansas to hear and decide the case.

Can there be any doubt that this language of Chief Justice WAITE as conclusively settles the question under consideration as to the circuit courts, as that of Chief Justice MARSHALL did as to the appellate jurisdiction of the supreme court? There certainly cannot be. Still, the maxim remains true that a sovereign state cannot be sued except in a manner and in a forum consented to by itself. But let it be remembered that the constitution of the

Union is no more nor less than a grant by the states to the Union of the powers which it enumerates. And the very question which we have been discussing is whether or not section 2, art. 3, is a grant of the power and jurisdiction under consideration. If it is, as is held by the two chief justices, then the state of Virginia has consented to be sued in the federal courts in the cases embraced by that section, and the question is at end.

SCHULENBERG-BOECKELER LUMBER Co. and others v. TOWN OF HAYWARD and others.

C. N. NELSON LUMBER Co. and another v. TOWN OF LORRAINE and another.

(Circuit Court, W. D. Wisconsin. March, 1884.)

1. COLLECTION OF TAXES—INJUNCTION TO RESTRAIN—JURISDICTION OF UNITED STATES COURTS—HOW ESTABLISHED.

In order to enable a federal court to enjoin the collection of state, county, and municipal taxes, it must proceed upon clear and established principles of equity jurisdiction.

2. EQUITY—INTERFERENCE OF, TO PREVENT MULTIPLICITY OF SUITS—IRREPARABLE INJURY—CLOUD ON TITLE.

Equity will not interfere except in special cases, as of fraud, to save a multiplicity of suits, or prevent irreparable injury, or a cloud upon title to land.

3. JURISDICTION—NOT CONFERRED BY JOINDER OF CLAIMS INSUFFICIENT IN AMOUNT TO LARGE ONES.

When claims are not of sufficient amount to give a court jurisdiction if suits are severally brought, a court will not gain jurisdiction by joining them with other claims sufficient in amount. Courts of equity cannot wrest jurisdiction from courts of law because there is more than one plaintiff severally interested in a controversy.

4. MULTIPLICITY OF SUITS.

Many actions by different plaintiffs, when an action at law will settle a controversy as to each, is not what is intended by a multiplicity of suits.

5. EQUITY—MULTIPLICITY OF SUITS—PARTIES CANNOT BASE RIGHTS ON RIGHTS OF THIRD PERSONS.

Where no one of a number of complainants stands in danger of a multiplicity of suits, they cannot complain that a third person must have a suit in order to obtain his legal rights.

6. TAXES—UNJUST ASSESSMENT—REMEDY AT LAW.

Where a tax is unjustly assessed, a complainant has an adequate remedy at law by paying the tax and suing to recover the amount so paid.

In Equity.

Clapp & Macartney, for complainants. *I. N. & J. W. Castle* and *Fayette Marsh*, of counsel.

Marshall & Jenkins, for defendants. *Gregory & Gregory*, of counsel.

BUNN, J. These cases are brought by complainants, being natural persons and corporations, citizens of Minnesota and Missouri,—one against the town of Hayward, in Sawyer county, and one against the town of Lorraine, in Polk county, Wisconsin,—to obtain a perpetual

injunction restraining the collection of the general state, county, and town taxes for the year 1883 upon a large quantity of saw-logs belonging, severally, to the complainants, cut in the winter of 1882-83, in said towns, from the complainants' lands lying therein, and banked upon the Namacogin river, in said town of Hayward, in Sawyer county, and upon the Clam river, in said town of Lorraine, in Polk county. The complainants, having filed their bills of complaint, now move the court thereupon for an injunction, pending the litigation, to restrain the town officers from levying upon the personal property of the complainants, situate in said towns, for the satisfaction of said taxes. The claim made by complainants is this: That they are non-residents of the state of Wisconsin, and are the owners in severalty of large quantities of timbered lands in the counties named, valuable, principally, for the pine timber growing thereon; that during the winter of 1882-83 they caused to be cut upon said lands large quantities of pine logs, with the sole purpose and intent of running them out through the navigable streams of the state into the St. Croix river, and thence to the city of Stillwater, Minnesota, to be manufactured into lumber for market in that and other states west of the Mississippi; that with this view they cut and hauled said logs to said rivers, which were navigable streams, and there rolled them down between the two banks of said rivers, upon the ice thereof, to await high water in the spring, whereby they could and did, in the month of May, 1883, run them down into the St. Croix river to Stillwater, in the state of Minnesota; that while the logs were there banked in the said stream, and upon the ice thereof, awaiting shipment, the assessors of said towns, in the month of April, levied these taxes upon them; that such logs were not subject to taxation in the towns where they were so cut and assessed, (1) because they had no *situs* in the state of Wisconsin, but had then become and were the subject of commerce, and in transit from one state of the Union to another, and were exempt from taxation by reason of the provision in the United States constitution giving congress the power to regulate commerce with foreign powers and between the several states; and (2) because the law of Wisconsin which authorizes the taxation is repugnant to the constitution of Wisconsin, which provides a uniform rule of taxation, and makes an unjust discrimination against non-residents of the town.

It will be evident, from this brief statement of the complainants' case, that the questions involved are of grave importance to the state and to holders of pine lands. There is also a question of jurisdiction in the case almost as important, and which it will be essential first to consider.

In order to enable this court to tie up the hands of the local state authorities, and stay the collection of the ordinary state, county, and municipal taxes, it must proceed upon clear and established principles of equity jurisdiction. By the law of congress (see section 3224,

Rev. St.) neither a federal nor state court has any power in any case to stay by injunction the collection of a United States tax. The language of the provision is broad enough, indeed, to cover the case of any tax, national or state. But although the provision no doubt applies only to taxes levied by the general government, it serves to show the temper and attitude of the government upon the general question. The reasons are quite as strong against the national courts interfering to stay the collection of state taxes as they are against allowing any court, state or federal, to interfere to stay the collection of the national revenues. And, consequently, we see that the United States courts have ever shown the greatest caution and reluctance in entertaining jurisdiction in such a case, and will always refrain from taking jurisdiction except when the complaint makes a case free from doubt, and under some well-recognized head of equity. The jurisdiction is claimed in this case chiefly on the ground of preventing a multiplicity of suits. But I am of the opinion that this principle is not applicable here.

In the first of the above-entitled cases there are eight complainants, some of them corporations and some of them natural persons, citizens of Minnesota and Missouri. They are all severally interested in the subject-matter of the suit; and as to six out of the eight, their claims amount to less than \$500. In the other, one of the two complainants has a claim of less than that sum. I think it clear that those whose claims are not of such an amount as to give the court jurisdiction if their suits had been severally brought, cannot, by joining with others whose claims exceed \$500, give this court jurisdiction of those cases. See *King v. Wilson*, 1 Dill. 555; *Adams v. Board of Com'rs*, McCahon, 235; 2 Abb. Pr. (N. S.) 12; *Township of Bernards v. Stebbins*, 3 Sup. Ct. Rep. 252, and cases cited. This leaves two complainants in one case and one in the other; certainly not a very formidable exhibit, so far as numbers are concerned, to bring the case within the principle contended for, allowing that they can so join together. But can they so join? Their interests are, in every important sense, several. There is no unity or community of interest between them as regards the subject-matter of the suit. They but have a common interest in the law of the case, which is not enough. If they brought actions at law they could not join. I think it quite as clear that they cannot join in equity.

If the town authorities were attempting to levy a tax unauthorized by law, all property owners would have a common interest and be affected alike. They might join, or one or more might sue for themselves and all others similarly situated, and one suit in equity might determine the whole controversy. But here is no complaint that the tax is not legal. The gist of the complaint is that the assessor has extended it against property not subject to assessment. Each complainant must make his own case upon the facts. One might succeed and another fail. I know of no case, and have been referred to none,

in which persons so severally interested have been permitted to join in either a legal or equitable suit, and to allow it would be to confound the established order of judicial proceeding, and lead to interminable confusion and embarrassment. Courts of equity cannot wrest jurisdiction from the courts of law because there is more than one plaintiff severally interested in the controversy; and many actions by different plaintiffs, where one action at law will settle the controversy as to each, is not what is intended by a multiplicity of suits. Here, no one of the plaintiffs would have any interest in any suit brought by another, and no one can complain because others are compelled to sue, inasmuch as he could not be called upon to share either in the vexation or expense. No one of the complainants stands in any danger of a multiplicity of suits affecting himself, and he cannot complain that some other person must have a suit in order to obtain that other person's legal rights. These cases come within the principle of *Cutting v. Gilbert*, decided by Judge NELSON, in 5 Blatchf. 259; *Dodd v. City of Hartford*, 25 Conn. 232; *Youngblood v. Sexton*, 32 Mich. 406; and *Barnes v. City of Beloit*, 19 Wis. 93.

It was contended by counsel on the argument that, as the state law forbids the bringing of replevin against the tax collector, there is no adequate remedy at law. I cannot concur in this view. The complainants have an adequate remedy at law in paying the tax demanded, and suing the town to recover it back. I am aware that some of the state courts, particularly in Illinois, have gone a considerable way in the direction of allowing an injunction to restrain the collection of a tax. But we have seen, and may see further by a reference to the decisions, what is the attitude of the general government, legislative and judicial, upon this subject. And the general doctrine holds good by the weight of authority, state and national, that equity will not interfere except in special cases, as of fraud, to save a multiplicity of suits, or prevent irreparable injury, or a cloud upon title to land. See *Dows v. City of Chicago*, 11 Wall. 108; *Hannewinkle v. Georgetown*, 15 Wall. 548; *Cummings v. Nat. Bank*, 101 U. S. 153; *State Railroad Tax Cases*, 92 U. S. 575; High, *Inj.* § 496; *Van Cott v. Sup'rs of Milwaukee*, 18 Wis. 247; *Cramer v. Sup'rs of Milwaukee*, *Id.* 257; *Mills v. Gleason*, 11 Wis. 470; *Quinney v. Town of Stockbridge*, 33 Wis. 505; *Brewer v. Springfield*, 97 Mass. 152; *Cooley, Tax'n*, 538.

In the judgment of the court this case comes fairly within the principle of *Dows v. Chicago*, 11 Wall. 108, and should be ruled by that case. And though the court in *Cummings v. The Bank*, 101 U. S. 157, use language which might, taken apart from any particular state of facts, seem to approve a somewhat broader rule, it will be considered that what was said was with reference to the facts then before the court, which facts brought the case within the principle of taking jurisdiction to prevent a multiplicity of suits. The case of *Dows v. City of Chicago* is affirmed in *State Railroad Cases*, *supra*, and the

doctrine of the case has never been disturbed nor questioned in any court of the United States.

For these reasons the motions must be denied and the complainants' bills dismissed. And as these questions of jurisdiction dispose of the case, it will not be necessary or proper to express any opinion upon the merits of the legal questions presented by the bills, though very ably and exhaustively discussed upon the argument.

CORNING and others v. DREYFUS.

KREBS and another v. SAME.

MADDOX and others v. SAME.

ALTSHEED and others v. SAME.

DREYFUS and others v. SAME.

HOFFHEIMER and others v. SAME.

ADDLER and others v. SAME.

LAZARD v. SAME.

BLOCK and others v. SAME.

WEILLER and others v. SAME.

(Circuit Court, E. D. Louisiana. February, 1884.)

1. ATTACHMENTS—PRIORITY OF LEVIES—STATE AND UNITED STATES COURTS.

In case of several levies by the same officer, priority depends upon the time of levy, or of commencing to hold under the subsequent processes. To effect a levy upon property in actual possession of the officer no overt act is necessary. In case of actual successive levies, the time when made determines rank or order of priority. In case of no actual subsequent levy, the time when officer commenced to hold under the process determines. In either case, the evidence may come from his return.

2. SAME—PROPERTY HELD BY OFFICER IN DUE PROCESS—SEIZURE UNDER PROCESS OF ANOTHER COURT.

When property susceptible of manual delivery is physically held by an officer of and under process from a court of one jurisdiction, it is incapable to be subjected to seizure by an officer and under process from a court of another jurisdiction.

3. SAME—UNLAWFUL DETENTION—VOID LEVY.

A levy upon property, otherwise valid, if effected by means of an unlawful detention of the property is void; but the invalidity of such a levy cannot be urged by a party whose right also springs solely from a seizure effected through the unlawful detention.

Attachment.

Semmes & Payne, for Krebs & Spiers and others.

Chas. S. Rice, for Corning & Co.

Bayne & Denegre, *Miller & Finney*, and *Walter D. Denegre*, for Hoffheimer & Co.

T. Gilmore & Sons, for Lazard and Block & Co.

D. C. Labatt, for Weiller & Co.

BILLINGS, J. These causes are submitted together with reference to the distribution of the proceeds of property seized under attachments. The questions are as to the claim of a creditor under an attachment from the state court, and as to the order of priority of creditors obtaining attachments in this court. Various creditors had obtained attachments on Sunday in this court, which were also levied on Sunday. The same and other creditors obtained attachments in several suits, also in this court, some early Monday morning, shortly after midnight, and others between 8 and 10 o'clock A. M., which were also levied upon the same property. The intervenor had obtained his writ from the state court on Saturday. Early Monday morning, shortly after midnight, and while the marshal was holding possession of the property under the Sunday writs alone, the sheriff came to the store, where the property was situated, for the purpose of serving the writ, and demanded entrance, which the marshal refused. The sheriff placed his keepers around the building and guarded the same continuously down to the time of the sale, and served notice of seizure and subsequently process of garnishment upon the deputy marshal in charge of the store, who had executed the processes of attachment from this court. The marshal preserved his possession without interruption from the moment of the seizure down to the time he sold the property under the Monday writs, the Sunday writs having been abandoned. The property seized was the wines and brandies, etc., the stock of a wholesale liquor store.

1. As to the effect of what was done by the sheriff. Nothing is before the court except the proceeds of a sale. They, and they alone, can have an award who show title; and, since all claim under process against the property of a common debtor, those alone who show a levy of the process upon the property; for, in this state, the issuance and existence of the process create no lien. It disposes of this part of the case to say that the sheriff made no seizure—no caption of the property. Its possession was withheld from him, and access to it was forcibly denied him. Whether this was done under color of a good or bad writ, or without any writ, all seizure was prevented, and no lien was effected. This would end the case of the intervenor, as to any privilege upon the fund, unless he can maintain that the marshal, holding under color of a writ from this court, can be made to hold also under a writ from the state court subsequently served by the garnishment process. The authorities for this proposition cited are *Patterson v. Stephenson*, unreported, decided by the supreme court of Mis-

souri at the April term, 1883, and *Bates v. Days*, 17 FED. REP. 167. Those cases are put, by the courts which decided them, upon a statute of the state of Missouri, which was deemed to have been adopted by the practice act of congress, regulating the procedure in the federal courts. In Louisiana we have no such statute, and there is, therefore, no need to discuss the question as to what would be the legal consequences if one existed. In this state the courts are to be guided by the doctrine which is settled by the cases of *Hagan v. Lucas*, 10 Pet. 400, and *Taylor v. Carryl*, 20 How. 583, to the effect that when property susceptible of manual delivery has been seized, and is held by the officer of, and under process from, the court of one jurisdiction, it is incapable to be subjected to seizure by another officer of, and under process from, the court of another jurisdiction. The authorities are collated in *Wilmer v. Atlanta & R. Air-line R. Co.* 2 Woods, 427, 428. It follows, then, that since the goods were, and continued to be, in the physical possession and custody of the marshal, under writs of this court, the intervenor could have acquired, and did acquire, no interest in the goods under his writ from the state court, and he can have no claim to the proceeds arising from their sale.

2. As to the order of priority of the creditors who attached under the writs from this court, no right is claimed and no right could have been acquired under the Sunday writs or seizures. The statute prohibits (Civ. Pr. art. 207) the institution of suits and all judicial proceedings on Sunday. The question, then, is as to the priority of the attachments which were issued on Monday; i. e., after 12 o'clock on Monday morning. The statute makes the priority of attachments upon the same property to depend upon seizure. Civ. Pr. art. 723; *Scholefield v. Bradlee*, 8 Mart. (O. S.) 510; *Hepp v. Glover*, 15 La. 461; *Hermon v. Juge*, 6 La. Ann. 768. Priority is to be determined by noticing, when necessary, fractions of the day. *Tufts v. Carradine*, 3 La. Ann. 430. The property was already in the possession of the marshal, and there is established a definite order in which the writs came into his hands. It is contended that, therefore, this order establishes their rank as liens upon the property. When property is already in the hands of an officer in order to effect a seizure, it needs no overt act beyond his return upon the latter process in order to effect a seizure. *Turner v. Austin*, 16 Mass. 181; *Drake*, Attachm. § 269. But it must appear in some way that the officer commenced to hold under the later processes. The mere receipt of process does not effect a levy. In these cases the deputy marshal, who already held by keepers the property, received at the clerk's office some half dozen writs in the order of the number of the causes upon the docket, and then proceeded to give effect to the processes by proceeding with them and making new levies. He probably did this because of fears as to the validity of his possession under the Sunday writs as the basis of subsequent seizures. Whatever was his

reason, he made fresh levies. His returns show that he levied first the writ in the case of Corning & Co., subject only to the Sunday writs, and that he levied the writs of the next seizing creditors subsequently, and immediately after the levy in the case of Corning & Co.

I think this manner and order of his levying these writs should control. In *Turner v. Austin* the court say that when the officer has several writs in his hands at the same time he has a power as to the order of seizure which is liable to abuse. Nevertheless, they maintain that the time of the actual levy or commencement to hold determines. Of course, if the officer wrongfully levied, or omitted to levy, or wrongfully postponed the levy, of one writ to that of another, he would render himself liable; but in this case, since the levies were under writs simultaneously held, though not exactly simultaneously received, upon property already in the officer's possession, but, notwithstanding this fact, were independently and additionally made, it seems to me the question in dispute must be settled by the evidence furnished by the returns. The returns indicate the order in which he levied or commenced to hold under the respective writs. This would, then, settle the order of priority of the several writs of attachment, unless the position taken by the counsel in the case of H. Weiller & Co. is correct. He contends that while his writ was last received and last levied that it is entitled to precedence, and indeed to be counted the sole, valid writ, because the plaintiffs in the earlier writs had used Sunday suits and Sunday processes to detain the property until the Monday writs could be obtained and levied, and that of the writs not so tainted his is the first. As a proposition of law it is indisputable that when a plaintiff has unlawfully obtained possession of a debtor's property for the purpose of levying process upon it, such levy is wrongful, and cannot be upheld as against any one who is so situated that he can urge its invalidity. *Wells v. Gurney*, 8 Barn. & C. 769; *Ilseley v. Nichols*, 12 Pick. 270; and *Closson v. Morrison*, 47 N. H. 482. If this was a suit brought by the debtor against the officer, or if the creditor, who attempted to attach through the sheriff, had been able to acquire any lien upon the property sought to be reached, then the objection could be urged. But it cannot avail, as presented by this creditor; for either the Sunday plaintiffs did not detain unlawfully, and did not thereby obtain a week-day seizure, or else the party here urging the objection is endeavoring equally to profit by the detention. It is as if a plaintiff had brought property within a jurisdiction and then seized, and subsequently a second plaintiff had there obtained and levied process, and sought to establish priority by urging against the first plaintiff the wrongful importation. The answer would be that the illegality furnished the opportunity for both seizures, and neither plaintiff could urge it against the other. Until some party whose title is independent of the detention presents a claim the court can be governed only by the order in which

the levies were made. The seizure of Corning & Co., therefore, ranks first. Next, and as simultaneous seizures, must rank these in Krebs & Spiers, Maddox, Hobart & Co., T. Altsheed & Co., B. Dreyfus & Co., Hoffheimer & Co., William Addler, and Calmer Lazard. And after these, as well as that of Elias Block, the seizure of H. Weiller & Co., which was effected subsequently, viz., at 10:35 of Monday morning. Since the proceeds will more than satisfy the judgment in the case of the first seizure, and will not satisfy the judgments of those cases of simultaneous seizures, the costs must first be paid; second, the judgment in Corning & Co.; and the residue must be divided *pro rata* among Krebs & Spiers, Maddox, Hobart & Co., T. Altsheed & Co., B. Dreyfus & Co., Hoffheimer & Co., William Addler, and Calmer Lazard, according to the amount of their respective judgments, and let the matter be referred to E. R. Hunt, commissioner, to make the tabulated statement as a basis for the decree of distribution.

HENDERSON v. LOUISVILLE & N. R. Co.¹

(Circuit Court, E. D. Louisiana. April 9, 1884.)

1. COMMON CARRIERS—LOSS OF PARCEL.

A railroad company, a common carrier of goods and persons, is not responsible for the loss of a parcel of valuables, carried in the hand of a passenger, falling out of an open window, without any fault of the carrier, for the reason that upon notice or demand it did not stop a train to recover the parcel until the train arrived at one of the usual and advertised stations.

2. SAME—LIABILITY LIMITED BY CONTRACT.

Beyond his contract, the common carrier is under no greater obligations to passengers than is the rest of the community.

3. SAME—MORAL OBLIGATION—ACTION.

A disregard of obligations which are moral and not legal gives no basis for a claim for damages.

Cause Heard on the Petition and an Exception, which, under the practice in the state of Louisiana, has the effect of a demurrer.

O. B. Sansum and E. Sabourin, for plaintiff.

Thos. L. Bayne and George Denegre, for defendant.

BILLINGS, J. The petition sets forth that the plaintiff was a passenger upon the defendant's road, in one of defendant's coaches, forming a part of one of its regular trains, which was run by a conductor by it appointed, from the town of Pass Christian to the city of New Orleans, and lawfully had with her a "certain leathern bag," which contained money, diamonds, and jewelry, in all to the value of \$9,875, carrying said bag in her hand; that "while the plaintiff was closing a window of the car in which she was riding, to stop a fierce

¹ Reported by Joseph P. Hornor, Esq., of the New Orleans bar.

current of air which came in upon her," "said leathern bag and its contents, by some cause unknown to the plaintiff, accidentally fell from her hand through said open window and upon defendant's road;" that thereupon the plaintiff communicated to the said conductor of the defendants the loss of said bag and the value of its contents, and requested him to stop said train that she might recover the same, which he refused to do, but carried the plaintiff on for a distance of three miles to Bay St. Louis, from which place she dispatched a trusty person back to the place where said bag and its contents were dropped, but before said person could arrive at said place the said bag had been stolen and carried away, whereby the plaintiff lost the value of said contents, for which the plaintiff prays judgment.

The question of law presented is, was the defendant, who was a common carrier of goods and persons, to-wit, a railroad company, responsible for the loss of a parcel of valuables carried in the hand of a passenger falling out of an open window without any fault of the carrier, for the reason that upon notice and demand it did not stop a train to recover the parcel until the train arrived at one of the usual and advertised stations. The propositions of law which the plaintiff must maintain in order to allow an affirmative answer to this question are two: (1) That the plaintiff had a right to take into the car with her the bag and its contents, and to carry the same in her hand or in some other way under her personal supervision, and in her personal custody; and (2) that the defendants, as an incident of their contract to carry the plaintiff, entered into some further contract with reference to the carriage and safety of the same which involved liability in case of loss or separation without fault on defendant's part from the plaintiff's possession. The first proposition is correct; the second cannot be maintained. The plaintiff, considering the well-known habits and requirements of passengers in the United States at this day, had an undoubted right to take with her her jewelry and money in her journey from her summer to her winter residence. They were in bulk and character such that they could be taken into the car without any inconvenience either to the defendants or the other passengers. Indeed, they were of such bulk and character as to altogether escape observation. But this was simply a *permission*; there was no obligation, except as connected with some default or wrong on the part of the railroad in the carrying of the plaintiff. If the loss had arisen in consequence of the defendant's failure, diligently and with proper skill, to carry the plaintiff, a different question would have arisen. For in that case there would have been a violation of a contract, and the sole inquiry would have been as to whether the loss of the valuables carried in the hand could have been a ground for the recovery of damage. But the case shows that the plaintiff was in all things, so far as related to herself, diligently and with proper skill, transported from the point to the point mentioned in her passage. There remains then the question whether the

defendants assumed any responsibility with reference to the valuables other than that the plaintiff herself should be carried, and that the valuables should not be interfered with by any act or fault of theirs. This contract was completely performed. Notwithstanding this performance the plaintiff, through her power of locomotion and not at all through any default or act of defendant, found herself separated from her valuables, and the force of plaintiff's argument was that the defendant was under obligation to stop the train to enable her to recover them. There was no duty to do anything at all towards recovery, unless there had been some violation of the undertaking to carry, and there had been none. It is as if the plaintiff had, by a theft or other casualty, preceding her journey, been separated from these same valuables, and recognizing them lying on the defendant's road, insisted that the conductor should stop the train in order to allow her to regain them. The appeal was to a party who was under no legal obligation to aid in the recapture, and stood upon grounds of kindness and Christian charity to be decided by the person appealed to by reference to moral and not legal considerations, and if refused caused *damnum absque injuria*.

In all the actions against the common carrier for *nonfeasance*, whether the action is in *assumpsit* or on the case, the gist of the action is the neglect to perform a duty which is created and measured by the contract. Beyond or outside of the contract the carrier is under no greater obligation to the shipper or passenger than is the rest of the community. The doctrine, "*Sic utere tuo ut alienum non lædas*," can never have the effect to transfer from one contracting party to another a risk of injury or loss which had by the plain words or unmistakable implication of the contract itself been lodged. In such a case the party who had assumed the responsibility must bear the damage or loss. Here the bag and its contents, so far as they depended upon its custody and location within the car, were by the contract of passage to be retained in the care of the plaintiff, and any disposition of them by her, which turned out to be unwise or simply unfortunate, and resulted in loss, concerned the plaintiff alone. Consistently with all the circumstances set forth in the petition, the continuance of plaintiff's possession of the bag and its contents, and their restoration to her possession after it had been interrupted, were matters which the plaintiff herself undertook to care for to the exclusion of responsibility on the part of defendant. In this respect the defendant violated no obligation, for none existed.

The exception must be maintained, and the petition dismissed.

The principal case presents the interesting question of the liability of a railway company, steam-boat man, or other common carrier, for property lost, injured, or destroyed while in transit in possession of a passenger.

1. GENERAL LIABILITY. As a general rule every one is liable for his negligence and its consequences. *Sic utere tuo ut alienum non lædas* is the

maxim. There is no doubt of the soundness or justice of this maxim. Its application to such a case as the principal one has been brought in question.¹ An agent of the plaintiff went upon the defendant's train with \$4,000 of plaintiff's money. During the transit the train fell through a bridge, and the agent and the \$4,000 were burned in the wreck. It was sought to hold the company liable on two grounds: (1) Under the maxim *sic utere*, etc.; and (2) as a common carrier. SCOTT, J., pointed out that the first ground of liability relied upon was not based upon any contract between the parties, nor upon any liability of the company as a common carrier, but only sought a recovery on the ground that the defendant negligently so conducted its business in running its train as to destroy plaintiff's property. "Yet," said he, "it proceeds on the important assumption that plaintiff's money was lawfully where it was at the time when the catastrophe occurred; that is, that McElroy was a passenger on defendant's train of cars, had a right to carry the money with him, and, without notice to defendant, to subject it to such perils as might arise from the negligence of defendant's servants in the management of the train. Had the money not been in the defendant's car it would not have been subjected to the peril which caused its destruction; and the question whether it was lawfully there necessarily involves a consideration of the second proposition. Damage resulting from the negligence of another will not in all cases constitute a cause of action. Should A., through negligence, burn his own house, and with it the property of B., placed there without the knowledge or consent of A., we apprehend B. could not hold A. liable for the loss. We cannot, therefore, ignore the fact that the carrying of the money in defendant's car was an essential element in the circumstances occasioning the loss, nor the fact that it was so carried by a person whose only right to be there was in virtue of his character as a passenger. * * *

"We do not call in question the right of a passenger to carry about his person, for the mere purpose of transportation, large sums of money, or small parcels of great value, without communicating the fact to the carrier, or paying anything for the transportation. But he can only do so at his own risk, in so far as the acts of third persons, or even ordinary negligence on the part of the carrier or his servants, is concerned. For this secret method of transportation would be a fraud upon the carrier, if he could thereby be subjected to an unlimited liability for the value of the parcels never delivered to him for transportation, and of which he has no knowledge, and has, therefore, no opportunity to demand compensation for the risk incurred. No one could reasonably suppose that a liability which might extend indefinitely in amount should be gratuitously assumed, even though the danger to be apprehended should arise from the inadvertent negligence of the carrier himself."²

Nothing need be added to the reasoning of this case. It appears conclusive, and establishes the principal case as well decided. The moral of both cases is that it is unwise for passengers to carry valuables and large sums of money with them upon the public conveyances. The proper way to transport those articles is by express. Then their safety is provided for and loss insured against.

2. LIABILITY AS A COMMON CARRIER. As a general rule, there must be a delivery to a carrier of a passenger's baggage, in order to hold the transporter responsible for its loss or damage. He should also be informed of the value of the baggage, and of its nature, in case any dangerous machine or compound be packed in it. Then the carrier may take adequate measures to compensate himself for carriage, and to guard against loss or damage. Delivery, actual or constructive, is always essential to charge the carrier;³ and

¹ First Nat. Bank v. M. & C. Ry. Co. 20 Ohio St. 278.

² Per SCOTT, J., First Nat. Bank v. M. & C. Ry. Co. 20 Ohio St. 279.

v.20,no.7—28

³ The R. E. Lee, 2 Abb. (U. S.) 49; Weeks v. N. Y., etc., R. Co. 9 Hun, 689; Gleason v. Goodrich Transp. Co. 32 Wis. 85.

the delivery must be to one having authority to receive the baggage, else it will not suffice.¹

The courts have differed as to what constitutes a delivery of baggage to a carrier, especially in cases where articles have been placed in the state-room of the passenger upon a steam-boat. Where jewelry, usually worn by two lady passengers upon a steam-boat as a part of their apparel, was left by them in their state-room in a carpet bag with other articles of personal use, and stolen while they were at supper, held, that the steamer was not liable therefor."²

In *Crystal Palace v. Vanderpool*³ a passenger on a steam-boat wore a gold watch and chain, a diamond breast-pin, and carried a sum of money. On retiring he complained of the state-room lock being out of order, and was told there was no way to fasten the door but to put his baggage and a chair against it, which he did and retired. In the morning he discovered his valuables had been stolen. Held, that the company were not liable, the valuables not having been delivered to the officers for safe-keeping.

In *Del Valle v. Richmond*⁴ a lady carried jewels in her pocket. It was cut open and the jewels stolen while her dress hung in her state-room, upon her retiring at night. Held, that the company was not liable, the evidence satisfying the court that she was guilty of contributory negligence in not depositing the jewels with the clerk. The jewels were worth about \$6,015. "The rule seems to be generally adopted and sanctioned," said the court, "that in order to render the carrier liable for losses of baggage or goods shipped as freight they must be delivered and intrusted to the carrier; and in regard to baggage the liability does not extend beyond the value of reasonable articles of apparel or convenience, and for such sum as might be deemed necessary for his expenses, according to the passenger's condition in life and the journey undertaken by him."

Plaintiff took passage on a steam-boat, and, upon purchasing his ticket, asked for a key to the state-room assigned him; but being informed that they gave no keys, he replied that he did not care for that,—all he wanted was to place his baggage in some room where it would be safe while he went down to get his trunk of samples checked. He deposited his valise in the unlocked room, calling the attention of two or three cabin or saloon boys to the fact, asking their opinion whether it would be safe, and receiving an affirmative answer. When he returned to his room, after an absence of three-quarters of an hour, the valise was gone. There was a porter or checkman on the boat, whose duty it was to receive and check baggage, which plaintiff knew. There was no evidence in the case of any custom of travelers to deposit their baggage in the manner plaintiff did; nor of any usage of carriers by steam-boat, or of defendant in particular, to accept delivery in that way; nor of any specific direction or assent on the part of the carrier; nor was there any finding by the jury that the carrier was guilty of negligence in not providing the state-room door with a suitable lock and key, according to the custom of such carriers, and that such negligence caused the loss. Held, that there was no delivery of the valise to the carrier, and he was not liable for the loss.⁵

Where an emigrant lashed his trunk to his berth on the steam-ship and retained exclusive possession of it during the voyage, the steam-ship proprietors were held not liable for loss of goods from it.⁶

There is, however, a heavy weight of authority holding steam-boat men liable for property negligently lost or stolen from state-rooms. Thus, where plaintiff took passage on the steamer of the defendants, and paid her fare,

¹ Gleason v. Goodrich Transp. Co. 32 Wis. 85.

² The R. E. Lee, 2 Abb. (U. S.) 49.

³ 16 B. Mon. 307.

⁴ 27 La. Ann. 90.

⁵ Gleason v. Goodrich Transp. Co. 32 Wis. 85.

⁶ Cohen v. Frost, 2 Duer, 335.

which included her board on the passage, a state-room, and lodging, she was assigned to the room by the proper officer of the boat; and another lady, a stranger to the plaintiff, was afterwards also assigned to the same room. Plaintiff, when she retired to bed, left her dress, in the pocket of which was her *porte-monnaie*, with some personal jewelry, and money for her traveling expenses, on an upper unoccupied berth. During the night, while plaintiff was asleep, the money and jewelry were stolen, but whether by some one from without or by the other lady within did not conclusively appear, though the evidence tended to show it was done from without. Held, company liable.¹

The proprietor of a steam-boat has been held liable for wearing apparel stolen from a passenger's state-room, in the absence of negligence on the part of the latter.²

There has been considerable discussion of the liability of steam-boat men in such cases, the best of which is by Judge CHRISTIANOY, who said: "But when a steamer is fitted up with regular sleeping apartments, and all the appliances for boarding and lodging her passengers as at an inn, and the owners or managers hold themselves out to the traveling public as furnishing such accommodations, and by these superior advantages induce travelers (as they naturally must) to prefer this to the less comfortable mode of traveling by railroads and stage-coaches, or even by vessels without such accommodations, when they receive the fare of a passenger, which includes not only his passage but his board and sleeping-room and bed, and when that room is assigned to him and he retires to it for the night, the whole transaction, it seems to me, carries with it an invitation to make use of the room and the bed for the purposes and in the manner for which they were obviously designed; in other words, to lay aside his clothing and to go to sleep there. And unless he is expected to sleep with his eyes open, and his faculties upon the alert, he is invited to lay aside all the vigilance he would be expected to exercise when awake, and to trust himself and his clothing, and such money and property as he may have about him, and as it is usual for passengers to carry in their clothing, to the protection afforded by the room and the vigilance to be exercised by those in charge of the boat. And the latter must, in the absence of any usage, request, or notice to the contrary, be held to assent that the passenger shall leave such clothing and contents at any convenient place in the room, instead of having to call the steward, clerk, or other officer of the boat to take it into his actual or manual custody,—a proceeding which (as it must take place after the passenger is undressed) would be somewhat awkward, in the case of a lady passenger, at least; and having been thus invited to rely upon the protection of his room, and their vigilance instead of his own, the invitation, it seems to me, carries with it an assurance that they will be responsible in the mean time for all losses of such clothing and contents from which he might by his own vigilance have protected himself when up and awake. If they do not thereby assume this responsibility, then it is no "figure of speech," but a literal truth, to say that by their invitation the passenger has been lulled into a false security."³

Giving the key of a state-room to a passenger does not release a steam-boat proprietor from liability any more than giving the key of a room to a guest at a hotel would release the proprietor of the hotel.⁴

Undoubtedly a steam-boat company may protect itself from liability by notice that it will not be responsible for property left in the state-room of travelers.⁵ But a regulation forbidding a passenger upon a steam-boat from

¹ McKee v. Owen, 15 Mich. 115.

² Gore v. Norwich & N. Y. Transp. Co.

2 Daly, 254.² See, also, Mudgett v. Bay State Steam-ship Co. 1 Daly, 151.

³ McKee v. Owen, 15 Mich. 115.

⁴ Mudgett v. Bay State Steam-ship Co. 1

Daly, 151. See, also, Gore v. Norwich & N. Y. Transp. Co. 2 Daly, 254.

⁵ Mudgett v. Bay State Steam-ship Co. 1 Daly, 151; Gleason v. Goodrich Transp. Co. 32 Wis. 85.

taking his baggage with him into his state-room or private chamber, except at his own risk, is not a reasonable regulation, so far as it would apply to light baggage or hand-satchels containing articles required for present use in travel, and cannot exonerate the carrier from liability for the loss of such baggage when taken by the passenger to his room in disregard of the regulation.¹

The owner of a steam-ship is not liable as a common carrier for a watch worn by a passenger on his person by day, and kept by him within reach at night, whether retained upon his person, or placed under his pillow, or in a pocket of his clothing hanging near him.² And generally carriers are not liable as such for money stolen from the persons of passengers on their conveyance, unless the thief be a dishonest employe knowingly employed by the company.³

"Passengers by steamer, while up and awake, or when or where they ought and are expected to be awake, like passengers by railroad or stage-coach, must be expected to rely upon their own vigilance for protection against larceny from their persons; and it is well understood by all that in such case the property carried upon the persons of passengers is in their own keeping. And it would be equally clear that if a passenger, while in a general cabin or elsewhere about the boat in any place (or at a time) not specially intended or designated for sleeping, (but where the other passengers are indiscriminately admitted, or passing and repassing,) suffer himself to fall asleep, he does so at his own peril; because, having intelligence and a will of his own, and moving about at his own pleasure, and choosing his own associates, he is generally fully capable of protecting himself; and no degree of vigilance on the part of the carriers could afford him that protection, if he will neglect to make use of his own faculties for that purpose, or allow himself to fall asleep at an improper place or time, or carelessly put himself in contact with improper persons."⁴

A number of cases present instances of the loss of property in possession of passengers upon railway trains. A passenger's portmanteau was at his request placed in the carriage with him. He got out, failed to find the right carriage again, and finished the journey in another. The portmanteau was robbed of a portion of its contents by a subsequent occupant of the carriage. It was held that the company were not liable. The company's contract to carry the baggage safely was held to be subject to the implied condition that the passenger take ordinary care of it, and if his negligence causes the loss the company are not responsible.⁵

A passenger carried a number of coats cut by the tailor ready for sewing, put up in a bundle in such a manner that the contents were not apparent. This bundle, together with a bandbox, she took with her ostensibly as personal baggage. She gave the defendants no notice that it was not such baggage, although she had ample time to do so before the train left. Held, that the company were not liable for the loss of the goods, there being no agreement to carry them either as goods or freight.⁶

Upon the arrival of one of defendant's trains at New York the car in which plaintiff was a passenger was detached from the others and allowed to remain unguarded while awaiting the arrival of horses, by which it was to be drawn to the station. The plaintiff got up and went towards the door to ascertain the cause of the stoppage, when he was seized by three men, who had just entered the car, and robbed of securities of the value of over \$16,000. Held, that the company was not liable.⁷

¹ Van Horn v. Kermit, 4 E. D. Smith, 453; Mackin v. N. J. Steam-boat Co. 7 Abb. Pr. (N. S.) 241.

² Clark v. Burns, 118 Mass. 275.

³ Abbott v. Bradstreet, 55 Me. 530.

⁴ Per CHRISTIANCY, J., in McKee v. Owen, 15 Mich. 115.

⁵ Talley v. G. W. Ry. Co. L. R. 6 C. P. 44.

⁶ Smith v. Railroad Co. 44 N. H. 325.

⁷ Weeks v. N. Y. & N. H. R. R. Co. 9 Hun, 669.

In *Le Conteur v. L. & S. W. Ry. Co.*¹ a passenger delivered a chronometer to a porter of the company, who deposited it under the seat in the carriage in which the passenger rode, from whence it was lost. The company was held liable.

A lady became a passenger by a first-class carriage to be conveyed from A. to B. Her dressing-case was placed in the carriage under the seat. On the arrival of the train at B. the porters of the company took upon themselves the duty of carrying the lady's luggage from the railway carriage to the hackney carriage, which was to convey her to her residence. On her arrival there the dressing-case was missing. Held, that the duty of the defendants as common carriers continued until the luggage was placed in the carriage, and that they were liable.²

The plaintiff, a passenger by railway, brought with him into the carriage a carpet-bag containing a large sum of money, and kept it in his own possession until the arrival of the train at the London terminus. On alighting from the carriage, with the bag in his hand, the plaintiff permitted a porter of the company to take it from him for the purpose of securing for him a cab. The porter having found a cab within the station, placed the carpet-bag upon the foot-board thereof and then returned to the platform to get some other luggage belonging to the plaintiff, when the cab disappeared and the bag and contents were lost. Held, company liable.³

In the three foregoing cases the baggage, although in close proximity to the passenger during the transit, was in fact in the custody of the carrier. The law is that in order to discharge the carrier from liability, there must either exist the *animo custodiendi* on the part of the traveler to the exclusion of the carrier, or he must be guilty of such negligence as discharges the latter from his general obligation.⁴

What is the liability of sleeping-car proprietors for the property of passengers lost or injured during their passage?

A sleeping-car company is not a carrier, either public or private. It carries no one. The transportation not only of sleeping-car passengers, but of the sleeping car itself, is done by the railway company. It and not the sleeping-car company contracts for the carriage and receives the compensation therefor. It should therefore assume the responsibilities of carrier. Nor is a sleeping-car company an innkeeper.⁵ "It does not, like an innkeeper, undertake to accommodate the boarding public indiscriminately with lodging and entertainment. It only undertakes to accommodate a certain class, those who have already paid their fare and are provided with a first-class ticket, entitling them to ride to a particular place. It does not undertake to furnish victuals and lodging, but lodging alone, as we understand. * * * The innkeeper is obliged to receive and care for all the goods and property of the traveler which he may choose to take with him upon the journey; appellant does not receive pay for, nor undertake to care for, any property or goods whatever, and notoriously refused to do so. The custody of the goods of the traveler is not, as in the case of the innkeeper, accessory to the principal contract to feed, lodge, and accommodate the guest for a suitable reward, because no such contract is made."

"The same necessity does not exist here as in the case of a common inn. At the time when this custom of an innkeeper's liability had origin, wherever the end of the day's journey of the traveler brought him, there he was

¹ L. R. 1 Q. B. 54.

² *Richards v. London B. & S. C. R. Co.* 7 Man., G. & S. (82 E. C. L.) 839.

³ *Butcher v. L. & S. W. R. Co.* 16 Com. B. 12.

⁴ *Mudgett v. Bay State Steam-ship Co.* 1 Daly, 154; *Robinson v. Dunsmore*, 2 B. &

P. 416; *Burgess v. Clements*, 4 M. & Sel. 310; *Tower v. Utica & S. R. Co.* 7 Hill, 47; *East India Co. v. Pullen*, 1 Strange, 694; *Gore v. Norwich & N. Y. Transp. Co.* 2 Daly, 254.

⁵ *Pullman P. C. Co. v. Smith*, 73 Ill. 360.

obliged to stop for the night and intrust his goods and baggage into the custody of the innkeeper. But here the traveler was not compelled to accept the additional comfort of a sleeping car; he might have remained in the ordinary car, and there were easy methods within his reach by which both money and baggage could be safely transported. On the train which bore him were a baggage and an express car, and there was no necessity of imposing this duty and liability on appellant."¹ This reasoning certainly appears satisfactory, and there are other cases sustaining the view that sleeping-car companies are neither carriers nor innkeepers, nor liable as such.² This is not saying, however, that a sleeping-car company is under no liability for the negligent loss or damage of its passengers' property. As laid down by the supreme court of Pennsylvania,³ it is the duty of a sleeping-car company to use reasonable and ordinary care to prevent intruding, picking pockets, and carrying off the clothes of passengers while asleep. Whether such care was exercised under the circumstances is a question for the jury. Where the regulations require a watchman to stay in the aisle of the car continuously until danger is over, and he goes out of the aisle, even for a very few minutes, and during that time a robbery occurs, if the jury believe that if he had been in his place of observation it would not have occurred, without detection, the company is liable. The watching must be continuous and active. It may be proved, too, that another person was robbed on the same car on the same night, as bearing upon the question of negligence.

ADELBERT HAMILTON.

Chicago.

¹ Pullman P. C. Co. v. Smith, *supra*.

² See *Nevin v. Pullman P. C. Co.* 106 Ill. 122; *Woodruff S. C. Co. v. Diehl*, 84 Ind. 474; *Pullman P. C. Co. v. Gardner*, (Pa. Sup. Ct. Nov. 1883,) 18 Cent. Law J. 14; *Diehl v. Woodruff*, 10 Cent. Law J. 66,

(Indiana Sup. Ct.) *Blinn v. Pullman P. C. Co.* (U. S. C. C. W. D. Tenn.) 3 Cent. Law J. 591; *Palmeter v. Wagner*, 11 Alb. Law J. 221.

³ *Pullman P. C. Co. v. Gardner*, *supra*.

UNITED STATES v. NICEWONGER.

(District Court, W. D. Pennsylvania. May Term, 1884.)

CRIMINAL LAW—ILLEGAL PENSION FEES—DECEASED PENSIONER—REIMBURSEMENT CLAIM—REV. ST. §§ 5485, 4718—ACT OF MARCH 3, 1881.

The penal legislation contained in section 5485 of the Revised Statutes, and the acts of June 20, 1878, and March 3, 1881, limiting the amount lawfully demandable or receivable by an agent, attorney, or other person instrumental in prosecuting a claim for pension, etc., does not apply to a claim under section 4718, Rev. St., for reimbursement out of an accrued pension by one who bore the expenses of the last sickness and burial of a deceased pensioner, nor to the agent or attorney of such claimant.

Sur Demurrer to Indictment.

Wm. A. Stone, for the United States.

Wm. D. Moore, for defendant.

ACHESON, J. The demurrer raises the question whether the indictment discloses a criminal offense against the laws of the United States.

Section 4718 of the Revised Statutes, relating to accrued pensions, where the pensioner, or person entitled to a pension, having an application therefor pending has died, in its concluding clause provides:

"And if no widow or child survive, no payment whatsoever of the accrued pension shall be made or allowed, except so much as may be necessary to reimburse the person who bore the expenses of the last sickness and burial of the decedent, in cases where he did not leave sufficient assets to meet such expenses."

John Harpst, a pensioner of the United States, lately died, leaving to survive him neither widow nor child. Eliza Templeton bore the expenses of his last sickness and burial, and the pensioner, having left insufficient assets to meet such expenses, she applied for reimbursement out of his accrued pension, and her claim was allowed. The defendant—to quote the language of the indictment—was her "agent, attorney, and person instrumental in prosecuting" her said "claim for reimbursement;" and the indictment charges that he "unlawfully did withhold from the said Eliza Templeton a greater compensation for his * * * services and instrumentality in prosecuting said claim for reimbursement as aforesaid than then was and now is provided in the title pertaining to pensions as set forth in the act of congress approved June 20, 1878, entitled 'An act relating to claim agents and attorneys in pension cases,' (20 St. at Large, 243,) to-wit, unlawfully did withhold and retain of and from the said Eliza Templeton the sum of one hundred and five dollars and thirty-three cents for his * * * services and instrumentality in prosecuting said claim for reimbursement."

The said act of June 20, 1878, declares: "It shall be unlawful for any attorney, agent, or other person to demand or receive for his services in a pension case a greater sum than ten dollars;" and the act of March 3, 1881, (Supp. to Rev. St. 602,) provides as follows: "The provisions of section 5455 of the Revised Statutes shall be applicable to any person who shall violate the provisions of an act entitled, 'An act relating to claim agents and attorneys in pension cases,' approved June 20, 1878."

Section 5485 reads thus:

"Any agent or attorney, or any other person instrumental in prosecuting any claim for pension or bounty land, who shall directly or indirectly contract for, demand, or receive, or retain any greater compensation for his services or instrumentality in prosecuting a claim for pension or bounty land than is provided in the title pertaining to pensions, or who shall wrongfully withhold from a pensioner or claimant the whole or any part of the pension or claim allowed and due such pensioner or claimant, or the land-warrant issued to any such claimant, shall be deemed guilty of a high misdemeanor, and upon conviction thereof shall for every such offense be fined, not exceeding five hundred dollars, or imprisoned at hard labor not exceeding two years, or both, at the discretion of the court."

Does this legislation cover the case of this defendant? For the proper solution of the question reference must be had to the title pertaining to pensions in the Revised Statutes, viz., sections 4768, 4769, 4785, and 4786.

Sections 4785 and 4786 fixed \$25 as the maximum compensation demandable or receivable by an agent, attorney, or other person "for

his services in prosecuting a claim for pension or bounty land," in case of an agreement between the parties filed with and approved by the commissioner of pensions, and \$10 as the lawful fee where there was no such agreement; and by sections 4768 and 4769 the paying pension agent was required to deduct from the amount due the pensioner such compensation or fee, and forward the same to the agent or attorney of record named in the agreement; or, in the absence of such agreement, to the agent prosecuting the case.

Section 4718, relating to accrued pensions, and providing for the reimbursement thereout, under certain circumstances, of the person bearing the expenses of the last sickness and burial of the decedent, is, indeed, found in the title pertaining to pensions; but it seems to me clear that section 5485 did not originally apply to such reimbursement claims, or to the agent or attorney of such claimant. A comparison of section 5485 with the other sections of the Revised Statutes referred to, constrains the conclusion, I think, that the penal legislation therein contained had respect to dealings between a pensioner, or claimant for a pension, and his agent or attorney or other person prosecuting his claim. The intention manifestly was to protect the pensioner, and to secure to him the bounty of the government. The agreement to be filed with and approved by the commissioner was an agreement between the pension claimant and his agent or attorney, and the compensation mentioned in section 5485 is for services or instrumentality in prosecuting a "claim for pension." By no fair interpretation of this language—especially when employed in a criminal statute—can it be held to embrace a claim for reimbursement out of a granted and accrued pension, by one who bore the expenses of the last sickness and burial of a deceased pensioner. The "claimant" spoken of in the latter part of the section, it is evident from the context, is a claimant for pension or bounty land, and the word "claim," there occurring, has no broader signification than it has in the earlier part of the section.

Did the subsequent acts¹ of June 20, 1878, and March 3, 1881, enlarge the scope of section 5485? I think not. Now, it is true, the language of the former of these acts, as we have seen, is: "It shall be unlawful for any attorney, agent, or other person to demand or receive for his services *in a pension case* a greater sum than ten dollars." A careful examination of the whole act, however, shows it to be simply amendatory of the legislation embodied in sections 4768, 4769, 4785, and 4786. It provides that "no fee contract shall hereafter be filed with the commissioner of pensions in any case;" and, after restricting sections 4768, 4769, and 4786 to then pending claims, where the claimant had already been represented by an agent or attorney, it repealed section 4785. The obvious purpose of this act was to fix \$10 as the compensation which, in all future cases, could be lawfully demanded or accepted by an agent, attorney, or other person instrumental in prosecuting a claim for pension. But it soon

became a serious question whether the penalty prescribed by section 5485 of the Revised Statutes was applicable to a violation of the act of June 20, 1878, and the decisions of the courts were conflicting. *U. S. v. Mason*, 8 FED. REP. 412; *U. S. v. Dowdell*, Id. 881. It is quite certain that, in order to remove all doubt and settle the law with respect to this disputed point, congress passed the act of March 3, 1881.

After a careful consideration of the whole legislation upon this subject, and having regard to that canon of interpretation which requires a penal statute to be construed strictly, I have reached the conclusion that judgment must be entered upon the demurrer in favor of the defendant; and it is so ordered.

MYERS v. CALLAGHAN and others.

(Circuit Court, N. D. Illinois. December 7, 1883.)

1. COPYRIGHT—INFRINGEMENT—STATE REPORTER—AFFIRMANCE OF DECISION.

The court affirms its prior decision,—*First*, that, in the absence of express legislation to the contrary, a state reporter is entitled to copyright his volumes of reports to the extent that the same consist of the work of his own mind, notwithstanding he may not have a copyright in the opinions of the court; *second*, the copyright law is to be liberally construed that effect may be given to what is to be considered the inherent right of the author to his own work.

2. SAME—INSTANCE.

The court finds an infringement on the copyright held by complainant, covering volumes 39 to 46, inclusive, of Illinois reports.

3. SAME—ARRANGEMENT OF LAW CASES AND PAGES.

In connection with other evidences of infringement, the court will consider the arrangement of the books infringing the original edition, and such evidence will be entitled to weight, in judging of the fact of infringement.

In Equity. Opinion on supplemental bill. For original, see 5 FED. REP. 726.

John V. Le Moyne, and *Geo. W. Cothran*, for complainant.

Jas. L. High, for defendants.

DRUMMOND, J. The views of the court upon one part of this case are to be found in 10 Biss. 139, 5 FED. REP. 726. The present inquiry is limited to what is alleged to be an infringement by the defendants of volumes 39 to 46, inclusive, of Mr. Freeman's Illinois Reports. Volume 40 seems never to have been regularly published like the other volumes, although the evidence of the infringement of the plaintiff's copyright in that volume is perhaps stronger than that applicable to any other of the volumes named. Upon comparing parts of each of the volumes, those of the complainant and of the defendants, one with the other, I think there can be no doubt that in some respects, in each case, the Freeman volume has been used by the defendants in the head-notes, the statement of facts, and the arguments

of counsel. That is, there are certain unmistakable *indicia* that in every volume prepared by the defendants they have not confined themselves solely to the original sources of information, namely, the opinions of the judges, the records, and the arguments of counsel. But while this is technically true, it is only true to a limited extent. The great bulk of what may be termed copyright matter, in each volume of the defendants, seems to be made up independent of the corresponding volume of the plaintiff, and in very many of the instances, where a similarity can clearly be traced, and the use of the materials of the plaintiff's volume distinctly made out, the similarity is trivial and unimportant, and such as I should feel extremely reluctant to hold worked a forfeiture of the whole edition. It would seem to me, while holding there is technically an infringement of the copyright of the plaintiff, the fairest view to take of the whole subject would be to require what might be termed a small royalty, such as the defendants could afford, to be paid to the plaintiff for the sale of the volumes named.

The fact appears to be, and indeed it is not a subject of controversy, that in arranging the order of cases, and in the paging of the different volumes, the Freeman edition has been followed by the defendants; but, while this is so, I should not feel inclined, merely on that account and independent of other matters, to give a decree to the plaintiff, although it is claimed that the arrangement of the cases and the paging of the volumes are protected by a copyright. Undoubtedly in some cases, where are involved labor, talent, judgment, the classification and disposition of subjects in a book entitle it to a copyright. But the arrangement of law cases and the paging of the book may depend simply on the will of the printer, of the reporter, or publisher, or the order in which the cases have been decided, or upon other accidental circumstances. Here the object on the part of the defendants seems to have been that there should not be confusion in the references and examination of cases; but the arrangement of cases and the paging of the volumes is a labor inconsiderable in itself, and I regard it, not as an independent matter, but in connection with other similarities existing between the two editions, when I say, taking the whole together, the Freeman volumes have been used in editing and publishing the defendants' volumes. It should be borne in mind that, as a general thing, there is but a small part of the report of a case which is the subject of copyright. Many of the cases contain nothing but the opinions of the court, with the simple remark that the facts are stated in the opinion; and the head-notes are nothing more than a repetition, in a condensed form, of what is in the opinion, and therefore it is often very difficult to select distinct points of comparison between the same case in the corresponding volumes of the parties, because there is so little which can be called the work of the reporter.

THE GUADALUPE.¹

(District Court, D. Texas. April, 1884.)

ADMIRALTY—SALVAGE—RULE FOR ESTIMATING.

In making up its judgment in an action for salvage, claimed for relieving a grounded vessel, the court inquires into whether or not the tugs employed performed only ordinary towage service; and, estimating the salvage earned, if any, considers how much danger and risk the plaintiffs incurred, the meritorious nature of their services, and the gallantry displayed.

In Admiralty.

McLemore & Campbell, for libelants.

Ballinger, Mott & Terry and *Hume & Shepard*, for respondents.

BOARMAN, J. The *Guadalupe*, an iron steamer of the Mallory line, of 2,190 tonnage, almost new, with powerful machinery, valued at \$300,000, with a cargo and freight charges valued at \$345,000, on the twenty-fourth of September, 1883, at 4:30 or 5 o'clock, A. M., ran aground on the sand beach at Bolivar peninsula, out at sea, about 15 miles from Galveston bay. The steamer, in an overcast and foggy night, while running head on to the shore, at flood-tide, with wind blowing from the shore, firmly lodged herself on the ground, between 300 and 400 yards from the tide limit. I add an extract from the ship's log-book

"Sounding frequently. At 4:45 A. M. weather overcast and foggy on the horizon. Ship stopped and aground in 11 to 12 feet water; soft mud. Got anchor out and tried all possible means to get off. 10:30 P. M., got off with assistance of three tugs."

The ship's draught then was 12 feet 2 inches at the stem and 14 feet aft. Soundings made, as the captain says, just after the ship grounded, showed 10 feet water at the bow and 13 feet aft of the pilot-house and 14 feet at the stern. When the tide ebbed he said there was less than 10 feet at the stern. Going towards the shore the water seemed to shoal about 1 foot to every 100 feet. From the captain's evidence it clearly appears to me that the ship at low tide must have been lying on ground from stem to stern, and, I think, considering the draught of the vessel, his testimony will warrant the opinion that even at flood-tide she was lying from one end to the other on the ground. Whether such a conclusion may be justly drawn from what he says as to the soundings, the belief that the full length of the ship was on the ground at *highest tide* is fully sustained by the physical conditions and surroundings, supplemented as they are by the evidence of the ship's engineer and the several officers of the salving tugs.

None of the ship's officers say anything definitely as to the rate of speed she was running when she grounded or when the slow-bell was sounded. But, whatever may have been her speed at that time, it

¹ We are indebted to Talbot Stillman, Esq., of the Monroe, Louisiana, bar, for this opinion.

appears that the bell for stopping the engines did not strike until the ship was in shoal water, less in depth than her draught, and that her movement forward towards the shore was checked and stopped by the ground under her, rather than by her engines. The ship's speed per hour is 11 miles. The engineer says when she is going at full speed she can be stopped in five or six minutes; at half speed, in two or three minutes. Considering the engineer's evidence as to the time (if there was any) the slow-bell and stopping-bell sounded, and the time required to check or stop the ship at full or at half speed, the ship, steaming head on the shore at either rate of speed mentioned, must have advanced into shoal water a distance greater than her length; and these considerations also suggest that when she stopped on a full tide,—which rises about 15 inches perpendicular,—her entire length must have been on the ground.

The captain says he continued to do all he could to withdraw the vessel from her fastenings until 11 o'clock A. M., when, finding that he could not move her, he sent the ship's mate overland to Galveston with a message to the ship's agent. The mate reached Mr. Sawyer, the agent, about 4 or 5 o'clock P. M., and he at once saw the agent of libelants. Sawyer, without telling libelants what particular service he wanted the tugs to perform, requested and directed them to be made ready as soon as practicable to go outside of the bar with him to the assistance of the Guadalupe. The steam-tugs Laura, Maddox, and the pilot-boat Mamie Higgins, and the steam-tugs Bessie and Buckthorne, the latter with a lighter in tow, being equipped and made ready as soon as practicable, got under way about 6:30 o'clock P. M., and proceeded, under the general charge and control of Sawyer, who went out on the Higgins. All of these tugs are engaged usually in lightering ships at the bar, and were as valuable and powerful boats as are usually employed in their line of business. The three first named tugs reached the ship about 10 o'clock P. M.; the others did not get up in time to render any service in releasing the vessel. But this fact does not deserve particular notice, because the libelants pray for a reward in gross. When the tugs reached the ship, she was lying stranded, just as she was when the mate left her, 11 hours before. The wind was from the shore, and the tide was about as full as it was when the ship grounded. The ship's captain says the vessel moved for the first time when the tugs came alongside of her, and adds that this movement, observed by him then as the first time she had moved since he abandoned all effort to release her, may have been caused by the approach of the tugs. The Laura's captain, having taken his vessel closest to the shore, says he sounded about 30 feet in front of the Guadalupe and found less than 8½ feet; and in sounding along-side, about the same distance from the stern of the ship, he found 10 feet of water. The tugs found the ship lying fast aground, where she had been for 17 hours, unable, as her captain admits, to move by any force of her own, or by the fa-

voring force of the tide and wind. Under the direction of Sawyer, the three tugs were lashed to the ship, and after the full power of these tugs had been applied for 15, 20, or 30 minutes to move the vessel, she found relief, and moved off, uninjured, into deep water, on her voyage to Galveston. Until the tugs reached the ship no one in the interest of the libelants knew anything of the condition of the distressed steamer. Sawyer, acting for the ship, demanded the services of the tugs, and in every way practicable they responded, without knowing or asking anything about the signal or message brought from the ship to her agent. Sawyer, being deeply interested in forwarding all possible aid for the ship's relief, hurriedly took charge of the tugs, without thinking it necessary to communicate to libelants any information as to the ship's condition, or to discuss with them the nature of the services required, or the amount to be paid for the work. At the time he applied for the services of the tugs there were not enough men on them for such services as might become necessary, and Sawyer furnished a number of men for the crews on the tugs. As there was no "lighterage work" done, I think it not necessary to refer more particularly to this fact.

I think this statement of the case substantially covers all the facts which are necessary to enable me to apply the law and make a decree responsive to the issues presented in the pleadings.

The libelants claim a salvage reward of 10 per cent. on the gross amount, \$45,000. The respondents, offering to pay a liberal *quantum meruit*, contend that the services performed do not in law entitle libelants to salvors' compensation, because the ship was not in peril; that the ship would have avoided all injury and found a speedy relief or release from her ground fastenings by the use of her own power and favor of a flood-tide without the assistance of the tugs, which, in fact, reached her just as she was, by the use of her own power, effecting or about to secure her own release; and, further, libelants are not entitled to anything more than a *quantum meruit*, because, if such work was performed in the ship's interest, she not being at the time in peril, as is shown by libelants' testimony, the services were only such as the steam-tugs perform in their every-day business, and they should not be allowed salvage compensation.

In reply to the suggestion made by respondents that the Guadalupe was not in peril when the tugs came up to her, it may be remarked that the true element of a ship is in the sea, and her life is only full and complete when she is riding in deep soundings, at anchor, or when she can respond and move at her master's will on the ocean in pursuit of her useful purposes. And when such a ship, at a time marginal to the equinoctial period, is found in the shoal water of the Mexican gulf, with the full length of her flattened bottom pressed by her great weight into the sand, unable, by the application of all her great power, supplemented by favorable tides and winds, for 17 hours to move herself, it cannot be said that she is free from

serious distress, though the sea and the conditions about her may give no perceptible evidence of immediate peril. The proof shows that she did not and could not, with favoring tides and winds, move herself for 17 hours; and under such circumstances the conclusion cannot be avoided that she was in distress, and that the peril attending such a ship was much more than a possible danger.

It cannot now be determined whether the ship, unaided by the tugs, could, or would have, in an hour, in a few hours, or in a few days, effected her own release from the sand-bed in which she was lying when the tugs came to her aid, as is so earnestly contended for by respondents' counsel. But it is clear from the proof that she was lying helpless, out of her element, and unable to respond to her master's purposes when the tugs were lashed to her sides, just as she was when the captain, in despair of securing her release, dispatched the mate with his message for relief to Galveston. I think it is also clear that she moved off into deep water only when and after the tugs supplemented the power of the ship's machinery with the full force of their combined effort to move her. The testimony on this point is conflicting, and but little proof can be extracted from it; but it is the duty of the court to apply the proof, however little there may be on the point, rather than to follow the speculations of the captain, when he, in his depositions, read on the trial of this cause, says the ship would have been released if the tugs had not come there. Especially should the court hesitate and refuse to abandon whatever proof there may be on this point, when it is borne in mind that the captain noted in his log-book, at a time when it is likely no thought of a controversy like the present one was in his mind, these remarks: "Ship stopped and aground in 11 to 12 feet water; got anchor out and tried all possible means to get off; 10:30 P. M. *got off with assistance of three tugs.*" Further, it appears to me, for the ship's captain to say, as he does, in the face of the admitted fact that the tugs applied their full force for a space of 15, 20, or 30 minutes before the ship begun to move, that the ship would have released herself in any given time, is as groundless a speculation on his part—and he is the only witness that indulges such an assertion—as it would have been for him, or any other weather prophet, to say, at the time the tugs came up, that the calm sea, then smooth and quiet, would not, in the same given time, be lashed by a September storm into a fury that would have driven the ship broadsides further on the dangerous shore. The tugs, though responding at once to a call for aid that took them out of, and a distance away from, the safety of the harbor, their usual field for labor, were in little more danger at any time while so employed than they were when engaged in lightering ships at the bar. But these tugs, in consequence of the character of the work they are ordinarily engaged in, cannot secure insurance against loss of any kind, and it may be said that the libelants' danger of loss is increased in some degree whenever they cross the bar in pursuit of any unusual purpose.

The fact that no great danger attended the performance of the service rendered in this case, does not of itself take from the service its salvage character, or make the work performed for the Guadalupe only such labor as the tugs usually perform.

The question whether any serious danger, great fatigue, or gallantry on the part of the salvors attended the performance of a valuable and useful service, may be and should be considered by the court in estimating the sum which should be allowed for reward. If none of these conditions characterized the valuable service in this case,—and I think they did only to a limited extent,—the service was not, technically speaking, very meritorious.

Believing that the service rendered the distressed ship was not simply towage service, nor a work performed in the line of the everyday business of these tugs, I shall consider the libelants as salvors, and allow a compensation reward based on well-established facts, which show that the libelants rendered a salvage service, though not of a very meritorious degree. A decree in favor of libelants for \$8,000, with 8 per cent. interest from date of demand, will be entered.

THE ROSEDALE.

(District Court, D. Connecticut. May 15, 1884.)

1. LIBEL—SALVAGE—COSTS.

Where a vessel is attached upon a libel for salvage, no demand having been made, and under circumstances which put the claimants to unnecessary expense and trouble, costs will not be allowed to the libelants

2. SALVAGE—COMPENSATION.

The amount of compensation which will be allowed to a libellant for an admitted salvage service considered.

In Admiralty.

Robert D. Benedict and *Daniel Davenport*, for libellant.

Chas. Henry Butler and *Thomas E. Stillman*, for claimant.

SHIPMAN, J. This is a libel *in rem* by the owner of the steam-boat *Crystal Wave*, in behalf of itself and all others interested, to recover salvage for services rendered to the steam-boat *Rosedale*. The facts are as follows:

The steamer *Rosedale* is a side-wheel passenger and freight steam-boat, regularly running between New York city and Bridgeport, and is worth \$100,000. She left New York at 3 o'clock P. M. on September 12, 1883, bound for Bridgeport, with a cargo and 36 passengers, and about 5 o'clock on the same afternoon, at a point in Long Island sound off Greenwich, and about four miles south-east of Captain's island, broke her steam pipe, by which accident she was completely disabled and was rendered helpless. The sea was heavy, the wind was blowing strong from N. E. to E. N. E., the tide was at the end of the flood, and the boat was drifting in the direction of Captain's island, an island of 15 or 16 acres. Her ground tackle was light, but the anchorage was good. The *Crystal Wave* is a side-wheel passenger and freight steamer, regularly plying between New York and Bridgeport, and is worth \$75,000. She

left New York on the same afternoon at 3:30 o'clock, was behind the *Rosedale* when the steam pipe burst, and saw that she was partly enveloped in steam and had met with an accident. The *Crystal Wave* was then within 12 or 15 minutes' reach of the *Rosedale*, and, without difficulty or danger, went to her assistance, put out a hawser to her, and at the same time took one from her. The sea was heavy, and the boats rolled so that the hawsers parted. The *Crystal Wave*, then without danger, from the fact that she had an experienced and skillful captain, but with some delay, again put out a hawser to the *Rosedale*, and took one from her, and resumed and completed the service of towing her to Greenwich cove, taking off her passengers and carrying them to Bridgeport. The time occupied by the *Crystal Wave* in rendering the service to the *Rosedale* occupied about two hours. The work was done without substantial risk or danger to the *Crystal Wave*, and without extraordinary labor, and without peril to any of her officers, passengers, or crew. The *Rosedale* was, at the time of the accident and of the service, in great need of help, but was not at the time in serious danger of wreck. She was drifting in the direction of a rocky shore, and her dependence was upon her anchors. She was on fair anchorage ground, and her anchors, though light, could probably have been made to hold.

The circumstances under which this salvage service was rendered by the *Crystal Wave* are correctly stated in a letter of thanks which was written and sent by the captain of the *Rosedale* to the captain of the *Crystal Wave* on September 15, 1883. The material portion of the letter is as follows:

"Allow me to express to you our sincere thanks for the timely aid rendered to our steamer *Rosedale*, disabled on Wednesday, September 12th, in Long Island sound. The kindness shown by you in taking our steamer in tow, and placing her in a safe harbor, in face of a high wind and heavy sea, breaking hawsers, etc., and still staying by us in time of great need until safely anchored, and conveying our passengers to Bridgeport, * * *."

No demand was ever made by the libelants upon the owners of the *Crystal Wave* for salvage. She was attached upon the libel on October 11, 1883, upon a claim of \$50,000 for salvage, and under circumstances which put the claimants to considerable unnecessary expense and trouble. I think that costs should be refused: *Atlas Steam-ship Co. v. Colon*, 4 FED. REP. 469.

In this case, as in other like cases, where it is admitted that the service which was rendered was a salvage service, the important question is as to the proper amount of compensation, and this depends much upon the condition of peril from which the *Rosedale* was rescued, because I find that neither the *Crystal Wave* nor her officers were in any danger which skillful seamanship could not easily avoid. The *Rosedale* was in great need of help, but was not, in my opinion, in serious danger of shipwreck. The reported case which most nearly resembles the one under consideration is the recent and carefully considered case of *The Plymouth Rock*, 9 FED. REP. 413, in which the conditions and prospects of danger to the rescued boat were far more serious than those in the present case, and in which there was a decree for the libellant for \$2,000. I am of opinion that \$1,000 will be a liberal compensation in the present case.

Let a decree be entered that the libellant recover \$1,000 on behalf of the owners and all others who may be interested.

MILLS and another, Ex'rs, etc., v. CENTRAL R. Co. OF NEW JERSEY and others.

(Circuit Court, D. New Jersey. May 2, 1884.)

1. REMOVAL OF CAUSES.

A defendant will not be allowed to transfer a case from the state courts, the chosen jurisdiction of a complainant, to the United States courts, upon the bare suggestion of a contingency which may never happen.

2. REMOVAL ON GROUND OF CITIZENSHIP—MOTION TO REMAND.

In an action where the main controversy is between citizens of the same state, there being no controversy wholly between citizens of different states which can be fully determined as between them, the suit is not removable from the state to the United States courts on the ground of citizenship, under section 2, act of March 3, 1875; and when it has been removed, a motion to remand will be granted. *Arapahoe Co. v. Kansas Pac. Ry. Co.* 4 Dill. 277, distinguished.

On Bill. On motion to remand.

H. C. Pitney, (with whom was *Mr. Gummere*,) for motion.

James E. Gowen, *contra*.

NIXON, J. The bill of complaint in this case was originally filed on August 28, 1883, in the court of chancery of New Jersey. The defendants put in a joint and several answer on December 14, 1883, and on the second of February following they presented a petition to the state tribunal praying for the removal of the suit to this court. The petitioners based their right of removal on two grounds: (1) Because the defendants justified the execution of the lease, which the complainants were seeking to set aside, under the provisions of an act of the legislature of New Jersey, approved March 10, 1880, wherein an attempt was made to alter and amend the charter of incorporated companies, without the consent of all the stockholders, which the complainants allege to be in violation of the constitution of the United States; and (2) because the only necessary and substantial parties to the controversy were the Central Railroad Company of New Jersey, and the Philadelphia & Reading Railroad Company, which were corporations respectively of New Jersey and Pennsylvania.

1. Is there a federal question necessarily involved? A careful examination of the pleadings and the issues there presented fail to disclose one. It is true that the defendants in their petition set forth that their right to make the lease which the complainants are endeavoring to avoid is rested by them upon a certain statute of the state of New Jersey, passed March 10, 1880, authorizing corporations organized under any of the laws of the state to lease their road, or any part thereof, to any corporation of New Jersey or any other state, and allege that the complainants contend that said statute is null and void because it violates the provision of the constitution of the United States that no state shall pass any law impairing the obligation of contracts. But no such ground of relief is found in the bill of complaint, nor is it suggested in the pleadings.

It nowhere appears that the complainants invoke the protection of
v.20,no.8—29

the constitution of the United States or question the constitutionality of any law of New Jersey. They do, indeed, charge that the lease is void and has been executed contrary to law, but they make no specific statement in what respect or upon what ground it is illegal. It is hardly competent for the defendants to incorporate into their petition for removal a possible federal question that may arise during the progress of the case, especially when the question is not only not suggested by the complainants, but is expressly disavowed and repudiated by them, and then to claim that the removal of the controversy into a federal court is proper in order to have it adjudicated. If it should appear during the continuance of the cause that a federal question is necessarily involved, I do not say that no appeal would lie from the highest state tribunal to the supreme court, but I do say that the defendants should not be allowed to transfer the case from the chosen jurisdiction of the complainants upon the bare suggestion of a contingency which may never happen.

2. With regard to the second ground a more difficult question is presented. The difference of views of the respective parties arises from the different conceptions of the learned counsel respecting the real parties to the controversy, and the purposes and objects of the bill of complaint.

The defendants allege that the right of the complainants to bring such an action is based upon the assumption of their right, as stockholders, to represent the Central Railroad Company of New Jersey; that the relief asked for in the bill of complaint is not merely relief for the complainants as such, but for all the stockholders, and for the said corporation of which they are the representatives; that whether the claims of said company are asserted by its governing body or by one of its stockholders, it is the company itself which is the party to the suit; that the individual defendants are not necessary and substantial parties to the litigation; and that, even if they are, the case discloses a controversy wholly between two corporations of two different states, which can be fully determined as between them without the presence of the other parties.

The complainants, on the other hand, insist that the Central Railroad Company is the naked trustee of the complainants; that the latter have a beneficiary estate and interest in the lands, franchises, tolls, and all other property in its possession and under its control as trustee; that the execution of the lease and contract was a breach of trust, and a diversion of the trust property to strangers without authority of law; that, so far from there being identity of interest between the complainants and the New Jersey Central Railroad Company, the controversy between them is actual, and in every sense antagonistic; that the individual defendants are made parties, not formally, but for the purpose of obtaining specific relief against them as active agents in making an unlawful transfer of their property; and that no separate controversy can be found between any two par-

ties, citizens of different states, which can be fully determined between them without the presence of the other parties to the action.

It is conceded that support is found for the defendants' view in the case of *Arapahoe Co. v. Kansas Pac. Ry. Co.* 4 Dill. 277. In that case the plaintiffs, citizens of Colorado and stockholders of the Denver Pacific Railroad Company, a corporation of Colorado, filed a stockholders' bill in a state court of Colorado against the said Denver Pacific Railroad Company and its directors, and the Kansas Pacific Railroad Company, a corporation of Kansas, and certain individual citizens of other states than Colorado. The object of the suit was to obtain an accounting with the Kansas Company and other defendants on an allegation that a majority of the trustees of the Denver Company had been committing frauds, and thus depriving that company of the funds belonging to it. The relief prayed for was a decree in favor of the Denver Company for the sum found due on the accounting. Mr. Justice MILLER said that the interests of the plaintiffs and of the Denver Pacific Company were identical; that if the suit was successful no decree could be entered in favor of the defendants, but only in favor of the Denver Company, for the amount found due; and that such was the flexibility of the mode of proceeding in a court of chancery, that, where a party refused to be the complainant in a suit, other interested parties might file a bill and make him a defendant, without changing his relations to the controversy; and that, under such circumstances, the court had power, for the attainment of justice, to render a decree in favor of one defendant against the other. Observing that no relief was asked against the individual defendants, he treated them as not necessary parties to the suit, and retained the case as one of federal cognizance, because the real controversy was, in fact, between the two corporations of different states. But it seems to me that the cases are distinguishable. In the latter, neither the Denver Pacific Railroad Company nor its board of directors, as such, was complained of. No relief was prayed for against the corporation, but in favor of the corporation against the fraudulent acts of a part of its trustees. All the material defendants against whom relief was asked were citizens of other states. There was nothing to be adjudicated against parties living in the same state. But in this case the suit is against the Central Railroad Company and a number of individuals, some of whom are citizens of the same state with the complainants, and others are citizens of different states, and specific relief is prayed against the acts of the corporation and of the individuals who are made defendants. Even if the theory should be adopted that the New Jersey Central Railroad Company is the real complainant, some of the defendants against whom relief is sought are citizens of the same state, and they are indispensable parties, if the complainants are to have determined the questions raised in the pleadings, and to have extended to them the full measure of relief which they pray for.

The case of *Bacon v. Rives*, 106 U. S. 99, S. C. 1 Sup. Ct. Rep. 3, does not help the defendants in their contention. The court there held that the executors of George Rives were not necessary and substantial parties to the issue between the complainants and the principal defendant, because no relief was prayed for against them; that they were made parties for the sole purpose of reaching the interest of George C. Rives in his father's estate, in their hands, if the complainants should succeed in their suit against him. Though made formally defendants, they were regarded substantially as mere garnishees. But, in the present case, specific relief is sought against the individual defendants, who are charged to be personally responsible for their alleged illegal acts in the misapplication of property which they held as trustees of the complainants. It falls rather within the principle of *Corbin v. Van Brunt*, 105 U. S. 576, where the suit was for the recovery of land, and damages for its detention. The controversy in regard to the recovery of the land was between citizens of the same state, and the one for damages for detention between citizens of different states. The court held that separate and distinct trials of these issues were not admissible, and that the case should be remanded to the state court from which it had been improperly removed.

Regarding the action as one where the main controversy is between citizens of the same state, and not finding in it any "controversy wholly between citizens of different states and which can be fully determined as between them," I must hold that the suit is not removable, on the ground of citizenship, under the second section of the act of March 3, 1875, and the motion to remand must prevail.

EDWARDS v. CONNECTICUT MUTUAL LIFE INS. CO.

(Circuit Court, N. D. New York. June 6, 1884.)

JURISDICTION OF UNITED STATES COURT—PARTY ESTOPPED FROM DENYING JURISDICTION OF COURT AFTER HAVING HIMSELF REMOVED THE CASE THITHER.

A case having been removed, on motion of defendant, from a state to a federal court, he cannot move its dismissal on the ground that it was improperly brought in the original court, such an objection being now immaterial: neither can he attack the jurisdiction of the court to which it has been removed upon his motion.

Motion to Dismiss.

William N. Cogswell, for plaintiff.

Forbes, Brown & Tracy, for defendant.

COXE, J. This is an action on a policy of insurance. The plaintiff is a citizen of Massachusetts. The defendant is a Connecticut corporation. The action was originally commenced in the supreme

court of the state of New York, and removed by defendant to this court. A motion is now made by the defendant to dismiss the action for want of jurisdiction,—*First*: because it was improperly brought in the state court; and, *second*: because, irrespective of that question, it is not a controversy of which this court can take cognizance. Even if the first ground of objection were well founded, the defendant is not in a position to take advantage of it. *Sayles v. N. W. Ins. Co.* 2 Curt. 212. Whether the state court had jurisdiction or not is a matter wholly immaterial. A decision in favor of the view advanced by the defendant upon this proposition would be indecisive and inconsequential. There is nothing for such a decision to operate upon. Let it be assumed that the state court had not jurisdiction. *Cui bono*? Can it be seriously maintained that this court should, on defendant's motion dismiss an action voluntarily brought here by the defendant, because another court which has now not even a remote connection with the cause has not jurisdiction to try it? In other words, should a court which has jurisdiction refuse to retain it because another court before which the action was once pending had not jurisdiction? Manifestly not.

The only pertinent question therefore is: Has this court jurisdiction? The defendant having alleged as the sole ground for removal "that the controversy in said suit is between citizens of different states" it may well be doubted whether it should now be permitted to challenge the jurisdiction of the court on the ground of citizenship. But it is contended that the court should on its own motion dismiss the suit pursuant to the fifth section of the act of March 3, 1875. It is urged that the papers now before the court demonstrate not only that the defendant is a corporation of Connecticut but also that it does not transact business in, is not an inhabitant of, and is not found within this district, and therefore the court should not retain the action. All the circumstances necessary to confer jurisdiction, as provided in the first and second sections of the act of 1875, are found to exist in this case; the amount exceeds \$500 and the parties are citizens of different states. Nothing more is required. *Brooks v. Bailey*, 9 FED. REP. 438; *Peterson v. Chapman*, 13 Blatchf. 395; *Claffin v. Ins. Co.* 110 U. S. 81; S. C. 3 Sup. Ct. Rep. 507. The subsequent clause of the first section, which provides that "no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving such process or commencing such proceedings," does not limit the jurisdiction of the court but relates to the mode of acquiring it. It is intended for the protection of the defendant and confers a privilege which he can waive by appearing without asserting it. *Robinson v. Nat. Stock-yard Co.* 12 FED. REP. 361; *Toland v. Sprague*, 12 Pet. 300; *Sayles v. N. W. Ins. Co.*, *supra*; *Flanders v. Aetna Ins. Co.* 3 Mason, 158; *Gracie v. Palmer*, 8 Wheat. 699; *Kel-*

sey v. Pa. R. Co. 14 Blatchf. C. C. R. 89. If permitted to do so, the plaintiff would, undoubtedly, have little difficulty in showing that the defendant is found within this district and is therefore in no position to claim the benefit of the privilege alluded to, but confining the case strictly to the stipulated facts it must be held that the defendant has waived any objection which it might have taken. The jurisdiction of this court was invoked by the defendant and it should abide the result in a forum of its own seeking.

The motion to dismiss the action is denied.

LULL v. CLARK and others.

(Circuit Court, N. D. New York. June 11, 1884.)

EQUITY PRACTICE—QUESTIONS ARISING BEFORE MASTER.

All questions arising before a master in chancery should be presented to the court by objection and exception to his report. Before such report is made, the court will not entertain a motion to instruct the master while discharging his duties according to the best of his ability.

In Equity.

Livingston Gifford, for complainant.

George J. Sicard, for defendants.

COXE, J. This is a motion to instruct the master in an equity action. The complainant has a patent for an "improvement in shutter hinges." The court heretofore sustained the patent and directed a decree for an injunction and an account. 13 FED. REP. 456. The infringing device introduced by the complainant on the trial was a hinge known as No. 1. On the accounting she sought to extend the investigation to several other hinges manufactured and sold by the defendants, contending that they were substantially the same as No. 1, and that they were covered by the decree. To this the defendants objected on the ground, *inter alia*, that the hinges other than No. 1 do not infringe, and, in the absence of a decision by the court holding that they infringe, the master had no authority to proceed. This objection was sustained by the master and complainant's counsel excepted, and immediately gave notice of a motion for an order directing and instructing the master to take and state, and report to the court, an account covering all the hinges referred to. A certified copy of the proceedings before the master is presented upon this motion. But the master has made no report and has not sought instruction or advice from the court.

The first objection interposed by the defendants is that this application is irregular and is not sustained by authority or the practice of the court. I am of the opinion that the objection is well taken. Rule 77 gives the master very general discretion in the conduct of

the investigation before him. He occupies, for the time being, the position of the court, and is not to be continually interfered with while discharging his duties to the best of his ability. It would create intolerable delays and confusion, besides putting an unnecessary burden upon the court to hold, that each time the master makes a ruling the aggrieved party may, by special motion, have it reviewed. The orderly, and it seems the generally accepted, procedure is, to present all the questions arising before the master by objections and exceptions to his report. Let it be assumed that the direction asked for is within the discretion of the court. It has not been customary to exercise it, and, in my judgment, it ought not to be exercised in a case like the present, where the master simply makes a ruling, which he has an undoubted right to make. A decision for the complainant will be recorded for a precedent and the attention of the court continually occupied with similar applications. A simple and well understood system will thus be involved in confusion and uncertainty. The weight of authority sustains the view here taken. *Union Sugar Refinery v. Mathiesson*, 3 Cliff. 146; *Wooster v. Gumbirner*, ante, 167; *Anon.* 3 Atkyn, 524; *Vanderwick v. Summerl*, 2 Wash. C. C. 41, (head-note;) *Daniell*, Ch. Pr. (5th Amer. Ed.) 1181.

The motion must be denied, but without prejudice to any other remedy the complainant may see fit to take.

LINTON and Wife v. BROWN'S ADM'RS and others.

(Circuit Court, W. D. Pennsylvania. May 23, 1884.)

DECLARATION OF TRUST—ACTUAL MANUAL DELIVERY NOT ESSENTIAL TO ITS VALIDITY.

In cases of declarations of trust and deeds of conveyance or mortgage, when nothing further is expected to be done by the beneficiary or grantee to complete the transaction as a whole, a formal sealing and delivery, without an actual delivery to the other party, or to a third person for his use, will be sufficient to make the deed or declaration operative immediately, unless something else exist or be done to qualify such formal delivery.

In Equity.

Hill Burgwin, George W. Guthrie, and James P. Colter, for complainants.

George Shiras, Jr., and Joseph Buffington, for respondents.

Before BRADLEY and ACHESON, JJ.

BRADLEY, Justice. The bill in this case was filed by Augustus F. Linton and Phebe R. E. Elwina, his wife, against the administrators, with the will annexed, of James E. Brown, deceased, and against his widow, Kate L. Brown, and infant son, James E. Brown, Jr., (by his guardian, Charles T. Neale,) the Kittanning National Bank, and the

First National Bank of Kittanning, to establish certain trusts, alleged to have been established and declared by James E. Brown, in his life-time, and by John B. Finlay, and for an account of the said trusts. Copies of the instruments by which the said trusts are alleged to have been created are annexed to the bill as exhibits, marked, respectively, A, C, and D. Exhibit C is an assignment, dated August 10, 1865, by which Mr. Brown, in consideration of the love and affection which he bore to his daughter, Jane B. Finlay, and to her daughter, Phebe R. E. Elwina Finlay, (who is now the wife of Augustus F. Linton, and one of the complainants,) assigned to said Jane 610 shares of the capital stock of the First National Bank of Kittanning, amounting to \$61,000, but to remain in his (said Brown's) name and under his control during his life, as trustee for the said Jane, for her sole and separate use, free from the control of her husband, during her natural life, and after her death the stock, with its accretions and accumulations, in trust for the sole and separate use of the said Phebe R. E. Elwina, free from the control of her husband, and in the event of the death of both of said beneficiaries in his life-time, the said stock, and its unused and funded or invested accumulations, to revert and return to himself, the said Brown. The terms of the trust are somewhat amplified in the instrument, but the general scope of it is as now stated. This instrument is admitted to be valid and binding, and the trusts contained in it are acknowledged by the defendants to be operative. Exhibit D is also admitted to be a valid and subsisting trust, and its execution is not opposed by the defendants. It is a release from John B. Finlay of all his right, title, and interest in his deceased wife's estate, to James E. Brown, in trust for the sole use of his daughter, Phebe R. E. Elwina Finlay, (now Linton,) one of the complainants, her heirs and assigns, until she should reach her majority, and then to be unconditionally transferred to her, her heirs and assigns. The other document, Exhibit A, is denied to be a valid and subsisting instrument, and its validity forms the principal subject of controversy at this stage of the case. It purports to be a deed-poll of the said James E. Brown, bearing date the twenty-third day of July, A. D. 1867, by which the said Brown, in consideration of \$500 to him paid by his daughter, Jane B. Finlay, and of the natural affection he had for her and her child, Phebe R. E. Elwina Finlay, granted, bargained, sold, conveyed, and transferred to the said Jane during her natural life-time, and to her said daughter after her death, all the real estate situated in the states of Pennsylvania, Wisconsin, Illinois, Missouri, and Nebraska, which Dr. John B. Finlay (husband of said Jane) had theretofore conveyed to him, the said Brown; all the personal estate, choses in actions, and claims which had been assigned and transferred to him, the said Brown, by the said John B. Finlay, and were yet held by said Brown; also all the claims, debts of every character which he held, and which were justly due to him by John B. Finlay and by Jane B. Finlay; and also the whole indebtedness to him by the firm of

Finlay & Co., including the transfer to him, said Brown, of said firm, in writing, dated November 7, 1866,—to be held and possessed by his said daughter and granddaughter, and their heirs and assigns, upon certain terms and conditions, which were then specified in the deeds, which were in substance nearly identical with the trusts declared in the previous instrument, Exhibit C; namely, that the property conveyed should remain in his, said Brown's, name, and under his control as trustee for them, during his natural life, for the sole and separate use of his said daughter during her natural life, and after her death for the exclusive use, benefit, and behoof of her said child and his granddaughter, Phebe R. E. Elwina, and her heirs and assigns, free from the liabilities, debts, and control of the husband of either his said daughter or granddaughter; and the proceeds of any of the property that might be disposed of with the consent of the grantee then living to be subject to the same terms and conditions; and if both of said grantees should die, in his, the said Brown's, life-time, the property unused should revert to him.

The validity of this deed, as before stated, is disputed by the defendants. They contend that it was never out of James E. Brown's possession during his life-time, was never delivered by him, and never became an effectual deed; and whether it was executed and delivered by him, and became an effectual deed, is the principal question now to be determined. As by the terms of the deed itself Mr. Brown was to be the trustee during his life-time, the fact of retaining it in his possession is of little consequence. If he was not the only proper custodian of it, there was, at least, no impropriety or repugnancy to its validity in his keeping it. Whether it was sufficiently executed and delivered by him, so as to become a valid and effectual instrument, is another question, which we shall proceed to examine.

As the surrounding circumstances under which a deed is executed often have an important bearing upon the question of its definitive execution and delivery, it will be proper to state the leading circumstances which existed in this case. When the deed was executed (or purported to be) James E. Brown resided in Kittanning, Armstrong county, Pennsylvania, being considerably advanced in life, and possessed of a very large estate. He had no family but a wife by a second marriage, the said Kate L. Brown, one of the defendants in this case. He had an only child by a former marriage, the said Jane B. Finlay, wife of John B. Finlay, who also resided in Kittanning, adjoining the building in which the First National Bank of Kittanning was located, (of which Mr. Brown was the principal, if not sole, stockholder,) and in which he also had his private office. Mrs. Finlay had an only child, the said Phebe R. E. Elwina Finlay, who was then (in 1867) about five years of age. This child, therefore, was at that time the only apparent descendant of Mr. Brown in the third generation. The probabilities, therefore, are in favor of such a provision for Mrs. Finlay and her child as was made by Mr. Brown by

the deed in question. At least, it may be said that such a provision was not an unreasonable or an improbable one for him to make.

In the next place, the property embraced in the deed consisted of lands in Pennsylvania, and several western states, which John B. Finlay had recently (mostly in November previous) conveyed to Mr. Brown, and personal estate, judgments, and claims which had been assigned by John B. Finlay to Brown; and also all claims held by Brown against Finlay, Mrs. Finlay, and Finlay & Co., (in which Mrs. Finlay was a partner,) including the property of Finlay & Co. transferred to Mr. Brown by an instrument dated November 7, 1866. The subject of the trust, therefore, consisted mostly of property which had belonged to John B. Finlay, or to Jane B. Finlay, his wife, or in which they were interested, and of debts due from them to Mr. Brown, and was not taken from the general mass of Mr. Brown's own estate, unconnected with the interest of the Finlays. It may be added that the firm of Finlay & Co. consisted of Mrs. Jane B. Finlay and one Joseph Alcorn, and that their business consisted in carrying on a woolen factory in Kittanning, situated on a lot of ground which Mr. Brown, in January, 1866, had conveyed to his son-in-law, John B. Finlay, in trust for his daughter, Jane B. Finlay; also that on the second of February, 1867, John B. Finlay conveyed to Mr. Brown a tract of land in Kittanning township, in the county of Armstrong, consisting of 319 acres, which the latter, on the same day, conveyed to his daughter, upon the same trusts, for her sole and separate use during her life, and after her death for the sole and separate use of his granddaughter, as are contained and declared in the deed in question; Mr. Brown reserving the control thereof during his life-time as their trustee, and the reversion of the property in case they should both die in his life-time, precisely as in the said deed, Exhibit A.

The deed in question, therefore, if valid, is but one of a series of acts of the same general character by which James E. Brown had transferred property to or for the use of his daughter and granddaughter. Such being the condition of Mr. Brown's family, such his relations to the beneficiaries named in the deed in question, and such the character and derivation of the property conveyed thereby, we proceed to consider the circumstances of its execution. The undisputed facts are as follows:

Mr. Brown drew the deed himself; it is all in his own handwriting, even to the attestation clause, so that it required nothing but the signatures of himself and the witnesses to be a perfect deed in form. Sometime on the day of its date, the twenty-third of July, 1867, he called into his private office, in the rear of the bank, the cashier, William Pollock, and another man, by the name of Absalom Reynolds, to witness its execution, and in their presence signed his name opposite a scroll seal, and then the witnesses signed their names to the attestation clause, which reads as follows: "Signed, sealed, and delivered in presence of ABSALOM REYNOLDS, W. POLLOCK." Then followed a receipt for the purchase money, also in Mr. Brown's writing, as follows: "Received of Mrs. Jane B. Finlay five hundred dollars, being the consideration money above mentioned," which he also signed, and which Mr. Pollock

witnessed as follows: "Attest—W. POLLOCK." In the margin, by the side of this receipt, is affixed a government internal revenue stamp of 50 cents, canceled by Mr. Brown himself, by the following memorandum written on its face: "23 July, '67. J. E. B." Whether this stamp was affixed before or after the execution does not appear. Then follows a certificate of acknowledgment, also in Mr. Brown's handwriting, as follows: "*Armstrong County, ss.*: Before me, Joseph Alcorn, a notary public in and for said county, came James E. Brown, above named, and acknowledged the foregoing deed to be his act and deed, and as such desired it to be recorded. Witness my hand and notarial seal the twenty-third July, 1867." On the same day Mr. Brown acknowledged the execution of the deed before Joseph Alcorn, a notary public, who thereupon affixed his official seal to the certificate, and signed it in his official character, thus: "JOSEPH ALCORN, Notary Public."

The fact of the execution is testified to by William Pollock, the other subscribing witness being dead; but all that Mr. Pollock can recollect of the circumstances is that he was called in from the bank to witness the paper; that Mr. Brown signed it in the presence of himself and Reynolds; and that they signed it as subscribing witnesses, when he, Pollock, went back into the bank. The fact of the acknowledgment is shown by the certificate of acknowledgment, which proves itself, and is also testified to by Alcorn, the notary public. The document thus executed, attested, and acknowledged, and the acknowledgment thus certified, was found at Mr. Brown's death in a sealed envelope, with his will, executed March 30, 1871, in the custody of William Pollock, who was a witness to the will as well as the deed, and to whom Mr. Brown had intrusted it for safe keeping several years previously. After Mr. Brown's decease, Pollock produced the envelope to his family, when it was opened, the will read, and the deed delivered to John B. Finlay, (his wife being then deceased,) and both papers were handed back to Pollock, with the request to have the will registered and the deed recorded, which was done.

The facts as now stated are undisputed, and we might stop here and ask whether the deed in question is not, by this evidence alone, well and sufficiently proved to have been duly executed and delivered, so as to become a valid and operative instrument on the day of its date? Or, if not operative as a deed of conveyance to transfer the legal title, whether it was not at least operative as a declaration of trust, binding upon James E. Brown and his heirs at law? We are inclined to think it was both. If valid as a deed of conveyance, of course it was valid as a declaration of the trusts contained in it, although it might possibly be valid as a declaration of trust, without being valid as a conveyance of title.

But there is additional evidence as to the execution and delivery of the deed, which, though questioned by the defendants, is not materially contradicted, nor is the credibility of the witnesses impeached. John B. Finlay testifies that he was present when the deed in question was written by Mr. Brown; that it was written after consultation with him; that he was present when it was executed; that it was acknowledged the same day, before it was delivered; that after it was executed Mr. Brown went into the dining-room of witness, when the family were at dinner, and in presence of witness and one Robert H. Sayre delivered the paper to Mrs. Finlay, witness' wife; that she handed it to witness to take care of; and that he placed it

in the pigeon-hole, in the vault of the bank, marked "Finlay papers," where he kept his papers, and that he next saw the paper the day the will of Mr. Brown was read, when it was taken out of the envelope as testified to by Pollock. He further testifies that a certain memorandum on the paper just after the acknowledgment, which is in Mr. Brown's handwriting, was not on the paper when it was delivered. This witness also testifies to the payment of the \$500, consideration money of the deed, on the same day on which the deed was executed; that it was paid by Mrs. Finlay, by assigning to Mr. Brown a contract for the purchase of some property in Kittanning, on which she had paid \$710. This contract was produced, and showed receipts for money paid on it to the amount of \$710 prior to the execution of the deed; \$210 being paid by the original party to the contract, who had assigned it to Mrs. Finlay, and \$500 paid by Mrs. Finlay herself in January, 1867. There is also indorsed upon it an assignment of the contract in Mr. Brown's handwriting, dated July 23, 1867, from Jane B. Finlay to James E. Brown. Simon Truby, the other party to the contract, testifies that Mr. Brown paid him the balance due on it over and above the \$710, and that he, thereupon, gave Mr. Brown a deed for the property. The deed was produced in evidence, bearing date the twenty-second of July, 1867, but acknowledged on the twenty-third of July, the day on which the deed in question was executed. These documents corroborate Mr. Finlay's testimony as to the payment and mode of payment of the consideration of the deed in question, as showing that Mrs. Finlay did, on the day of its execution, assign to her father the contract referred to; and that she had made the payments upon it which Mr. Finlay testifies she had done.

Mr. Finlay's testimony is further corroborated by the testimony of Sallie R. Brown, a niece of James E. Brown, who says that some time in the month of July, 1867, she went to the house of Mr. and Mrs. Finlay, in Kittanning, between 12 and 1 o'clock, at noon, and met her uncle, James E. Brown, coming out of the breakfast room, and spoke to him, and on going in she found them at dinner,—Col. Finlay, Mrs. Finlay, and Mr. Sayre; that Mrs. Finlay first asked her to take dinner, which she declined, and that then Mrs. Finlay, holding up a paper, said, "Come and let us have a jollification,—father has given me a deed for the western lands, the mill property, and factory;" that she did not examine the paper, but was near enough to recognize her uncle's handwriting on the back. The deed in question being shown to her, she said it looked like the paper she saw. She fixes the date of the occurrence by the fact that her uncle was going to Butternuts, and did go the next morning. It is shown by other evidence of a conclusive character that Mr. Brown and his wife left Kittanning on the morning of the twenty-fourth of July for Butternuts, New York, on a visit to Mrs. Brown's parents, and were absent until near the middle of August; so that the time of the occur-

fence testified to by the witness must have been the twenty-third day of July, the day on which the deed was executed and dated. An occurrence of this kind, happening in such immediate connection with the transaction, and while the emotion of gratification caused by it still displayed itself in the countenance and actions of the principal beneficiary, may be regarded as a spontaneous burst of the same feeling, and as part of the *res gesta*.

There is nothing to contradict this very conclusive testimony, unless it be that of Joseph Alcorn, the notary public, who took the acknowledgment of the deed. He says that the acknowledgment was taken by him at Mr. Brown's house, in Kittanning, four or five squares from the bank, between sundown and dark, by lamp-light; that he stopped at the house with his seal, at Mr. Brown's request, and found him at a table with the paper in his hand; that Mr. Brown remarked that a portion of it was not as he expected, but that he would explain; that he then wrote the postscript which is below the acknowledgment. The postscript to which the witness referred, and which he pointed out on the deed, is a memorandum in Mr. Brown's handwriting, in the following words: "No indebtedness to the Kittanning Insurance Company, to the Kittanning National Bank, or the First National Bank of Kittanning, are to be affected by the above transfer; none of which is transferred, but remains unpaid and due thereto. J. E. B. 23 July, '67." The witness went on to state that at the time Mr. Brown wrote the postscript he said he was sorry he had not room to write it above the acknowledgment, but that he wanted him to recollect it; but that it made little difference, as he did not intend to deliver that deed; that Mr. Brown told him his object was that if he died without making a will he wanted his property to go as provided in it; otherwise, if he made his will, he wanted it to control."

It is to be observed of this evidence that it does not in the least contradict the testimony of William Pollock, John B. Finlay, and Sallie R. Brown, except the statement of Mr. Finlay that the deed was acknowledged before it was delivered to his wife. But if Mr. Finlay was mistaken in this circumstance it would not detract from the legal effect of the execution of the deed and its delivery to Mrs. Finlay. When thus delivered it became a perfect deed, valid and operative as such, and passed out of the power of Mr. Brown to alter it or take it back by any subsequent declarations or *memoranda*. It is unnecessary, therefore, to scrutinize the remarkable statement made by Alcorn. In the first place, as an officer authorized to take the acknowledgment of a deed, he cannot be received to testify to anything repugnant to the legal effect of his certificate of acknowledgment. In the next place, it is quite possible that Alcorn may be mistaken as to the identity of the instrument on the acknowledgment of which the circumstance and conversation referred to by him took place. He was constantly in the habit of taking Mr. Brown's

acknowledgments to deeds and other instruments. The deed of February 2, 1867, already referred to, was acknowledged before him, and that had quite a long memorandum or postscript in the attestation clause, noting various alterations in the body of the instrument, and other cases of a similar nature might easily have occurred. Mr. Alcorn's testimony was taken 16 years after the deed was executed, and it would not be at all surprising that he should be mistaken in his recollection of a conversation which took place at such a distance of time. Besides, it is very clearly shown that he entertained inimical feelings against Finlay. He was the partner of Mrs. Finlay in the woolen factory, and, after the firm had assigned it to Mr. Brown, he remained in the superintendence for several months, and finally, when Mr. Brown determined that the concern should be closed up, he demanded a considerable sum of money in settlement; and when it was refused he threatened that he would have Finlay indicted for making false returns to the internal revenue department, and actually carried out his threats so far as to make complaint against Finlay, and to have proceedings instituted against him in the district court of the United States, which were subsequently quashed or dismissed by the court. We are satisfied that his testimony, if it would alter the case, is not of such a character as to invalidate that of the other witnesses referred to.

Both parties have referred, with considerable confidence, to the conduct of the parties after the execution of the deed with reference to the property embraced therein. But in our view there is nothing in their subsequent dealings with the property, or in their conduct or declarations, that can affect the validity and binding force of the instrument. Mr. Brown assumed the paramount control of the property; but this it was his right and duty to do as trustee for his daughter and granddaughter. It was natural, however, that as most of it, except the woolen-mill, had belonged to Mr. Finlay, who was presumably better acquainted with its condition and needs than any one else, the care of it should be deputed to him. And this was in fact the case. Mr. Finlay testifies that the rents of the real estate mentioned in the deed were received by him for Mrs. Finlay, or by herself, from the date of the deed until he went to Europe, in 1873, when he was absent about five months, and returned thither again in November, 1874; that the taxes were mostly paid by the tenants, except on the western property, "on which," he says, "they were paid by ourselves;" that he generally paid them. Tenant houses were built or repaired on some of the lands, and paid for by Mrs. Finlay, several of which he specifies. In April, 1878, when Mr. Finlay was about to go to Europe again, Mr. Brown, as Finlay testifies, requested him to make out a list of all the real estate, so that the taxes could be looked after, and he made such a list, which is produced in evidence. In 1879 Mr. Brown wrote to the witness, requesting him to come home and assist in attending to the property, but he did not return until June, 1880.

During the summer and fall of that year Finlay made an extended visit to the west to look after the western lands, and transacted a good deal of outside business besides for Mr. Brown, who was getting very old, and who died in the latter part of November.

At various times after the execution of the deed, when Mr. Brown had occasion to deal with or to speak of the property comprised in it, he spoke of it as held by him for his daughter or granddaughter, the former having died on the thirtieth of December, 1876. The only matters of a positive character in the evidence showing any conduct or declarations of Mr. Brown, after the deed was executed, inconsistent with the position held by him under its provisions, are what we shall now specify. It is shown that he used a considerable amount of Mrs. Finlay's money derived from the bank-stock which he had given her, or from other sources, to pay debts of the firm of Finlay & Co., or of Mr. or Mrs. Finlay, which, in and by the deed, had been given to her or for her use. He may have thought he might justly do this. He may have been mistaken, and his estate may be liable to account for such application of her money. We do not think that the fact of his doing what he did in this regard should have the effect to draw in question the validity of the instrument which he so solemnly executed and delivered.

Another transaction is strongly relied on by the defendants to show that Mr. Brown did not regard the deed in question as binding on him, and that his views of the subject were acquiesced in by John B. Finlay and his wife. On the first day of April, 1871, James E. Brown and his wife, Kate L. Brown, executed a deed of conveyance to Jane B. Finlay, her heirs and assigns, for nearly the same real estate which was conveyed by the deed of July 23, 1867, being described as "all that certain real estate situated in the states of Pennsylvania, Wisconsin, and Missouri, Nebraska, and Minnesota, which was conveyed to the said James by and more particularly described in the following conveyances, viz.,"—then describing the several deeds given by John B. Finlay to James E. Brown, in November, 1866. The purpose of the conveyance is then stated to be "for the sole and separate use of the said party of the second part, (Jane B. Finlay,) and her heirs and assigns, and to be uncontrolled, nor incumbered, nor charged by, nor liable, nor subject in any way to debts, contracts, or engagements of her present or future husband, nor of the future husband of her daughter, Phebe R. E. Elwina Finlay;" to have and to hold the said real estate and appurtenances for the purposes and limitations aforesaid, unto the said party of the second part, and her heirs and assigns, forever.

Mr. Brown did not constitute himself a trustee by this instrument. The deed appears to be regularly executed by the grantors, and witnessed by J. B. Heiner and W. Pollock, and acknowledged on the day of its date before said Heiner as a justice of the peace, and is stamped with government stamps to the amount of \$10, the con-

sideration named in it being \$10,000. It also has a receipt signed by J. E. Brown, written under the attestation, acknowledging that he received on the date, from Mrs. Jane B. Finlay, the sum of \$10,000 in full of the consideration. There is no evidence in the case, however, except this receipt, that any money or valuable consideration was actually paid. It is shown that John B. Finlay left it for record in the recorder's office of Armstrong county on the ninth of October, 1871, and that it was taken by him again after being recorded; and it was subsequently, in the month of November, recorded in two counties in Nebraska. A certified copy of a lease was also given in evidence, dated July 23, 1879, and executed by one Hamlin as attorney in fact for the heirs of Jane B. Finlay, for a lot in Nebraska, in which the said deed was referred to. At this time, however, Mrs. Linton, the only heir at law of Mrs. Finlay, was only 17 years of age, and was a married woman.

John B. Finlay, being examined with regard to this deed, (of April 1, 1871,) says that he got it after this suit was commenced from W. D. Patton, a lawyer in Kittanning, and that he knew nothing about it from the time of his wife's death until it was handed to him or shown to him by Mr. Patton; and, when it was handed to him, there was a paper folded up in it in the handwriting of his wife. This paper was offered in evidence by the plaintiff, but was objected to as incompetent. It seems to consist of *memoranda* of instructions to counsel, and cannot have any legitimate effect as evidence, unless it be to show that Mrs. Finlay herself repudiated the deed. Perhaps, as the conduct of the parties is so searchingly inquired into for the purpose of ascertaining their intentions and understanding as to the validity and subsistence of the deed in question, this declaration of Mrs. Finlay, now deceased, is as good for the purpose as the declarations and conduct of Mr. Brown. In the memorandum, which is written and signed by her, she says—

"That this is not the original transfer; that J. E. Brown transferred to me said lands and said judgment, two years previous to this one, by paper signed, sealed, stamped, by himself and wife, and given into my possession; that said paper was handed to J. E. Brown, as custodian, and two years afterwards present paper was returned to me. Defendant now asks for production of first-named transfer.

[Signed]

"JANE B. FINLAY."

There is a further memorandum on the paper which does not appertain to this subject. On the back is indorsed a pencil memorandum in the handwriting of Mr. Painter,—a lawyer,—which probably furnishes some clue to the purpose of the memorandum. It is the title of a judgment, "*Kittaning Bank v. J. B. Finlay*," and a note as to its date, (June term, 1867,) and that no *fi. fa.* had been issued on it; so, probably, one of the debts or judgments which Mrs. Finlay claimed to have been transferred to her, and on which proceedings against her were about to be taken. On the hearing we were dis-

posed to think that this paper was entirely incompetent, but we think it may be used as some evidence of Mrs. Finlay's position with regard to the deeds of 1867 and 1871. There are inaccuracies of date, and of some particulars, as that Mrs. Brown executed the first deed; but no more than might be expected when Mrs. Finlay was depending on mere recollection.

But this whole matter of subsequent conduct and declarations, including the deed of 1871, may be disposed of by the observation that, if the deed of July 23, 1867, was duly executed and delivered, as we have shown that it was, it could not be gotten rid of or taken back by Mr. Brown by any indirect methods of the kind referred to; certainly not as against his granddaughter, the present complainant, who did not come of age until February, 1883, after this suit was brought, and who has been a married woman since December, 1878. She would not be concluded by any waiver of rights which her mother, Mrs. Finlay, might have submitted to, if she did submit to any.

Under the view of the case which we have taken on its facts, it is hardly necessary to refer to any authorities on the question as to what will amount to an effectual execution and delivery of a deed and a declaration of trust. We will only indicate briefly a few of those which may be regarded as more directly bearing upon the subject in hand.

The case of *Doe v. Knight*, 5 Barn. & C. 671, settled the principle, if it was not settled before by the cases there referred to, that where an instrument is *formally* sealed and delivered, and there is nothing to qualify the delivery but the keeping the deeds in the hands of the executing party,—nothing to show he did not intend it to operate immediately,—that it is a valid and effectual deed, and that delivery to the party who is to take by it, or to any person for his use, is not essential. Of course, in the ordinary case between vendor and purchaser, it is not expected, on the one side or the other, that a deed of conveyance, though duly prepared and executed, and even acknowledged by the vendor, who retains it in his possession, is to have any effect or operation until the whole transaction is completed by the payment or security of the purchase money, and the actual delivery of the deed to the purchaser. In such a case there is something to show that the deed is not intended to operate immediately on its execution, and that something is the very nature of the transaction itself, and the universal understanding in relation to it. And hence it does not contravene the rule laid down in *Doe v. Knight*, but is strictly within its provision. But in the cases of declarations of trust, and deeds of conveyance or mortgage, where nothing further is expected to be done by the beneficiary or grantee to complete the transaction as a whole, the rule applies that a formal sealing and delivery, without an actual delivery to the other party, or to a third person for his use, will be sufficient to make the deed or declaration operate immediately, unless something else exist or be done to qualify such formal delivery.

In the present case the proof that the deed was formally signed, sealed, and delivered is complete. The signature and seal of the grantor, and the signatures of the witnesses to the attestation, are verified by one of the witnesses, and his non-recollection of the details of the transaction cannot impair the effect of the solemn attestation which he signed. He remembers nothing to derogate from its force. And the payment and receipt of the purchase money show that nothing further was required to be done by the grantee, or the parties for whose benefit the instrument was made. The other circumstances attending the transaction, to-wit, the fixing and cancellation of the government stamp, and the acknowledgment duly made and certified, corroborate the conclusion, and render it certain. So that, under the rule stated in *Doe v. Knight*, it did not need any actual delivery to Mrs. Finlay to render the deed a valid and operative instrument.

The principle of *Doe v. Knight* was fully adopted by the supreme court of Pennsylvania in *Blight v. Schenck*, 10 Barr, 285, in an elaborate judgment prepared by Judge ROGERS. The substance of the case is stated in the head-note, that where a grantor executes and acknowledges a deed before a magistrate, which had been left there for that purpose by the agent of the grantor and grantee, and leaves the instrument with the magistrate without instructions, the delivery is absolute; and instructions given to the agent on the next day not to deliver the deed until payment of the purchase money are immaterial, and do not amount to an escrow; for matters subsequent to an unqualified delivery to a stranger cannot make a delivery in escrow. The court say: "That the delivery was complete when the grantors declared before the proper officer that they signed, sealed, and delivered the deed, without saying or doing anything to qualify the delivery, is well settled on authority. If the grantee had been present at the time, either personally or by agent, no person would doubt that the title vested; but it is ruled that this will not prevent it taking effect as a good deed;" and reference is then made to *Doe v. Knight*, and a number of other authorities. And again the court says: "The general principle of law is that the formal act of signing, sealing, and delivery is the perfection and consummation of the deed; and it lies with the grantor to prove clearly that the appearances were not consistent with the truth. The presumption is against him, and the task is on him to destroy that presumption by clear and positive proof that there was no delivery, and that it was so understood at that time."

The case of *Blight v. Schenck* was cited and relied on in the subsequent case of *Diehl v. Emig*, 15 P. F. Smith, 820, where the alleged deed was from a father to his daughter, and was retained in the grantor's possession, and it was objected that there was no proof of delivery; but the court said "'signed, sealed, and delivered' was the solemn statement of the grantor, formally acknowledged before a magistrate, and admitted to the witnesses;" and that, on the princi-

ple laid down in *Blight v. Schenck*, such circumstances, unaccompanied by any fact which would countervail their effect, would establish a *prima facie* case of due execution, including delivery, and call upon the other side to rebut their effect by proof of non-delivery.

In *Hope v. Harman*, 11 Jur. 1097, Mr. Hope executed a deed to his nephew for a box of jewels, in the presence of a witness, who signed the attesting clause, "signed, sealed, and delivered." The deed never went out of the possession of the grantor, and Lord DENMAN left it to the jury to say whether it had been duly executed and delivered with intent to operate immediately, and the jury found that it had been. The instruction was held by the court in bank to have been correct.

But declarations of trust are often sustained by much less regard to evidence of delivery than is required for establishing deeds of conveyance. Thus, in *Fletcher v. Fletcher*, 4 Hare, 67, the testator, by a voluntary deed, covenanted with trustees that in case A. and B., his two natural sons, should survive him, his executors and administrators should pay to trustees named £60,000 upon trust for them, to be paid at 21 years of age. He retained the deed in his possession and told no one of it. By his will he bequeathed all his property in trust for his widow and other persons. The deed was found among his papers. It was held by Vice-Chancellor WIGRAM that it created a trust for A., (who survived the grantor,) though the trustee refused to sue at law; and that the retention of the deed in the grantor's custody, and not communicating its existence to the trustee or *cestui que trust*, did not affect its validity. On the last point the vice-chancellor referred to *Dillon v. Coppin*, 4 Mylne & C. 660, and to *Doe v. Knight*, 5 Barn. & C. 671.

This subject is discussed in *Adams v. Adams*, 21 Wall. 185; in *Bunn v. Winthrop*, 1 Johns. Ch. 329; *Souveryby v. Arden*, Id. 255; and in *Lewin, Trusts*, 152.

Mr. Lewin, as quoted in *Adams v. Adams*, gives the following rules on this subject:

"On a careful examination the rule appears to be that, whether there was transmutation of possession or not, the trust will be supported, provided it was, in the first instance, perfectly created. * * * It is evident that a trust is not perfectly created where there is a mere intention or voluntary agreement to establish a trust, the settlor himself contemplating some further act for the purpose of giving it completion. * * * If the settlor propose to convert himself into a trustee, then the trust is perfectly created, and will be enforced as soon as the settlor has executed an express declaration of trust intended to be final and binding upon him, and in this case it is immaterial whether the nature of the property be legal or equitable. * * * Where the settlor proposes to make a stranger the trustee, then, to ascertain whether a valid trust has been created or not, we must take the following distinctions: If the subject of the trust be a legal interest, and one capable of legal transmutation, as land, or chattels, etc., the trust is not perfectly created unless the legal interest be actually vested in the trustee."

It seems to us that the deed in question, regarded merely as a declaration of trust, was clearly executed in a manner to fulfill all the

requirements of such an instrument; though we are further of opinion that it was well and sufficiently executed and delivered as a deed of conveyance to transfer the legal title.

Our conclusion is that the complainants are entitled to a decree declaring that the deed of July 23, 1867, was duly executed and delivered, and became valid and effectual for all the purposes therein expressed at and from the day of its date; and that all the trusts declared in the several instruments described in the bill of complaint, and annexed thereto as Exhibits A, C, and D, should be established, carried out, and enforced, and that an account should be required as prayed for in the bill.

Upon an examination of the master's report we are entirely satisfied with its correctness, and if it were a regular practice to refer the principal controversy in an equity suit to a master, we should be content to accept and confirm the report, without a particular and detailed examination of the evidence. But as this practice is not strictly regular, and as it is the duty of the court itself to pass upon the merits of the case, we have felt it our duty to do so. We have examined the form of decree which the master has proposed and annexed to his report, and are satisfied with it as the proper decree to be entered.

It may be proper to observe, before concluding this opinion, that as the deed of February 2, 1867, from James E. Brown and wife to Mrs. Jane B. Finlay, for the tract of 319 acres of land in Kittanning township, Armstrong county, was executed before the deed of July 23, 1867, and contained identically (or nearly so) the same trusts which are declared in the latter deed, it is paramount thereto, and the complainants will be at liberty, if they see fit, to amend their bill of complaint by setting forth the said deed of February 2, 1867, and praying for the establishment and execution of the trusts therein contained. It was not exhibited in evidence until the present hearing, and had probably been overlooked in the preparation of the bill of complaint.

See *Ireland v. Geraghty*, 15 FED. REP. 35, and note 45.—[ED.]

ILLINOIS CENT. R. CO. v. STONE and others.

(Circuit Court, S. D. Mississippi. 1884.)

1. CONSTITUTIONAL LAW—OBLIGATION OF CONTRACTS.

A railroad company—purchaser of another railroad—having received a charter from the state through which the latter ran, conditionally upon its payment to the state of the debts of the purchased road, became thus a party to a contract to which the state was the other party, and any law of the state subsequently made restraining the company in its rights under the charter is "a law impairing the obligation of contracts," and therefore void.

2. SAME—LAWS TO REGULATE COMMERCE.

A state legislative act to fix and regulate the charges of transportation of any road save such as is strictly and entirely within the borders of that state, is a law to regulate commerce, and against the constitution of the United States.

Motion for Preliminary Injunction.

HILL, J. The questions now presented for decision arise upon complainant's motion for a preliminary injunction to restrain the defendants, as railroad commissioners for the state of Mississippi, from in any way interfering with the complainant or its agents in the management and business of operating its railroad. The questions presented have been most ably and exhaustively argued by the distinguished and learned counsel on both sides, and are questions of momentous importance to the people, and to the commercial interests of the country at large, as well as to the complainant, and all whose interest it represents. The facts set forth in the bill, not being controverted, for the purposes of the motion are to be taken to be true. These facts, so far as they relate to the questions now to be decided, are, in substance, as follows:

"The complainant corporation was created by an act of the legislature of the state of Illinois, and is the owner of and operates the Illinois Central Railroad, and its branches and connections, running north from the city of Cairo, in the state of Illinois, and is the lessee of and operates the Chicago, St. Louis & New Orleans Railroad and its branches, extending south from Cairo to the city of New Orleans, in the state of Louisiana. The Chicago, St. Louis & New Orleans Railroad Company is a corporation created by the legislatures of the states of Louisiana, Mississippi, Tennessee, and Kentucky, as a continuous line of railroad communication between the cities of New Orleans and Cairo, and there to connect with the Illinois Central Railroad, and its branches and connections, so as to afford a connected line of transportation for persons and commercial commodities from the city of New Orleans, and its commercial connections on the Mississippi river, Gulf of Mexico, and railway connections, and all intermediate connections, by railroad or water, from New Orleans to the terminus of the Illinois Central Railroad, its branches and connections, thus affording a great commercial highway from the gulf on the south to the lakes on the north."

The bill further alleges that the purpose of those who built this extensive channel of commercial communication, and the United States, the states, the counties, and the people, who have contributed thereto, and which they would not otherwise have done, was to establish a highway for the transportation of persons and articles of commerce, for the benefit of themselves and all others who might desire to avail themselves of this means of rapid transit from one part of the United States to another, and to other parts of the world, and over which hundreds of thousands of persons and many millions of property are constantly being transported, and have been for years past, without interruption from any state authority, until recently.

The bill further states that the Chicago, St. Louis & New Orleans Railroad Company became the owner by purchase, under the decrees of this court, of the Mississippi Central Railroad, and of the New Orleans, Jackson & Great Northern Railroad, and all the property connected therewith owned by said railroad companies; the former extending from Canton, in the state of Mississippi, to Cairo, in the state of Illinois, passing through the states of Tennessee and Kentucky, and

the latter from New Orleans, in the state of Louisiana, to Canton, in this state, both being interstate railroads; and by said purchase became vested with all the rights and privileges of the debtor corporations, the sales having been made to satisfy debts owing by said corporations respectively. That as a condition upon which the corporate powers were, by the legislature of the state of Mississippi, granted to the Chicago, St. Louis & New Orleans Railroad Company, it was required of said corporation that it would pay to the state all the indebtedness due from said corporations whose property and rights had been so purchased, and for which said purchaser was not responsible, and which payment, to the amount of \$158,978.82, has been made; that under the chartered rights so purchased, and the act of incorporation, it is expressly granted to said corporation the right and power to adapt, establish, and change at pleasure a tariff of charges; that the same right and power was granted to the debtor corporations which was so purchased by complainant's lessor, together with the right and power to select all necessary officers, agents, and employes, and to control and manage and operate said railroad, and all the business and property connected therewith.

The bill further charges that the legislature of the state of Mississippi, on the eleventh day of March, 1884, passed an act, which has been approved by the governor of said state, entitled "An act to provide for the regulation of freight and passenger rates on railroads in this state, and to create a commission to supervise the same, and for other purposes;" that under the provision of this act the defendants have been appointed and commissioned as such commissioners, and have entered upon the discharge of their duties as such, and threaten to interfere with the rights of complainant, to which it has succeeded as such lessee, and which have been enjoyed and exercised by those whose rights complainant has purchased, for a quarter of a century, without just complaint, which interference, it is alleged, if permitted, will greatly injure and embarrass complainant in the management and control of said railroad, and the transportation of persons and freight over the same, in violation of the just rights and privileges so purchased and granted, and in violation of and in conflict with the constitution of the state of Mississippi and of the United States, and from doing which the bill prays the defendants may be restrained and enjoined by the decree of this court.

Whether the act of the legislature creating the commission, and giving it the powers and imposing the duties therein provided, is wise or unwise, on the one hand, or whether the acts of the complainant intended to be controlled by it are just grounds of complaint, on the other, are questions over which this court will not undertake to decide. The only question is, did the legislature have the power and authority, under the constitution of the state of Mississippi and the United States, to enact the law? Or, to state the question in other words, do any of the provisions of the act, and if so, which of them,

violate or conflict with any of the provisions of both or either of these constitutions? If they do not, then the act must be maintained, and the complainant, if suffering a wrong, must apply to the legislature for relief; but if they do, then the act, so far as it does violate any of these constitutional rights, must be declared void, and treated as if the act had never been passed.

It is a well-established and cardinal rule, as expressed by Chief Justice MARSHALL in the case of *Fletcher v. Peck*, 6 Cranch. 87,—

"That the question whether a law be void for its repugnancy to the constitution is at all times a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative in doubtful cases. The court, when impelled by duty to render such a judgment, would be unworthy of his station could he be unmindful of the obligation which that station imposes. But it is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers, and its acts to be considered as void. The opposition between the constitution and the law should be such that the judge feels a strong conviction of their incompatibility with each other."

But when the judicial mind is clearly satisfied of the repugnancy of the legislation to the constitution, the fundamental law, then the court has no alternative but to so declare it, and to hold the act of the legislature void. Another rule is that when there are different and distinct provisions in an act, and some of them are in conflict with the constitution and others are not that such as are violative of the constitution are declared void, and the others valid.

Before considering the provisions of the act complained of, it is necessary to consider the nature and character of the rights of the complainant corporation. The rights of the lessor corporation are of a twofold character: *First*, to provide and maintain a great interstate commercial highway for the transportation of persons and property from one state to another, and from one commercial mart to another; *secondly*, to make a return to those who have invested their money in the enterprise, either originally or by purchase, by way of dividends or interest upon the capital invested.

Complainant's road is a public highway, so far as it affords to all a means of transportation upon payment of a reasonable compensation for the service to be performed, the right to receive which is conferred by the charter granted to the Chicago, St. Louis & New Orleans Railroad Company, and the right and power to fix and change at pleasure the rate of charges given in the charter must be understood as reasonable compensation for the services rendered or to be rendered. The complainant being a common carrier is liable to be amerced in damages, not only compensatory, but punitive, for refusing to transport persons or property, suitable for transportation, upon the payment, or tender of payment, of such reasonable compensation. The question of what is reasonable compensation in such cases is one alone for judicial ascertainment, when not fixed by the charter, and no power is reserved therein, thereafter, to fix it.

The rights granted in the act of incorporation, and accepted, constitute a contract between the state of Mississippi and the Chicago, St. Louis & New Orleans Railroad.

The doctrine that the rights, powers, and privileges granted by the legislature in the acts of incorporation, when not violative of any provision of the constitution of the state or United States, and not invalid, constitute a contract between the parties, which is protected by the tenth section of the first article of the constitution of the United States, was first announced by the supreme court of the United States in the case of *Dartmouth College v. Woodward*, 4 Wheat. 565, and has been strictly adhered to by that court from that time to the present. Reference to the repeated decisions of that court sustaining this position need not be referred to. These chartered rights, however, are in all cases subject to the police power of the state, with which it is not at liberty to part, and may be granted and withdrawn at the pleasure of the legislature. These police powers relate to the public peace and safety, public health, public morals, and the like. The Chicago, St. Louis, & New Orleans Railroad, upon its creation, became vested with and entitled to all the rights and privileges granted by the charter, and was entitled to all the protection under the law, and subject to all the liabilities, that an individual would have been entitled to, or liable for, in like condition. A private corporation,—and in one point of view complainant is such,—although serving a great public purpose, is an association of individuals for a lawful object. The great object of an incorporation of this character is to give individuality and perpetuity to a collection or body of men for the accomplishment of a common end.

It will be sufficient, for the purpose of disposing of the present motion, to consider only two of the objections stated in the bill to this act of the legislature as violative of the constitution of the United States, either of which, if well taken, must dispose of the motion. The first, and the one which lies at the foundation, is that it violates and is in conflict with the tenth section of the first article of the constitution of the United States, because it impairs the obligation of the contract made between the state of Mississippi and the Chicago, St. Louis & New Orleans Railroad Company, the lessor of complainant, by which said corporation was vested with the power "to make contracts, and to adopt and establish such tariff of charges for the transportation of persons and property as said corporation might think proper, and the same to alter and change at pleasure."

By the sixth section of the act of the legislature complained of, it is provided that—

"All persons or corporations who shall own or operate a railroad in this state shall, within thirty days after the passage of this act, furnish the commission with its tariff of charges for transportation of every kind, and it shall be the duty of said commission to revise said tariff of charges so furnished, and determine whether or not, and in what particular, if any, said

charges are more than just compensation for the services to be rendered, and whether or not unjust discrimination is made in such tariff of charges against any person, locality, or corporation; and when said charges are corrected, as approved by said commission, the commission shall then append a certificate of approval to said tariff of charges; but in revising or establishing any and every tariff of charges, it shall be the duty of said commission to take into consideration the character and nature of the service to be performed, and the entire business of such railroad, together with its earnings from the passenger and other traffic, and shall so revise such tariffs as to allow a fair and just return in value of such railroad, its appurtenances and equipments; and it shall be the duty of said commission to exercise a watchful and careful supervision over every tariff of charges, and continue such tariff of charges from time to time as justice to the public and each of such railroad companies may require, and to increase or reduce any of said rates, according as experience and business operations may show to be just; and said commission shall fix accordingly the tariffs of charges for those railroads failing to furnish tariffs as above required. And it shall be the duty of said railroad company, or persons operating any railroad in this state, to post at each of its depots all rates, schedules, and tariffs for the transportation of passengers and freights, made or approved by said railroad commission, with said certificate of approval, within ten days after said approval, in some conspicuous place at such depot; and it shall be unlawful for any such person or corporation to make any rebate or reduction from such tariff in favor of any person, locality, or corporation which shall not be made in favor of all other persons, localities, or corporations, by a change in such published rates, except as may be allowed by the commission; and when any change is contemplated to be made in the schedule of passenger or freight rates of any railroad by the commission, said commission shall give the person or corporation operating or managing said railroad notice in writing, at least ten days before such change, of the time and place at which such change will be considered."

It is very clear that this act, if enforced by the commission, will deprive complainant of the right to adopt by its duly-appointed officers and establish such a tariff of charges for the transportation of persons and property as it may think proper, and the same to alter and change at pleasure, which right is conferred upon the Chicago, St. Louis & New Orleans Railroad Company by its charter, and to which the complainant is entitled under the lease executed by said company to the complainant, and which has been approved by the legislature. This right and power was granted by the state in the charter, which was accepted by the Chicago, St. Louis & New Orleans Railroad Company without any conditions, restrictions, or limitations upon its enjoyment and exercise, and without any reservation upon the part of the legislature to thereafter impose them. But there was a condition imposed in the charter of a different character, and that was that the corporation should pay to the state an indebtedness due to it from the Mississippi Central Railroad Company, and for which the corporation was in no way liable, amounting to the sum of \$158,978.82, which has been paid. Taking the purpose of those contributing to the establishment of this great commercial highway, and the consideration so paid, I can come to no other conclusion than that this charter, with this right and power so given and ac-

cepted, constituted a contract between the state of Mississippi and the corporation which is protected and is inviolate under the tenth section of article 1 of the constitution of the United States, the great sheet-anchor of the rights of corporations as well as individuals, and this conclusion is strengthened by the fact that the right upon the part of the owners of these railroads to charge and receive a fair and reasonable compensation for the money expended by them, and those from whom they have purchased, in building and operating them, is as necessary as is blood to imparting life and motion to the human body, and without which neither can long exist. I am satisfied that not only the sixth section of this act, but several others, violates this contract so secured by this constitutional provision, and renders the whole act void, so far as it relates to the exercise of any power or control by the commission created by it over the Chicago, St. Louis & New Orleans Railroad, so possessed and operated by complainant.

With this conclusion thus reached I might dismiss the subject without further comment, but it has been pressed with great force on the one side, and with equal earnestness and ability resisted on the other, that this act of the legislature is in conflict with and violates the eighth section of the first article of the constitution of the United States, because in purpose and effect it is an attempted regulation of commerce among the states,—a power which is vested exclusively by this provision of the federal constitution in the congress of the United States. This is a grave and important question, in which all concerned are deeply interested. As already stated, the right to demand and receive compensation for the expense incurred in building, equipping, and operating this wonderful and immense mode of transportation of persons and property from one place, state, and country to another, is an absolute necessity. It is difficult to perceive how the power to fix and regulate the charges for such transportation can be considered in any other light than that of a power to regulate commerce, and when the railroad upon which the transportation is made passes through more states than one, or from one state into another, it does constitute commerce among the states, and the states have not the power to regulate.

As already stated, the Chicago, St. Louis & New Orleans Railroad was designed to be and was chartered by the legislatures of Louisiana, Mississippi, Tennessee, and Kentucky, though all acting separately, it is true, but with one common purpose, which was to constitute one corporate body for the maintenance of a great commercial highway for the transportation from New Orleans to Cairo, and there to connect with all the commercial highways connecting at that point. It is not, therefore, a mere local highway, although, as an incident, freight and passengers were intended to be and are transported from one place to another in the same state, as is done by means of vessels, on navigable streams passing by or through more states than

one, in respect to which the supreme court of the United States has decided, in the case where the transportation was of a person from New Orleans to Hermitage, in the state of Louisiana, that it was a commerce within the exclusive control of congress, and for the reason that the vessel was engaged in the transportation of passengers on the Mississippi river between New Orleans, in Louisiana, and Vicksburg, in this state, and that an act of the legislature of Louisiana, attempting to control the carrying of passengers on steam-boats in that state, was a violation of the provisions of the constitution of the United States conferring upon congress the power to regulate commerce among the states. See *Hall v. De Cuir*, 95 U. S. 485. In the case of *Ex parte Boyer*, 109 U. S. 629, S. C. 8 Sup. Ct. Rep. 434, the same court decided that a canal, constructed wholly in one state and by that state, but forming part of a line of transportation passing through more states than one, or from one state into another, is within the admiralty jurisdiction, and it would follow that interstate commerce conducted on it is under the exclusive control of congress.

It is argued upon the part of defendants that there is a distinction between water or a natural highway and an artificial one; but the canal is an artificial way, and it is difficult to find a reason for a distinction between the water on which the canal-boat or other vessel floats and the iron rails over which the cars pass in transporting the same character of persons and property.

I do not suppose it can be seriously questioned that the original act as passed by the legislature violated the provisions of the federal constitution under consideration, and the legislature seems to have recognized that fact, and therefore, in the effort to avoid the result, passed a supplemental act confining its operations to persons and property transported from one place to another within the state, and to persons and freight transported from a place without the state to a place within the state, and from a place within the state to a place without the state.

The cases of *Munn v. Illinois*, 94 U. S. 113; *Chicago, B. & Q. R. Co. v. Iowa*, Id. 155; and *Peik v. Chicago & N. W. R. Co.* Id. 164, are relied upon to sustain the validity of the act as it now stands. The first-named case was in relation to a warehouse situated wholly in Illinois, and does not, in my opinion, apply to the question under consideration. In the second case, the railroad about which the controversy arose was wholly within the state of Iowa. The last case, at first view, would seem to sustain the position assumed by counsel. But it cannot fairly be supposed that the court intended to declare that interstate commerce might be regulated by the states until congress chose to regulate it, for the same court has often said that inaction by congress in this respect is no warrant for state interference. The opinion is not as intelligible as perhaps it might have been made by a fuller statement of the facts. It was a peculiar case. A corporation of Illinois was, by the consent of that state,

merged into a corporation of the state of Wisconsin, and in express terms was thereafter to be governed by the laws of Wisconsin, within that state, and the constitution of Wisconsin authorized the legislation complained of, and the corporation had become a domestic corporation of Wisconsin, although its line of road extended into the state of Illinois. The court said that Wisconsin could certainly regulate its fares, and that such regulation affected people outside the state only incidentally. In any event we have not such a case before us in the striking particulars presented, to-wit, a case where one state had the power to regulate rates on a road extending beyond its limits. It will be observed that the court throughout treats the corporation as a domestic corporation under the power of Wisconsin throughout its line of road. The language of the court is: "Thus Wisconsin is permitted to legislate for the consolidated company in that state precisely the same as it would of its own original companies if no consolidation had taken place." It is sufficient to say, without expressing an opinion how far this peculiar condition of the corporation ought to modify the rule as to commercial power, that there is no such case presented here, and that the question before the court in this case is an open one, so far as it relates to this court.

The question, however, has been passed upon by Judge McCrARY, of the United States circuit court of Iowa, in the case of *Kaiser v. Illinois Cent. R. Co.* 18 FED. REP. 151, in which that distinguished judge held that a statute of Iowa fixing the maximum rate to be charged by railroad companies for carrying freight within the state is invalid in so far as, by its terms, it applies to through shipments, from points within the state to points without the state, because it is a regulation of commerce beyond the state, and, if upheld, would enable the state to discriminate against other states.

It will be observed that the constitutions of Illinois, Iowa, and Wisconsin, in which the cases relied upon by defendants' counsel arose, reserved the right to the legislatures, respectively, to fix maximum or regulate the rates of charges for transportation within the respective states, which is a right not reserved by the constitution of this state. The rule held by Judge McCrARY is the same recently announced by Judges BAXTER, KEY, and HAMMOND, in the case recently decided at Nashville, Tennessee. *Louisville & N. R. Co. v. Railroad Com'rs of Tenn.* 19 FED. REP. 679. Other decisions by eminent circuit judges, going to sustain the same position, might be referred to, but being satisfied that the rule stated is the law, I adopt it, and, applying it to the act of the legislature complained of in the bill, hold it to be in conflict with the constitution of the United States, and void. This being so, other questions raised in the bill need not be considered, as it would extend this opinion to too great a length.

The result is that the motion of the complainant must be sustained, and a writ of injunction awarded, as prayed for in the bill.

JONES and others v. STEAM STONE CUTTER Co.

(Circuit Court, D. Vermont. May 29, 1884.)

VENDOR AND VENDEE—NOTICE OF INCUMBRANCE—IMPROVEMENTS—REV. LAWS VT. § 126.

One who takes a deed for an incumbered piece of property, knowing it to be so, in the faith that his grantor will relieve it of the incumbrance, does so at his peril, and he cannot, by the laws of Vermont, recover of his ejector compensation for the improvements he has made upon it.

At Law.

William Batchelder, for plaintiffs.*Aldace F. Walker*, for defendant.

WHEELER, J. This is a declaration for betterments, filed according to the statutes of the state, after judgment in ejectment, in favor of this defendant, against the plaintiffs at the last term. Rev. Laws, Vt. § 1261. The issue has been heard by the court, upon the waiver of a jury, and involves the right to maintain the declaration which is the chief matter in controversy. The right to maintain the action depends wholly upon the statutes of the state. *Griswold v. Bragg*, 18 Blatchf. 202. These statutes give the right to the defendant in ejectment, against whom a recovery has been had, to recover of the plaintiff the value of improvements made by the defendant, or those under whom he claims, upon the land, if he has or they have purchased the lands, "supposing the title to be good in fee." Rev. Laws Vt. § 1260. These plaintiffs purchased the lands of the Windsor Manufacturing Company. They were subject to a lien in the nature of an attachment, held by this court to be valid, and upon which the recovery in ejectment has been had. *Steam Stone Cutter Co. v. Sears*, 20 Blatchf. 23; S. C. 9 FED. REP. 8; *Steam Stone Cutter Co. v. Jones*, 13 FED. REP. 567. These plaintiffs knew, at the time of their purchase, of this attachment. It was mentioned as an incumbrance, and covenanted against, in their deed. They testify that they supposed the Windsor Manufacturing Company would make the title good, and do not testify that they supposed the attachment was invalid. It seems quite clear upon the evidence that they relied upon the covenant of their grantor, and the ability of the grantor to relieve the property from the attachment, either by defeating the suit in which the attachment was made, or by satisfying the judgment, if one should be recovered, rather than the title of their grantor as against the attachment. They purchased supposing the title to be subject to the attachment, instead of supposing it to be good in fee, as the statute requires to entitle them to maintain this claim. They do not lose the land by the failure of a title which they supposed to be good, but by the failure of the Windsor Manufacturing Company to keep good a title which they knew was liable to turn out to be bad. This is a rule of property to be governed by the

laws of the state, but the decisions of the courts of the state most favorable to, and most relied upon to support, the claims of these plaintiffs, only give countenance to recoveries for betterments made under a title supposed to be good in itself. *Brown v. Storm*, 4 Vt. 37; *Whitney v. Richardson*, 31 Vt. 800. The faith which these statutes vindicate must rest upon the title, and its inherent strength to withstand attack, and not upon covenants or other undertakings to maintain. The result is there must be judgment for this defendant upon this declaration. These plaintiffs will have left to them, apparently, all the remedies which they supposed they had against the Windsor Manufacturing Company. If those remedies fail of substantial result for want of pecuniary responsibility of that company, these plaintiffs, and not these defendants, trusted to that responsibility in this respect, and it is more just that they should stand the loss.

Judgment for defendant on declaration for betterments, with costs.

See *Griswold v. Bragg*, 6 FED. REP. 342.

GEORGE v. STEAM STONE CUTTER Co.

(Circuit Court, D. Vermont. May 29, 1884.)

VENDOR AND VENDEE—RIGHT TO RECOVER FOR IMPROVEMENTS—EJECTMENT—NOTICE OF INCUMBRANCE.

Jones v. Steam Stone Cutter Co., ante, 477, distinguished.

At Law.

William Batchelder, for plaintiff.

Aldace F. Walker, for defendant.

WHEELER, J. This case differs from that of *Jones v. Steam Stone Cutter Co.*, ante 477, in this: that this plaintiff purchased this land of them supposing the title to be good in fee. She made the betterments in reliance upon the title itself. The attachment was of the land without the betterments. Its force is not abated by the statute, or these proceedings. If she is within the description of the statute, she owns so much of the premises as her betterments have enhanced the value, and the defendant the rest, which is exactly what was attached. If not, the defendant owns the whole, according to the common law. The statute declares and enforces a right arising from the natural equity in favor of giving the enhanced value of land to the one who placed it there as an owner. The manner in which the title fails, whether by an unknown lien or a paramount title, is not made any condition. The sole test of the right to the value conferred by the betterments is that they be made by the purchaser of a supposed title in fee. *Brown v. Storm*, 4 Vt. 37; *Whitney v. Richard-*

son, 81 Vt. 300. The plaintiff falls within the description, and is entitled to judgment in her favor upon this declaration. The betterments are found to enhance the value of the land to the amount of \$1,300. Final judgment in the action of ejectment has not yet been entered, but withheld to preserve the right of the plaintiff there to have the value of the land ascertained by commissioners according to further provision of the statute. Section 1269 *et seq.* Final judgment will now be entered for the seizin and possession of the premises, with six dollars damages, and costs, and judgment for the plaintiff on the declaration for betterments for \$1,300, value of betterments.

Executions stayed according to section 1266, Rev. Laws Vt.

AMSDEN v. STEAM STONE CUTTER Co.

(Circuit Court, D. Vermont. May 29, 1884.)

VENDOR AND VENDEE—RIGHT TO RECOVER FOR IMPROVEMENTS—EJECTMENT—NOTICE OF INCUMBRANCE.

George v. Steam Stone Cutter Co., ante, 478, distinguished.

At Law.

William Batchelder, for plaintiff.

Aldace F. Walker, for defendant.

WHEELER, J. This case differs from that of *George v. Steam Stone Cutter Co.*, ante, 478, in this: George E. Chase purchased the land of Jones, Lamson & Co., supposing the title to be good in fee, made betterments upon it, and conveyed the property to this plaintiff, who knew of the attachment. The statute expressly covers this difference by providing for a recovery by a defendant in ejectment for betterments made by those under whom he claims, if they purchased the lands supposing the title to be good in fee and made the betterments. Rev. Laws Vt. § 1260. The increase in value in consequence of such betterments is found to be \$2,000. Final judgment for seizin and possession of the premises, with \$30 damages, is now to be entered in the action of ejectment; and judgment for the plaintiff on the declarations for betterments for \$2,000, value of betterments.

Execution stayed according to section 1266, Rev. Laws Vt.

PEORIA SUGAR REFINERY v. SUSQUEHANNA MUT. FIRE INS. Co.¹

(Circuit Court, E. D. Pennsylvania. February 6, 1884.)

1. FIRE INSURANCE—WAIVER OF EXPRESS PROVISIONS IN POLICY—CUSTOM.

Waiver of an express provision in a policy of fire insurance cannot be proved by parol testimony showing that the general custom among insurance companies and brokers is otherwise than as stated in the provision, when there is another clause in the policy providing that there shall be no waiver, except by the authority of the company expressed in writing.

2. SAME—PAROL EVIDENCE.

But such a waiver can be proved by parol testimony showing the course of business of the company which issued the policy in its dealings with the broker who procured the policy.

3. SAME—PAYMENT OF PREMIUMS—AGENCY.

A policy of insurance on the plaintiff's factory provided that the company should not be liable "until the cash premium be actually paid to the company, or an agent of the company;" that any broker, or other person than the assured who had procured the policy, should be "deemed the agent of the assured, and not of the company;" that no person should be considered the agent of the company, unless he held the commission of the company; that there should be no waiver by the company of any term in the policy, except by express authority in writing. The insured, owning a large factory, placed their insurance in the hands of H. & Co., insurance brokers in New York: H. & Co. applied to B. & Co., insurance brokers in Jersey City, who obtained the policy and delivered it to H. & Co. B. & Co. had previously placed a few risks with the defendant, but was not, in fact, their agent. H. & Co. sent the premium to B. & Co., who kept it for several days, and until the property insured was burnt, when they sent it to the defendant, who refused to accept it. *Held*, that B. & Co. were not the agents of the company to receive payment of this premium for the company, and that the plaintiff could not recover.

Sur Motion to take off Compulsory Nonsuit.

This was an action of *assumpsit* on a policy of insurance for \$1,500, dated August 25, 1881. At the trial, before BUTLER, J., November 13, 1883, the plaintiffs offered in evidence the policy, proved the total destruction of the property insured on October 27, 1881, and their compliance with all the requirements of the policy as to furnishing proofs of loss, etc. The policy contained the following clauses:

"(1) This company shall not be liable by virtue of this policy, or any renewal thereof, until the cash premium be actually paid to the company, or to an agent of the company.

"(2) If any broker, or other person than the assured, have procured this policy, or any renewal thereof, or any indorsement thereon, he shall be deemed to be the *agent of the assured*, and not of this company, in any transaction relating to the insurance.

"(3) Only such persons as shall hold the commission of this company shall be considered as its agents in any transactions relating to the insurance, or any renewal thereof, or the payment of premium to the company. Any other person shall be deemed to be the agent of the assured, and payment of the premium to such person shall be at the sole risk of the assured."

"(6) The use of general terms, nor anything less than a distinct agreement, clearly expressed and indorsed by this company on this policy, shall be construed to be a waiver of any printed or written term, condition, or restriction

¹ Reported by Albert B. Gullbert, Esq., of the Philadelphia bar.

thereof, nor can any such printed or written term, condition, or restriction be waived by any agent of this company, either before or after a loss, without special authority in writing from the company."

It appeared from the testimony that the insurance was negotiated by Hamlin & Co., of New York, through W. W. Buckley & Co., insurance brokers of Jersey City. The policy was received by Buckley & Co. from the home office of the defendant company in the early part of September, 1881, and immediately sent to Hamlin & Co., who forwarded it at once to the plaintiff. The premium was received by Hamlin & Co. on October 1 or 2, 1881, from the plaintiff, and sent to Buckley & Co. on October 21, 1881, who sent a check for it to the defendant on October 29, 1881. Meantime, on October 27, 1881, the property insured had been totally destroyed by fire. The defendant thereupon refused to accept the premium, and returned the check to Buckley & Co.

At the trial, after proving the facts as stated, the plaintiff offered to show by a member of the firm of Buckley & Co. the course of business between the witness' firm and the defendant, with a view of proving authority on the part of the witness' firm to accept payment of the premium for the defendant. This offer was admitted, and the witness testified in substance that, before this transaction took place, his firm had obtained many policies from the Susquehanna Fire Insurance Company, sent the applications, and the company returned the policies to them; and they had a common form of policy. He collected the premiums and forwarded them to the company, sometimes a day and sometimes a week or more after receiving them. The company never objected to their delivering policies without receiving premiums, and they never wrote to dun him for not sending delayed premiums. Plaintiffs then offered to show by the witness, as an expert in the insurance business, that it is the custom in that business, when carried on through brokers, to issue policies without requiring prepayment of the premium, and allowing the broker to remit in payment at stated or convenient intervals. Upon objection, the court refused the offer. The plaintiffs then closed, and the defendant moved for a nonsuit, which was granted, with leave to move to take it off.

Walter George Smith and Francis Rawle, for the motion.

Where the policy is delivered without requiring payment of the premium the presumption is that a credit is intended; and the rule is well settled where a credit is intended that the policy is valid, though the premium was not paid at the time the policy was delivered. *Miller v. Ins. Co.* 12 Wall. 303; *Behler v. Ins. Co.* 68 Ind. 347; *Boehen v. Ins. Co.* 35 N. Y. 134; *Eagan v. Ins. Co.* 10 W. Va. 583. A waiver of the payment of premium may be inferred from any circumstances fairly showing that the insurers did not intend to insist upon the prepayment of the premium as a condition precedent. *Equitable Ins. Co. v. McCrea*, 8 Lea, 541; *Heaton v. Manhattan Ins. Co.* 7 R. I. 502; *Hanley v. Life Ass'n*, 4 Mo. App. 253; *Goit v.* v.20,no.8—31

N. P. Ins. Co. 25 Barb. 189; *Bodine v. Ins. Co.* 51 N. Y. 117; *May, Ins.* § 340. A condition may be waived by parol, although there is a clause in the policy saying that no condition can be waived except in writing. *Carson v. Ins. Co.* 43 N. J. Law, 300; S. C. 39 Amer. Rep. 584; *Ins. Co. v. Norton*, 96 U. S. 234; *Thompson v. Ins. Co.* 104 U. S. 252; *Phoenix Ins. Co. v. Doster*, 106 U. S. 35; S. C. 1 Sup. Ct. Rep. 18. There was sufficient evidence of waiver to give the case to the jury. *Coursin v. Penn. Ins. Co.* 46 Pa. St. 323; *Patterson v. Ins. Co.* 22 Pittsb. L. J. 205. The learned judge should have admitted plaintiff's offer to show that it was a general custom among insurance companies and brokers to issue policies without requiring payment of premium, even when there is a clause of limitation similar to the one in this case. *Helme v. Phila. Life Ins. Co.* 61 Pa. St. 107; *Girard v. Mutual Life Ins. Co.* 86 Pa. St. 236; *Baxter v. Massasoit Ins. Co.* 13 Allen, 320; *Pino v. Merchants' Ins. Co.* 19 La. Ann. 214; *Union Cent. Ins. Co. v. Pottker*, 33 Ohio St. 459.

Fleming & McCarrell, contra.

This case is settled by *Pottsville M. I. Co. v. Min. Sp. Imp. Co.* 100 Pa. St. 137.

By THE COURT. The motion is refused.

DAVEY v. ÆTNA LIFE INS. CO.

(Circuit Court, D. New Jersey. January, 1884.)

1. LIFE INSURANCE—UNTRUE ANSWER—USE OF INTOXICATING LIQUORS.

An untrue answer to a question in the application regarding the use of intoxicating liquors will avoid the policy, where the application is part of the contract.

2. SAME—IMPAIRMENT OF HEALTH—USE OF STIMULANTS—PHYSICIAN'S CERTIFICATE.

The policy provides that if the insured should become so far intemperate as to impair his health, it should be void. The attending physician certified that he was in the habit of using stimulants and tobacco, and probably they impaired his health. *Held*, that while the certificate must not be taken as evidence of the truth of the fact stated, it is a suggestion entitled to weight in considering the justification of resistance by the company.

3. SAME—BREACH OF WARRANTY.

A substantially untrue answer, where the application is part of the policy, is a breach of warranty which avoids the policy. It is of no consequence whether the question be material or not.

4. SAME—INTEMPERANCE—DELIRIUM TREMENS.

The condition that if the insured should become so far intemperate as to impair his health, the policy would be void, is a condition subsequent whose breach involves a forfeiture. *Delirium tremens* from intemperance would amount to a forfeiture.

5. SAME—IMPAIRMENT OF HEALTH.

Impairment of health is to be taken in its ordinary sense, and need not be permanent. Habitual intemperance is not necessary, so long as his health is impaired.

6. SAME—DEATH CAUSED WHOLLY OR PARTLY FROM INTOXICATING LIQUORS.

If death resulted wholly or partly from the use of intoxicating liquors, the policy is void.

At Law.

John Linn, for plaintiff.

Theron G. Strong, for defendant; *A. Q. Keasbey*, of counsel.

McKENNAN, J., (*charging jury*.) On the sixteenth of July, 1878, William A. Davey entered into a contract with the Ætna Life Insurance Company, of Hartford, Connecticut, whereby, in consideration of the annual payment of \$233.60, to be paid on or before the sixteenth day of July in each year during his life, the Ætna Life Insurance Company stipulated to pay to Ada Davey, within 90 days after notice of the death of William A. Davey, the sum of \$10,000. The first premium of \$233 was accordingly paid it, on or before the execution of the policy; the three subsequent premiums were paid at the time when they severally became due. On the sixth of August, 1881, William A. Davey died, and on the sixteenth of August what are called proofs of death, dated on the thirteenth of August, 1881, were delivered to the Ætna Life Insurance Company. Thereupon the plaintiff in this case, and beneficiary under this policy, claimed that the insurance company was bound to pay her the amount stated in the policy, the sum of \$10,000, with interest after 90 days from the day of service of notice of Mr. Davey's death,—about the sixteenth of November. These facts were proved by the plaintiff, and, indeed, there is no contest between the parties as to the proof thereof; and therefore, apparently, the plaintiff is entitled to recover the amount of this policy unless some sufficient reason is shown by the defendant why it should not be required to pay that amount. The right of the plaintiff to the amount, and the liability or obligation of the defendant to pay the amount stated in the policy, are dependent upon certain clauses and stipulations and conditions of this policy, the breach or violation of which are alleged by the defendant as the reason why it is not liable to pay the same. Accompanying the policy, and as part of it, is what is called an application, which contains answers to numerous questions and statements of facts, which the parties have agreed and stipulated shall be regarded as part of the contract, and to the absolute truth of which the insured bound himself. So that every statement of fact contained in this application the insured made himself responsible for the absolute truth of, no matter whether there was any inadvertent or unintentional mistake.

It is alleged in the first place by the defendant that an answer of William A. Davey to a question found in this application was untrue, and therefore, by the express terms of the contract, it was absolved from any liability to pay anything on this policy. That question is as follows: "Has the party ever been addicted to the excessive or intemperate use of any alcoholic stimulants or opium, or does he use any of them often or daily?" The answer to that is "No," which im-

parted the information that he has never been addicted to the excessive use of any alcoholic liquor or opium, and that he did not then, at the time of the answering of this question, habitually use any of them often or daily. You will observe, gentlemen of the jury, that this relates to the condition of things existing at the time of the execution or signing of this application, July 16, 1878. It relates to the habits and course of life of William A. Davey at that time. He is bound by his contract to make a truthful answer to that question, and if it is in any sense untrue, the contract between him and the insurance company was void, and cannot be the basis of any claim for the amount stated in the policy. You will consider the evidence which has been produced here by the defendant to support the allegation made that the answer is untrue. I do not intend to advert to it in detail, or more than in the most general way, but simply to say to you that you must be satisfied, from the evidence produced by the defendant before you, (because the burden is upon the defendant,) that at the time when this question was answered by Mr. Davey he either had been addicted to the excessive or intemperate use of alcoholic stimulants or opium, or that he was at that time in the habit of the frequent or daily use of it. If you are so satisfied, why then the answer was untrue, the contract void, and the plaintiff is not entitled to recover the amount of this policy.

The second ground of the defense is that this policy, on its face, is made subject to a number of conditions. They are recited in detail in the third clause of the policy. Among them is the condition that if he (William A. Davey) shall become so far intemperate as to impair his health, or induce *delirium tremens*, the company shall be absolved from any liability to pay the amount agreed to be paid by this policy of insurance. This, you will observe, gentlemen, relates to the habits and course of life of the insured after the delivery of this policy. In effect he agrees that he will pursue a temperate course of life, or at least will not indulge so far in the use of alcoholic liquor as to impair his health or induce *delirium tremens*, and in case he does, why the contract between him and the company is void. And this, gentlemen, you will perhaps regard as the most serious inquiry imposed upon you under the testimony in this case. In the first place it is incumbent upon the beneficiary under this policy of insurance, Mrs. Davey, to give notice of the death of her husband; to inform the company of the cause of his death; to supply it with a certificate of a physician having knowledge of the cause of the death, so that the company may have full information touching not only the fact but the circumstances of the death of the insured, that they may make such inquiry as might be deemed proper by them under the circumstances to ascertain the truth of the facts surrounding the death of the insured.

Now, in this case, that duty was complied with by the plaintiff, and in due time a physician's certificate of the death of William A.

Davey was furnished to the company. The physician who gave that certificate was William A. Rae, who was stated in the certificate to have been a regular physician by profession, and that as such physician he attended William A. Davey in his last illness, and was called to attend him on or about the fourth of August, and continued to attend him until about the time of his death, which occurred on the sixth of August, 1881. This, gentlemen, was not only a regular physician, but he stood in very close relations to the insured. He was his attending physician. Presumably he had knowledge of the cause of his death. He certainly was familiar with the circumstance of his death. Now, in this certificate he is asked to say what occasioned the last illness of the insured; or, to give the question in its exact words, "Was his last illness occasioned, or had his general health been impaired, by any pernicious habits?" The answer to that question is: "He was in the habit of using stimulants and a great deal of tobacco; probably they impaired his health." Now there is at least a suggestive inference that the habit and use of stimulants had something to do with the cause of this man's death. Although, as you have heard through the progress of this trial, this certificate is not to be taken as evidence of the truth of the fact stated here, it is proper to be taken into consideration by this company, to whom it must be furnished for their consideration in ascertaining the truth touching the circumstances of the death of the insured; and here is a suggestion which is certainly entitled to weight, in so far as it may afford a full and complete justification of the course this company has taken in making inquiry as to the cause of death, and in insisting that its liability, in view of the information gathered, shall be determined by the proper tribunal. We say, therefore, that there is no ground whatever for any reflection upon the course taken by this company in resisting the demand of the plaintiff for the amount of this policy, but it has properly come here before a jury of the country to submit to it such evidence as it has been able to gather, in view of the intimation given by the family physician of the deceased,—to submit to a jury such information as it could gather touching the circumstances of the death of this man, in order that an impartial jury may be able to decide between these parties whether the insured has committed a violation of the contract which he stipulated to observe and keep. And in this connection you have the testimony of Dr. Rae in the court before you, in which he substantially reaffirms what he said in the certificate. Although he says that he was not certain, and could not be as to the cause of this man's death, yet in view of the doubt, because there was no autopsy, no *post mortem* examination, yet he stated he entertained the impressions which are stated in the certificate of death which he furnished to the company. And you have testimony produced here by witnesses called on behalf of the company to testify as to the habits and course of life of Mr. Davey, principally at Alexandria bay, during a number of years that he was

in the habit of visiting there. You have also the testimony of physicians who were present at his death, one of them, (who was not full-fledged at the time, but graduated afterwards,) Dr. Bruce, who detailed to you what he saw in the last illness of Mr. Davey. He was present in the room and waited upon him, and you have his opinion as the cause of his death. You also have the opinion of Dr. Watson, who seems to be a very candid and fair and intelligent physician. He details to you fully the symptoms he observed in the case of this man, and what occurred in the course of the visits he made to him in the last days of his life, and you have his opinion also as to the cause of his death. You have also the testimony of a number of witnesses, covering a period of about seven or eight years, who were with Mr. Davey in his visits at Alexandria bay, and who told you what they saw of his habits in the latter part of his life. Now, all this is produced by the defendant to satisfy you that Mr. Davey committed a breach of the condition referred to in the third clause of this policy, and a violation of which he stipulated should be attended by a forfeiture of this contract. On the other hand, you have rebuttal testimony produced by the plaintiff as to the habits and course of life and condition of health of Mr. Davey for a period of seven, eight, ten, or fifteen years before his death. That is furnished by the family relations of Mr. Davey, and by those who were accustomed to see him frequently, and who say they are familiar with his habits of life. All this must be taken into consideration by you, gentlemen of the jury, and from it all you must deduce your conscientious conclusions as to the fact which is established. Does it satisfy you, taking it altogether, that Mr. Davey, after the date of this policy, had become so far intemperate as to impair his health, and indulge in the use of alcoholic liquors to such an extent as to impair his health or induce *delirium tremens*? If it does so satisfy you, the defendant has made out his case; if it fails to convince you, why the plaintiff is entitled to recover the amount of this policy.

Now, gentlemen, it remains only to explain to you the meaning of this condition in the policy of insurance, and that I can do by simply reading what I have written here in answer to the prayer of instructions presented by counsel:

"(1) By the terms of the policy in this case, the application therein mentioned is made part of it; the answers in the application are warranties, and if any answer is untrue the warranty is broken and the policy is void."

I substantially affirm that point in what I have already stated.

"(2) The agreement of the parties that the statements in the application are true, and their falsity in any respect should avoid the policy, removes the question of their materiality from the consideration of the court and jury, or either of them."

I substantially affirm that.

"(3) If the jury believe that the answer to question No. 6 in the application for insurance, as to whether the party had ever been addicted to the

excessive or intemperate use of any alcoholic stimulant or opium, or whether he uses any of them often or daily, was false or untrue, the policy issued upon the application is void, and their verdict must be for the defendant."

That is affirmed.

"(4) The condition of the policy to the effect that if William A. Davey shall become so far intemperate as to impair his health, or induce *delirium tremens*, etc., is a condition subsequent, and the breach of it renders the policy null and void, as provided in the eighth section thereof."

That is affirmed.

"(5) If the jury find that the insured became so far intemperate as to impair his health, the policy became null and void except as provided in the eighth section."

That is affirmed.

"(6) If the jury find that the insured became so far intemperate as to induce *delirium tremens*, the policy became null and void, subject to the eighth section thereof."

That is also affirmed.

"(7) The words 'impair his health' are to be taken in their ordinary meaning, and mean simply impair his health."

That is also affirmed.

"(8) The impairment of health referred to need not be a permanent impairment of health in order to avoid the policy."

The impairment of health contemplated by this condition of the policy is not necessarily permanent or irremediable, nor is it the temporary indisposition or disturbance usually resulting from a drunken debauch, but it is the development of disease, or the impairment of constitutional vigor, by the use of intoxicating beverages in such a degree and for such a time as is ordinarily understood to constitute intemperance.

"(9) The expression in the policy, 'became so far intemperate as to impair his health,' does not mean habitual intemperance; but an act of intemperance producing impairment of health is within the condition of the policy, and renders the policy null and void except as therein provided."

This instruction is refused. The words of the condition are to be expounded according to the common and popular acceptance of their meaning. In this sense of them a single excessive indulgence in alcoholic liquors is not intemperate, but there must be such frequency in their use, continued for a longer or shorter period, as indicates as injurious addiction to such indulgence.

"(10) If the jury find that the illness of William A. Davey at Alexandria bay in the summer of 1881, which resulted in his death, was occasioned by the use of alcoholic liquors, the policy was null and void except as therein provided in the eighth section.

"(11) If the jury find that the illness of William A. Davey at Alexandria bay, in the summer of 1881, which resulted in his death, was not occasioned wholly by the use of alcoholic liquors, but that the use of the same contributed to said illness, his health was impaired by said liquors, and the policy is null and void, except as provided in the eighth section."

These points are answered together. If the jury find that the illness of William A. Davey at Alexandria bay in the summer of 1881, which resulted in his death, was caused, either wholly or partially, by the intemperate use of alcoholic liquors, as explained in answer to the ninth prayer of the defendant, the policy was thereby avoided, except as therein provided in section 8.

"(12) If the jury find that the said William A. Davey drank alcoholic liquors at Alexandria bay to the extent testified to by the witnesses for the defense, and the effect of the same was to impair his health in any degree, the policy is void, except as provided in the eighth section."

The jury must consider the testimony on both sides touching the habits, course of life, and condition of W. A. Davey at Alexandria bay, and if they are satisfied that they became so far intemperate, as before explained, and that he there indulged his injurious taste as to impair his health in any degree, the policy is void, except as provided in the eighth section.

Now, gentlemen, there are two questions for your consideration here,—two branches of inquiry to which you must devote yourself to decide this case for the plaintiff or defendant. In the first place, was the question which I have read to you, No. 6, truthfully or untruthfully answered at the time the application was made out for this insurance? If the evidence satisfies you that before that time Mr. Davey was addicted, or had been addicted, to the excessive or intemperate use of any alcoholic stimulants or opium, or he was at the time in the habit of using any of these often or daily,—if the evidence satisfies your conscience that the answer, his denial of his addiction to such habit, or such daily or frequent use of alcoholic liquor or opium, is untrue, why it is your duty to find against the plaintiff. If you are not satisfied, however, then, so far as that ground of defense is concerned, why the defendant's case will fall. In the next place, you will consider the habits and course of the life of Mr. Davey after the execution and delivery of this policy of insurance. Did he become so far intemperate as to impair his health or induce *delirium tremens*? Did he become intemperate in the sense which I have explained to you in the answer to the defendant's prayer of instructions, and was his health impaired by such intemperance? If there is sufficient proof to satisfy you that this condition of the policy was broken by the habits and course of life of Mr. Davey after the execution of the policy, and his indulgence contributed to his death, then the plaintiff is not entitled to recover. As you consider the proofs on both sides touching these two branches of the case, your verdict will be for the plaintiff or defendant.

It is suggested by the counsel for the defendant, in his address to the jury, that if you are satisfied that this last condition of the policy was violated, the defendant is entitled to a general verdict in its favor. While it is true, gentlemen of the jury, that this violation of the condition of the policy does not work an entire forfeiture of it, but there

is a provision here for certain compensation,—the value of a paid-up policy for such amount as the premium would purchase,—yet you have no evidence before you as to the value of such policy, and although the plaintiff might be entitled to recover such sum, yet, under the state of the evidence here, if you are satisfied that the defendant has made out its defense, why you could not find anything more than nominal damages for the plaintiff. We do not know the value of such a policy. It may be worth only six cents, or it may be worth a thousand dollars. You are to judge of the evidence, and cannot indulge in any speculation as to the value provided for by this policy in favor of the insured, if the condition of the policy has been violated; so that, if you are satisfied that upon that ground the defense has been made out, your verdict will be for the plaintiff for nominal damages.

Mr. Strong. With reference to the last point that your honor has stated, I desire simply to say, on behalf of the company, that we do not wish to avail ourselves of the lack of proof on that subject, and if the jury should find that, by reason of his intemperate habits, the conditions of the policy have been broken, which, however, would give the plaintiff a right to a paid-up policy for a certain amount, we are perfectly willing to have that amount ascertained afterwards.

The Court. That is altogether voluntary. I suppose that, having brought suit, the plaintiff has sued for all he is entitled to recover on this policy, and a verdict may stand in the way of that payment.

Mr. Keasbey. Such result may be moulded under the direction of the court, and the amount may be ascertained, I suppose, by reference or consent.

Mr. Strong. Shall I call your honor's attention to one or two points now, or after the jury have retired? It is to take one or two exceptions to your honor's instruction in regard to question No. 6. Your honor spoke of the habit of intemperance.

The Court. I simply followed the example of your learned associate. He spoke of that—counsel on both sides spoke of the habit of daily use.

Mr. Strong. I should like to have an exception to that portion of the charge. Then, as to the point raised in regard to the doctor's certificate, the court stated that the jury is not to take that as evidence. We desire to except to that.

The Court. The jury have that; and in regard to that I said that while it is not to be taken as independent evidence of the facts set forth therein, its contents were recited by Dr. Rae in his examination before the jury.

Mr. Strong. It is simply to save the point we made in the course of the trial, in which we thought, it being furnished and offered by the plaintiff, it was evidence, and we wish to save that point.

The Court. You took the exception at that time. The evidence is before the jury. You objected then to my statement that it was not

to be taken as independent evidence of the facts set forth in it. I said it was not to be taken as independent evidence, but is to be taken in connection with the testimony of Dr. Rae. I cannot see that there is any ground for exception at all. It is evidence in connection with Dr. Rae's testimony, and the jury, of course, must attach such weight to it as they may deem proper, in view of Dr. Rae's affirmation or reaffirmation of the truth of that certificate.

Mr. Strong. Will your honor be good enough to give us an exception to the refusal to charge as prayed for?

The Court. You may except to each one of the answers as you choose. Note them now.

Mr. Strong. There are two or three that your honor refused to charge. We pray exceptions.

The Court. They are in writing. The first seven points I affirmed without qualification, and the rest are answered in writing. Note your exception.

Mr. Strong. Then, as to the eighth, the permanent impairment of health. We except to that. Also as to the ninth, which your honor refused to charge. We except to that, and to the charge as given upon that subject. We pray separate exceptions, of course, on all these points.

The Court. You may note the exception on each point.

The jury then retired, and after remaining out about 25 hours returned a verdict for the plaintiff for the full amount of the policy, with interest.

There are many interesting questions presented in the above case, in connection with which we may be permitted to note other cases in which like questions have been discussed.

In the particular case the court was asked to give the following instruction: The expression in the policy, "became so far intemperate as to impair his health," does not mean habitual intemperance; but an act of intemperance producing impairment of health is within the condition of the policy, and renders the policy null and void except as therein provided. This instruction, it will be noticed, the court declined to give, declaring that the words of the condition were to be expounded according to the common and popular acceptance of their meaning; and that in this sense of them a single excessive indulgence in alcoholic liquors was not intemperate, but there must have been such frequency in their use, continued for a longer or shorter period, as indicated an injurious addiction to such indulgence.

In *Bennecke v. Ins. Co.*¹ Mr. Justice FIELD, speaking for the supreme court of the United States, said: "The question was as to the habits of the insured. His occasional use of intoxicating liquors did not render him a man of intemperate habits, nor would an exceptional case of excess justify the application of this character to him. An attack of *delirium tremens* may sometimes follow a single excessive indulgence. * * * When we speak of the habits of a person, we refer to his customary conduct, to pursue which he has acquired a tendency from frequent repetition of the same acts. It

¹ 105 U. S. 350.

would be incorrect to say that a man has a habit of anything from a single act. A habit of early rising, for example, could not be affirmed of one because he was once seen on the streets in the morning before the sun had risen; nor could intemperate habits be imputed to him because his appearance and actions on that occasion might indicate a night of excessive indulgence. The court did not, therefore, err in instructing the jury that, if the habits of the insured, 'in the usual, ordinary, and every-day routine of his life were temperate,' the representations made are not untrue, within the meaning of the policy, although he may have had an attack of *delirium tremens* from an exceptional overindulgence. It could not have been contemplated, from the language used in the policy, that it should become void for an occasional excess by the insured, but only when such excess had, by frequent repetitions, become a habit."

In *Union Mut. Life Ins. Co.*¹ the policy of insurance was conditioned to be void if either of the answers to the following questions was false or untrue: Has the party whose life is to be insured ever been intemperate? Is the party now of correct and temperate habits? The answer to the first question was in the negative, and that to the second was in the affirmative. The trial court told the jury that these questions were not whether the insured was ever drunk or whether he ever used intoxicating liquors, but whether he was ever intemperate; that is, whether, at any period of his life, his usual and *daily habits* were such as to constitute and render him what is known as an intemperate man,—*a man habitually under the influence of intoxicating liquor*. This was held error, and the judgment was reversed. Mr. Justice JOHNSON, in delivering the opinion of the court, said: "An occasional excess in the use of intoxicating liquor does not, it is true, constitute a *habit* or make a man intemperate, within the meaning of this policy; but if the habit has been formed, and is indulged in, of drinking to excess and becoming intoxicated, whether *daily* and *continuously* or *periodically*, with sober intervals of greater or less length, the person addicted to such a habit cannot be said to be of temperate habits, within the meaning of this policy. In view of the fact that the evidence strongly tended to show that it was the habit of the insured to indulge to excess at frequent times, and did not tend to show a case of daily or continuous state of intoxication, this charge was clearly misleading. From it the jury might well understand, and, in view of the whole evidence, we think may reasonably have understood, that Charles Rief was of correct and temperate habits, although it was his habit to get drunk periodically and frequently, with sober intervals of longer or shorter duration. The habit of using intoxicating liquors to excess is the result of indulging a natural or acquired appetite, by continued use, until it becomes a customary practice. This habit may manifest itself in practice by daily or periodical intoxication or drunkenness. Within the purview of these questions it must have existed at some previous time, or at the date of the application; but it is not essential to its existence that it should be continuously practiced, or that the insured should be daily and habitually under the influence of liquor. Where the general habits of a man are either abstemious or temperate, an occasional indulgence to excess does not make him a man of intemperate habits; but if the habit is formed of drinking to excess, and the appetite for liquor is indulged to intoxication, either constantly or periodically, no one will claim that his habits are temperate, though he may be duly sober for longer or shorter periods in the intervals between the times of his debauches."

In *Swick v. Home Life Ins. Co.*,² the case being before Justice DILLON and Justice TREAT, the jury were instructed as follows: "Now, as to the question respecting intoxicating liquors. These relate to the habits of the party. The applicant stated that he had never been addicted to the excessive or intem-

¹36 Ohio St. 596.²2 Dill. C. C. 160.

perate use of alcoholic stimulants. This is not a statement that he had never been addicted to the use of intoxicating liquors at all, but a statement that he had never been addicted to the excessive and intemperate use of them; and it is untrue if Henry had, and only in case he had, been addicted to the excessive or intemperate use of alcoholic stimulants. The application, in answer to other questions, stated that his habits were uniformly and strictly sober and temperate, and that he did not habitually use intoxicating drinks as a beverage. These questions and answers, you will perceive, relate to the habits of the party in that respect. If the company did not intend to insure any person who used intoxicating liquors at all, it would be very easy to ask such a question. But they have not done so. The occasional use of intoxicating liquors by the applicant would not make these answers untrue; nor would they be rendered untrue by any use of intoxicating drinks which did not make his habits those of a man not uniformly and strictly sober and temperate, or which did not amount to habitual use of such drinks as a beverage."

In *Knickerbocker Life Ins. Co. v. Foley*¹ the court sustained as a good instruction one which was to the following effect: If the jury finds that the habits of the insured at the time of, or at any time prior to, the application were not temperate, then the answer made by him to the questions, "Are you a man of temperate habits? Have you always been so?" were untrue, and the policy was void; but if the jury finds that his habits, in the usual, ordinary, and every-day routine of life, were temperate, then such representations were not untrue within the meaning of the policy, although they may find that he had an attack of *delirium tremens* resulting from an exceptional indulgence in drink prior to the issuance of the policy.

In *Brockway v. Mutual Benefit Life Ins. Co.*² it was declared that the terms "sober" and "temperate" were to be understood in their ordinary sense; that they did not imply total abstinence; that a moderate and temperate use of alcoholic liquor is consistent with sobriety, but if used to such an extent as to produce frequent intoxication the applicant could not be considered sober and temperate.

In *Holterhoff v. Mutual Benefit Life Ins. Co.*³ where a policy of life insurance contained a provision that in case the assured should die by reason of intemperance from the use of intoxicating liquors the policy should be void, it was laid down that death must be the natural and proximate result of intemperance from the use of intoxicating liquors. And the following charge was sustained: "A habit, then, as generally understood, and as defined by lexicographers, is a disposition or condition of the mind or body, a tendency or aptitude for the performance of certain actions acquired by custom, or a frequent repetition of the same acts. Habit is that which is held or retained,—the effect of custom or frequent repetition. Hence we speak of good habits and bad habits. Frequent drinking of spirits leads to habits of intemperance, etc. Adopting this interpretation of the phrase used in the present instance, and applying it to the state of facts as claimed to be proven, I have to say to the jury that if they find from the evidence that at the time the application was made, or subsequently, the deceased had an appetite for intoxicating drinks to such an extent that a single indulgence necessarily instigated him to a repetition of it, and led him into what have been called 'sprees,' and thesesprees were frequent, and rendered him incapable of controlling his appetite while they continued, then, although there were intervals during which he remained entirely sober, there was such a repetition of acts of drinking as amounted to a habit."

In *Miller v. Mutual Benefit Ins. Co.*⁴ it was held that evidence that the plaintiff's decedent died from a cause occasioned or produced by an excess-

¹ 11 Fed. Rep. 766.² 9 Fed. Rep. 249.³ 3 Ins. Law J. 854.⁴ 34 Iowa, 222.

ive use of intoxicating liquors, would support the defense that he died from intemperance. The policy contained a condition making it void if the person insured should die "by reason of intemperance from the use of intoxicating liquors." In one of his debauches, having passed several days at a saloon drinking, he was taken home, a physician was called, and he was found to be suffering from *delirium tremens*. In his delirium he escaped from those having charge of him and ran through the streets in inclement weather, in his underclothes. This brought on congestion of the lungs and resulted in death. The court held there could be no recovery upon the policy.

In *Knecht v. Mutual Life Ins. Co.*¹ the policy contained a provision like this: If any of the statements or declarations made in the application for this policy, upon the faith of which this policy is issued, shall be found in any respect untrue, then, and in every such case, this policy shall be null and void. In his application the applicant had declared "that he does not now, nor will he, practice any pernicious habit, which obviously tends to the shortening of life." It appeared in evidence that at the time of making the application the applicant was of correct and temperate habits, but that some years afterwards he became addicted to the use of intoxicating drinks, and was finally attacked with *delirium tremens*, from which attack he died. The court held that the policy was not invalidated. The clause of the application above alluded to, it was said, evidently referred to a state of things existing at the time the policy was issued, and as such contained no untrue statement; his declaration as to his future intentions not being false at the time it was made.

In *Gartside v. Connecticut Mut. Life Ins. Co.*² it was held that where an insured person was shown to have been intemperate after the policy of insurance was issued, the presumption was that he became so after the date of the policy.

In *Odd Fellows' Mut. Life Ins. Co. v. Rohkopp*³ the policy was conditioned to be void if the insured "should become so far intemperate as to seriously or permanently impair his health, or induce *delirium tremens*." It appeared in evidence that the insured had become habitually intemperate, and had been so for years. It was held that this fact, standing by itself, was of no account. It was necessary to show in addition that his health had been seriously or permanently impaired thereby.

In *Hartwell v. Alabama Gold Life Ins. Co.*⁴ the supreme court of Louisiana held that a policy of life insurance would be annulled when the insured had made misrepresentations to the insurer as to his habits of drinking, although he himself, in making the declarations, may have acted in good faith, and not have intended any deception.

In *Shader v. Railway Passenger Assurance Co.*⁵ an accidental insurance policy contained a clause providing that no claim should be made thereunder where the death or injury may have happened while the insured was, or in consequence of his having been, under the influence of intoxicating drink. It appeared in evidence that he had been killed by a pistol shot; and the court held that if death occurred while he was under the influence of intoxicating drink, that fact alone avoided the policy, without regard to the question whether that condition was the natural and reasonable cause of death, or in any manner contributed thereto.

HENRY WADE ROGERS.

¹ 90 Pa. St. 118.

² 8 Mo. App. 593.

³ 94 Pa. St. 59.

⁴ 11 Ins. Law J. 897.

⁵ 66 N. Y. 441.

DAVEY v. ÆTNA LIFE INS. CO.

(Circuit Court, D. New Jersey. March 25, 1884.)

MOTION FOR A NEW TRIAL—JURORS JUDGES OF THE FACTS.

A motion for a new trial, on the ground that the verdict was against the weight of evidence, should not be granted if it appears that the verdict, though unexpected, could by possibility have been given consistently with facts in the case and the court's instructions.

On Application for Rule to Show Cause.

A. Q. Keasbey, for the motion.

John Linn, *contra*.

NIXON, J. This is an application for a rule to show cause why a new trial should not be granted upon the ground that the verdict was against the weight of evidence. See *ante*, 482. It rarely happens that a court is justified in setting aside the action of a jury on issues of fact, in the absence of proof of fraud or palpable mistake, where there is any evidence to sustain the verdict. A trial by jury is the constitutional right of the American citizen, and courts may not infringe upon this right by undertaking to nullify the acts of the jurors by setting aside their deliberate judgment in cases where the judges, under the evidence, would have reached a different conclusion. It is conceded that the verdict rendered in this case was not expected, but there is one view of the facts upon which it may probably be sustained. In construing the provisions of the policy of insurance on which the suit was brought, the court instructed the jury that they had the right to hold that proof of a single instance of the excessive use of alcoholic liquors, although it resulted in death, should not be regarded as the intemperance referred to in the policy, by which the health of the insured was impaired. The jury may have regarded the proof of the free use of brandy and gin on the night of the sickness which terminated in death as an exceptional case, growing out of the surrounding condition and circumstances, and may not have given as much importance to the testimony of drinking at other times as the defendants were disposed to do.

We have carefully read the testimony, and do not perceive how any additional light can be shed on the case by granting the rule to show cause, and the application is therefore refused.

ABBOTT and others v. WORTHINGTON, Collector.

(Circuit Court, D. Massachusetts. June 7, 1884.)

CUSTOMS DUTIES.—SWEDISH IRON NAIL-RODS.

Swedish iron nail-rods should be classified as a description of rolled and hammered iron not otherwise provided for, and so subject to a duty of one and one-fourth cents a pound.

At Law.

Chas. Levi Woodbury, for plaintiff. *Geo. P. Sanger*, U. S. Atty., for defendant.

COLT, J. The collector assessed duty at the rate of one and one-half cents per pound, on an importation of Swedish iron nail-rods, under Schedule E, § 2504, Rev. St., as bar iron, rolled or hammered. The plaintiffs claim that the article is only liable to a duty of one and one-fourth cents per pound, either as a description of rolled and hammered iron not otherwise provided for, or as coming under the similitude clause of section 2499, Rev. St., as resembling scroll iron. The case was heard by the court, jury trial being waived. The evidence shows that the importation is known commercially as nail-rods, and that, in a commercial sense, nail-rods are not bar iron. The article is made and used for a special purpose, and known in commerce by a distinct name. It further appears that in the act of 1842, and in some previous acts, nail-rods are specifically designated as such, so that congress in the tariff laws has recognized nail-rods as distinct from bar iron, or iron in bars. Nail-rods, having acquired a specific commercial designation among traders and importers, and having been designated by a specific name in previous tariff legislation, would not properly come under the general term bar iron in the Revised Statutes, but should be classified as a description of rolled and hammered iron not otherwise provided for, and so subject to a duty of one and one-fourth cents a pound.

We think this case clearly within the rules laid down in *Arthur v. Morrison*, 96 U. S. 108, and *Arthur v. Lahey*, Id. 112, and that judgment should be entered for the plaintiffs.

JEFFRIES v. BARTLETT and another.¹

(Circuit Court, N. D. Georgia. March, 1884.)

BANKRUPTCY JURISDICTION—EXEMPTED PROPERTY.

When exempted property is designated and set apart to the bankrupt, under the orders of the bankruptcy court, as such property does not pass to the assignee, and does not further concern the court nor the estate, the court has not jurisdiction to defend such property from adverse liens that may or may not be extinguished by the bankruptcy.

Appeal in Equity.

Boyton, Harrison & Peebles, for plaintiff.

Bartlett & Hoke Smith for defendant.

PARDEE, J. The suit was instituted in the district court for an injunction to restrain the defendants from executing an old judgment lien against the homestead property set off to plaintiff by his assignee in bankruptcy, in the bankruptcy proceedings *Ex parte Jeffries*, pending then and now in the district court. A temporary injunction was issued by the district court on the bill and exhibits in 1879, and was dissolved on the same showing, except in an unimportant particular, March 7, 1883. The case is brought up to review the correctness of this last order.

The case made by the bill and exhibits is this: October 28, 1861, the defendant Bartlett obtained in the Jasper county superior court a judgment against complainant for the sum of \$1,000 and costs, which judgment is unsatisfied. May 24, 1873, complainant was adjudged a bankrupt on his own petition by the order and judgment of the United States district court for this district, and an assignee was duly appointed, and in due course said assignee, under section 5045, Rev. St., duly set off to complainant certain lands described as a homestead and exemption under the Georgia law, on which lands complainant, who is the head of a family, now resides; that thereafter, in 1874, complainant applied for a discharge in bankruptcy, but several creditors filed oppositions thereto, and the matter of discharge is still pending; that the defendant Bartlett, though duly notified, never proved his debt nor appeared in the bankruptcy proceedings; and that in December, 1878, he sued out a writ of *fiery facias* on the judgment aforesaid, in the superior court of Jasper county, and levied on, and will proceed to advertise and sell, the homestead exemption so set off, aforesaid, and also 100 acres of the same tract which complainant had transferred to certain lawyers named, to pay costs and attorneys' fees in bankruptcy.

By the law of Georgia existing at and before the homestead exemption law of Georgia, and prior to the bankruptcy law of 1867, it seems that the said judgment was a lien upon the land aforesaid at

¹ Reported by Joseph P. Hornor, Esq., of the New Orleans bar.

the time complainant was adjudicated a bankrupt, and unless the lien has been discharged by the bankruptcy proceedings, it is still in full force. The injunction sought was to restrain the defendant Bartlett from executing his lien upon the property aforesaid until the question of complainant's discharge in bankruptcy should be decided, and in the event of the discharge being granted, to perpetually enjoin the execution of the judgment.

Three grounds are assigned in the motion to dissolve the injunction: (1) Because the same matter was brought into controversy between substantially the same parties by a bill filed June 26, 1873, on which an injunction was granted June 26, 1873, which injunction was dissolved on the merits, which dissolution was and is an adjudication of all the questions in controversy; (2) because there is no equity in the bill; (3) because, if there ever was equity sufficient to uphold the grant of an injunction, the same was dependent upon the element of time, and ample time has long since elapsed within which to settle the question of the bankrupt's discharge, and the said question has been left open, and is still open, by reason of his failure to prosecute his application with due diligence.

The district court dissolved the injunction, because it was of opinion that, sitting as a court of bankruptcy, it had no jurisdiction "to interfere with the dispute or controversy between the parties as to whether or not the exemption set aside to the bankrupt by the assignee is subject to the lien of the defendant's judgment."

There is nothing in the record in this court to show any previous litigation between the parties on the subject-matter involved, and the questions for decision are (1) that stated in the order of the district court brought up for review, to-wit, is the controversy within the jurisdiction of the bankrupt court? and (2) is the case one for the exercise of equitable remedies?

By the terms of law, (Rev. St. § 5045,) "these exceptions shall operate as a limitation upon the conveyance of the property of the bankrupt to his assignee; and in no case shall the property hereby excepted pass to the assignee, *or the title of the bankrupt thereto be impaired or affected by any of the provisions of this title*; and the determination of the assignee in the matter shall, on exception taken, be subject to the final decision of the said court."

From this it would seem that the jurisdiction of the bankruptcy court begins and ends in regard to excepted or exempted property in reviewing and controlling the assignee in designating and setting apart such property, and that property designated and set apart does not pass to the assignee, nor is it subject to be administered by the court as a part of the bankrupt estate. See Bump, (7th Ed.) 144, and *Id.* 465 *et seq.*, for cases cited. If such exempted property can be said to be brought into the bankrupt court at all, then, when it has been designated and set apart by the assignee, it has been administered, and has passed out of the possession and control of the court.

After property has been administered upon by the bankruptcy court and disposed of, and neither the assignee nor the creditors have any further interest therein, the bankruptcy ought not to stand as a warrantor, and by injunctions protect the property from assaults in other courts at the suit of persons who may claim liens thereon or title thereto. See *Adams v. Crittenden*, 4 Woods, 618; S. C. 17 Fed. Rep. 42.

The general jurisdiction of the district courts, as courts of bankruptcy, is determined by section 4972, Rev. St., which provides that it shall extend (1) to all cases and controversies arising between the bankrupt and any creditor or creditors who shall claim any debt or demand under the bankruptcy; (2) to the collection of all the assets of the bankrupt; (3) to the ascertainment and liquidation of the liens and other specific claims thereon, (on the assets of the bankrupt;) (4) to the adjustment of the various priorities and conflicting interests of all parties; (5) to the marshaling and disposition of the different funds and assets, so as to secure the rights of all parties, and due distribution of the assets among all the creditors; (6) to all acts, matters, and things to be done under and in virtue of the bankruptcy, until the final distribution and settlement of the estate of the bankrupt, and the close of the proceedings in bankruptcy. This extensive jurisdiction undoubtedly includes everything necessary to settle, administer, and distribute the estate of the bankrupt, but does not go so far as to extend to controversies, although against the bankrupt, with which the court, nor the assignee, nor the creditors before the court, have any concern. Outside of protecting the estate of the bankrupt, and, in some cases, the person of the bankrupt, the bankruptcy court cannot interfere with proceedings in other tribunals, although the matters in controversy depend upon the regularity, force, and effect of proceedings had in the bankruptcy court. If property has been sold by order of the bankrupt court, the purchaser will not be protected from suits by parties claiming adverse liens, or adverse title. If a bankrupt receives his discharge, and suits are prosecuted against him on discharged debts, the bankruptcy court cannot interfere. And so, I think, that when exempted property is designated and set apart to the bankrupt under the orders of the bankruptcy court, as such property does not pass to the assignee, and does not further concern the court nor the estate, the court has not jurisdiction to defend such property from adverse liens that may or may not be extinguished by the bankruptcy.

For these reasons I am disposed to concur with the district judge in the opinion that the court has no jurisdiction to determine the controversy. There would be no doubt on this point if the complainant had received or been refused his discharge, and the bankruptcy proceedings in this case had been closed. And that the question of his discharge is not determined, and his case in bankruptcy wound up, appears to be the result of his own negligence. His application for

discharge was made in 1874, and opposition made thereto in March of that year, and action thereon has been postponed and continued for now 10 years, and no excuse is shown or suggested for this delay. The bill seems to be without equity, and its further retention in the district court, even if the court had jurisdiction, would work hardship to the defendants, who are entitled to have an adjudication of their rights under their lien, which is now over 20 years old.

The order of the district court will be affirmed.

In re NEGLEY, Bankrupt.¹

(District Court, W. D. Pennsylvania. May 14, 1884.)

BANKRUPTCY—ACTION IN STATE COURT—INJUNCTION.

The bankrupt court will not restrain by an injunction an action brought in the state court by a creditor seeking to recover his whole debt from a bankrupt who has effected a composition.

In Bankruptcy. *Sur* motion for an injunction to restrain proceedings at law.

On the second day of December, 1876, D. C. Negley filed his petition for adjudication in bankruptcy. Among the creditors in his schedules appeared "H. C. Kelsey, Erie, Pennsylvania, dealer in ice," for \$1,500, on a promissory note dated May 1, 1876, at Pittsburgh, Pennsylvania, due November 4, 1876, drawn by the firm of Negley Bros. & Cunningham, indorsed by R. H. Negley and D. C. Negley, for ice. On the twenty-seventh day of November, 1876, suit had been brought on this note, and also on a book account, for about \$66.55, at No. 1,071, December term, 1876, in the court of common pleas, No. 1, of Allegheny county, Pennsylvania, by the Erie Ice Company against Negley Bros. & Cunningham, and judgment was obtained by defendant, on December 11, 1876, for \$1,575.95. On December 16, 1876, the bankrupt presented a petition for a composition under the provisions of the bankrupt law. Among the creditors named in the schedule appeared "H. C. Kelsey, Erie, Pa., \$1,500." This composition was effected, but the bankrupt was unable to comply with its terms, and, on November 5, 1881, presented a petition for a meeting of creditors to vary the composition previously accepted. On the schedule presented at that meeting appeared "Kelsey, H. C., (Erie Ice Company,) Erie, Pa., \$1,315.62." This meeting was held, and a composition effected. When the amount of composition was tendered to these creditors they refused to accept it, and a *scire facias* was issued on June 1, 1882, to revive the lien of the judgment at No. 1,071, December term, 1876, which is still pending. The bankrupt, there-

¹ From the Pittsburgh Legal Journal.

fore, presented his petition in this court, asking for an injunction to restrain said creditors and their counsel from further prosecuting their *scire facias* in said case.

W. K. Jennings, for the bankrupt.

C. C. Dickey and *George Shiras, Jr.*, for the creditors.

ACHESON, J. Mr. Blumenstiel, in his treatise on the Law and Practice in Bankruptcy, at page 452, says:

"If, however, the time stipulated in the resolutions for the payment of the composition has passed, the court will not restrain any action brought by a creditor who may seek to recover his whole debt, notwithstanding the settlement. The debtor, in such a case, will be left to interpose such defense by pleading the resolutions, or otherwise, as he may deem advisable."

This doctrine is reasonable, and is fully supported by the authorities cited by this author, one of which is a decision of the late Judge KETCHAM. *In re Lytle*, 14 N. B. R. 457. In the analogous case of an execution against a discharged bankrupt it is held that the bankrupt court will not interfere by injunction, (*Penny v. Taylor*, 10 N. B. R. 200,) nor will the bankrupt court protect, by injunction, the vendee of the bankrupt's property sold by the assignee from hostile claims. *Adams v. Crittenden*, 17 FED. REP. 42. In the present case it is not to be doubted that the state courts will give proper effect to the composition in bankruptcy.

And now, May 14, 1884, the motion for an injunction is dismissed without prejudice to the right of the bankrupt to set up the composition in bankruptcy by plea or otherwise.

UNITED STATES v. BARGER.

(District Court, W. D. Pennsylvania. June 3, 1884.)

CRIMINAL LAW—REMISSION OF FORFEITED RECOGNIZANCES.

During the term at which a recognizance in a criminal cause is forfeited the court will take off the forfeiture where substantial justice is thereby subserved, although the case may not be strictly within the letter of section 1020 of the Revised Statutes, relating to the remission of forfeited recognizances.

Sur Rule to Show Cause why forfeiture of recognizance should not be taken off.

Wm. A. Stone, for the United States.

Hugh W. Weir and *J. M. Garrison*, for defendant.

ACHESON, J. During the term when it is rendered or entered of record, a judgment or an order, however conclusive in its character, is under the control of the court pronouncing it, and may then be set aside, vacated, or modified. *Bronson v. Schulten*, 104 U. S. 410. Upon this principle, I think the court has the power to take off the forfeiture of the recognizance in this case, although it may not be

strictly within the letter of section 1020 of the Revised Statutes. The recognizance here was taken, not for the defendant's appearance for trial, which strictly seems to be the case contemplated by section 1020, but after trial and conviction, and was conditioned for the defendant's appearance on the first day of the present (May) term, to abide the sentence of the court. He did not appear then, but did subsequently during the term, and was sentenced. The party making application for the remission is the bail, who certainly was guilty of no "willful default," however it may have been with the defendant himself. Public justice does not require the penalty to be enforced if the defendant pay his fine and costs. The case is within the spirit and reason of the said section 1020, and substantial justice will be subserved by remitting the forfeiture upon terms.

And now, June 3, 1884, it is ordered that the forfeiture of said recognizance be taken off and the penalty remitted, upon condition that the defendant pay the fine imposed on him, and the costs of prosecution.

PALMER v. TRAVERS.

(Circuit Court, S. D. New York. June 6, 1884.)

PATENTS FOR INVENTION—THREATENING SUITS FOR INFRINGEMENT—INJUNCTION.

Courts of equity have no jurisdiction of libel or slander affecting title to a patent or patent-right, or any other slander or libel, unless threatened or apprehended repetition make preventive relief proper and necessary. The remedy for past injuries of that nature is an action at law.

In Equity.

Edwin H. Brown, for orator.

Louis W. Frost, for defendant.

WHEELER, J. This suit is brought upon written representations to dealers in hammocks that hammocks made by the orator infringe a patent of the defendant, and threats of suit for the infringement, contained in letters from the defendant's attorneys addressed to such dealers. The bill does not allege that the defendant threatens, nor that the orator believes he intends to continue such representations or threats, nor even that the orator fears he will. The proof does not go, in this respect, beyond the bill. These representations by letters addressed to persons or firms do not import that they are to be continued, as circulars or advertisements inserted in stated continuous publications might, but each is complete in itself and stands by itself. Courts of equity have no jurisdiction of libel or slander affecting title to property or property rights, or any other slander or libel, unless threatened or apprehended repetition makes preventive relief proper and necessary. The remedy for past injuries of that nature is un-

derstood to be wholly at law. On the allegations and proofs here, the orator might, and might not, be entitled to maintain an action at law for these representations and threats and their consequent damage. But whether he would or not, he is not entitled to maintain a suit in equity merely for an account of such damage. An account might follow, as it does in patent and other cases, if the equitable right to an injunction was made out. There must be some ground for equitable relief before a court of equity will grant any relief. *N. Y. Guaranty Co. v. Memphis Water Co.* 106 U. S. 205; S. C. 2 Sup. Ct. Rep. 279. No ground for such relief is claimed here, except the right to an injunction; and no ground for an injunction appears, for nothing a court of equity would prevent is shown to be impending.

Let there be a decree dismissing the bill of complaint, with costs.

CONSOLIDATED ELECTRIC LIGHT CO. v. BRUSH-SWAN ELECTRIC
LIGHT CO.

(Circuit Court, S. D. New York. June 10, 1884.)

PATENT—PLEADING—MULTIFARIOUSNESS—INFRINGEMENT OF SEPARATE AND DISTINCT PATENT

Upon the alleged infringement of five distinct patents by the use of one machine, each of the five inventions being capable of separate use independent of the others, the trial as to the validity of each patent, and the infringement as well, must be separate from trials as to the validity and infringement of the others, and upon distinct issue as to each.

In Equity.

Amos Broadnax, for orator.

William C. Witter, Eugene H. Lewis, and Samuel A. Duncan, for defendant.

WHEELER, J. This is an amended bill brought upon five different patents,—one for an electric lighting system, one for an improved regulator for electric lights, one for an improvement in electric lamps, one for an improvement in carbons for electric lights, and one for an improvement in the treatment of carbons for electric lights,—and is demurred to for multifariousness. The bill alleges that the patented inventions are capable of being used conjointly; that the orator makes, uses, and sells conjointly, as parts of the same electric lighting system, each and all of said inventions in some essential and material parts thereof; that the defendant is infringing each and all of these patents by making, selling, and using each and all of said inventions conjointly, in a system of electric lighting, the same substantially as that of the orator. The titles of the patents, as well as the patents themselves, of which profert is made, show that these inventions may be used separately, and operate independently, with respect to each

other. Any of them might be infringed without infringing any of the others. The trial of the validity of each, and of the infringement of each, must be separate from that of the others, upon distinct issues as to each. The facts may be proved by the same witnesses, but, if so, it will be on account of identity of persons in connection with the subject rather than because of the sameness of the issues involved in the subject. That they are used in the same system does not change the nature of the issues to be tried. They are distinct parts of the system. Each patent is for a distinct machine, or process, or manufacture, and must stand or fall as such; and the infringement of each must or may be a separate trespass. The bill apparently covers as many causes as there are patents, when it should cover but one. *Hayes v. Dayton*, 18 Blatchf. 420; S. C. 8. FED. REP. 702.

The demurrer is sustained and the bill adjudged insufficient.

UNTERMEYER v. JEANNOT and others.

(Circuit Court, S. D. New York. June 6, 1884.)

PATENT LAW—DESIGN—FIGURES IN RELIEF—PHOTOGRAPH.

The prominent claim in a patent design being figures in relief, a photograph of the design, since it does not show the relief, does not sufficiently describe the design in the absence of a minute description in the specifications.

In Equity.

Rowland Cox, for orator.

Birdseye, Cloyd & Bayless, for defendants.

WHEELER, J. This suit is brought upon design patent No. 12,485, dated September 20, 1881, and granted to the orator for a watch-case. The design consists in the representation of a locomotive engine and tender upon a railroad track, with ornamental plants in the foreground, the whole surrounded by a ring of dots and an ornamental border. There are two claims: one, for the engine and tender on the track, and ornamental plants; and the other, for the same, surrounded by the ring of dots and ornamental border. An accompanying photograph of a watch-case shows the style of locomotive, tender, and track, the form of the plants, the size and frequency of the dots, and the characteristics of the border; but none of these are described in the specification or claims, except by name. The engine and tender and some of the other parts are said to be shown in relief; and the alleged infringement shows the same in relief. There were watch-cases before having representations of locomotives and tenders on railroad tracks, surrounded by wreaths and ornamental borders and rings of dots, and engines with flowers in the foreground surrounded by scroll-work and borders, but none with such work in

relief, unless cases like the alleged infringement were made before, as the defendants' evidence tends to show. With these things in existence before, the orator could not have a valid patent for anything but his peculiar design as distinguished from the former designs. *Ry. Co. v. Sayles*, 97 U. S. 554. The alleged infringement has a line of fence-posts between the plants and railroad track; they are not surrounded by a row of dots, but are by an ornamental border. The design, therefore, is not exactly the orator's design. The form of the defendants' case, the view of the engine, and the workmanship are very much like the orator's. These similarities, in connection with the fact that the same parts in each are made in relief, bring the cases to near enough alike to lead a common observer, having the interest of a customer, to think they were the same when seen at different times. But the orator is not entitled to, and is not seeking, any relief on account of imitation of his goods or workmanship. Relief against infringement of his patent is all that he can properly or does ask here. If the photograph does not show parts in relief, the claims are neither of them for those parts in relief.

Miller v. Smith, 5 FED. REP. 359, is relied upon to show that representation in the photograph would be sufficient without description in the patent or claim. That case, as reported, however, does not appear to hold the photograph to be sufficient alone. The language of the opinion seems to imply that there was further description, and a claim accordingly.

The claims are the essential parts which the public are to look to and scrutinize to ascertain their rights, and must control. *Burns v. Meyer*, 100 U. S. 671. Taking out the raised features, and comparing the defendants' case with the orator's patent, instead of with the manufacture, and infringement will hardly appear. The design is not the orator's design, as patented, nor sufficiently like it to present the same substantial appearance to purchasers. The defendants, therefore, do not infringe.

Let there be a decree dismissing the bill of complaint, with costs.

NEW YORK GRAPE SUGAR CO. v. BUFFALO GRAPE SUGAR CO. and others.

SAME v. AMERICAN GRAPE SUGAR Co. and others.

(Circuit Court, N. D. New York. June 2, 1884.)

PATENT LAW—AMENDMENT OF BILL—ASSIGNED CLAIMS FOR DAMAGES.

The assignee of a patent, in an action against an alleged infringer, can move, before the signing of an interlocutory decree, to amend his bill so as to include the subject of assigned claims for damages and profits which were due to mesne assignors, the bill having been brought, answered and tried upon the theory that a recovery upon the assigned claims was sought.

Motion to Amend Bills.

E. N. Dickerson, for plaintiff.

George Harding and Franklin D. Locke, for defendants.

SHIPMAN, J. In these cases the plaintiff moved, before the signature of the interlocutory decree, to amend each bill by the insertion of averments that the assignment of the letters patent, which are the subject of the respective bills, also conveyed to the plaintiff and present owner the right of recovery for prior infringements of said letters, both in regard to profits and damages, during the previous life of the patents, and by the insertion of a prayer for an accounting for the infringement by the defendants of the letters patent from the date of the issuing of them, severally, and for the violation of the rights of the mesne assignors, and each of them. The motion has been argued solely upon the propriety of allowing the amendments, and not upon the effect of the allowance, if made, upon the decree. The counsel for the plaintiff asks for the amendments upon this ground. He admits that, as a general rule, an amendment which changes the character of the bill, or which introduces a new cause of action, ought not to be allowed, especially after the bill has been heard, (*The Tremolo Patent*, 23 Wall. 518;) but he says that these bills were brought, not only for an injunction and for an accounting in respect to the amount which the plaintiff, as an owner of the patent, should recover, but to recover the assigned claims for damages and profits; that the plaintiff supposed that the averments were sufficient; that all the equitable objections to a recovery for infringements prior to the plaintiff's purchase were set up in the answer; and that the defendants knew that a recovery upon the assigned claims was sought. I think that these positions are true. In view of the history of the case, it is not possible that the plaintiff brought its bills without intending to include, and supposing that it had included, the subject of the assigned claims for the damages and profits which were due to the mesne assignors, although I am clearly of opinion that the averments of the bills did not include such claims. It is also true that the defendants knew that a recovery for such claims was sought, and defended against them. Under these

circumstances, I think that, the allowance of the amendments being within the power of the court, it is its duty to allow them; and that to refuse the allowance would be an improper precedent. The question will hereafter arise as to the propriety of a decree for an account of the profits, or an assessment of the damages which accrued before the purchase of the patents.

The motion is granted.

REAY v. BERLIN & JONES ENVELOPE CO.

(Circuit Court, S. D. New York. June 10, 1884.)

PATENT—IMPROVEMENT IN ENVELOPE-MAKING MACHINE.

Claim in the patent being for improvement in envelope-machine in respect to the table over the conveyor, whereby the blanks are held in place while being carried by the conveyor to the creasing box, the alleged infringer may continue the use of the machine, the table and conveyor being changed, such use not being inconsistent with the claimant's rights.

In Equity.

Arthur v. Briesen, for orator.

Stephen D. Law, for defendant.

WHEELER, J. The second claim of the orator's patent for improvements on envelope machines is for the arrangement of the table over the conveyor so that the blanks are held even and in place by the table while being carried by the conveyor to the creasing box. The defendant was enjoined not to use several machines having this arrangement, made in violation of that claim of the patent. 19 FED. REP. 310. The table and conveyor were changed and the use continued. These proceedings are instituted against that use as a contempt of the injunction. The question is whether that claim covers any more of the machine than the table and conveyor. The defendant was in good faith advised that it did not, and continued the use in the assertion of supposed rights without intending to violate any order of the court. The orator claims that the claim covers the parts which operate in connection with the conveyor and table. The creasing box was old. The blank is made ready to be taken by the conveyor in the defendant's machines by contrivances different from the orator's. The blanks, when ready, were to be taken to the creasing box. This claim was for the arrangement of mechanism to accomplish that object. When the blank reaches the creasing box another operation upon it begins. The table and conveyor finish with each blank when it arrives there, and have nothing to do with the next operation upon it, which is to crease it. The arrangement of the table over the conveyor, to steady the blank while on the conveyor, affects nothing but the work-

ing of those two parts. So, when those parts were changed, the patented arrangement was changed, and the machines became, *pro tanto*, new machines made out of the reach of the patent.

The motion is denied.

THE HETTIE ELLIS.¹

(Circuit Court, E. D. Louisiana. June 9, 1884.)

1. DECK-LOAD.

With reference to cargo stored on deck, the ship is not liable as a common carrier, but its liability in this case is limited to ordinary care, *i. e.*, such degree of care as a prudent owner would exercise. If the loss was the result of the negligence, want of skill and care, of the master, the liability of the vessel is established. *Lawrence v. Minturn*, 17 How. 111, followed; *The Hettie Ellis*, *ante*, 393, affirmed.

2. SAME—JETTISON.

In a case where a vessel, built with a view of carrying the major part of her cargo on deck, running in a trade where it is customary and necessary to load the major part of the cargo on deck, so trading and so loaded, is compelled by a peril of the sea to jettison part of her deck-load to save the ship and remaining cargo, *held*, the shipper whose goods have been so destroyed for the common safety is entitled to just remuneration. In such a case the whole reason for exempting deck cargo from the benefit of general average fails, and the rule itself ought to fail.

Libel for Short Delivery of Cargo of Lumber shipped from Tensas river, Alabama, to New Orleans, Louisiana.

E. H. Farrar, for libelants.

James R. Beckwith, for claimants.

PARDEE, J. Under the evidence in the case there is practically no dispute that the quantity and quality and value of lumber, as claimed by libelants, was shipped by the Hettie Ellis, and that there was the short delivery as claimed. It is agreed that there was no contract between the parties, save as to rate of freight, and such contract as the law implies in cases of shipment. Who loaded the craft, and whether the large deck-load was with or without the consent of the shipper, does not appear. There is evidence which, taken with the description of the craft, is sufficient to show that on her and like craft in that trade, it was usual, customary, and necessary to load the major part of the cargo on deck. The responsibility of the Ellis under the circumstances was that of a common carrier. Where there is short delivery by a common carrier the burden is on him to excuse himself. And it makes no difference in this respect whether the goods were taken on a vessel as deck-load with the consent of the shipper, or were shipped between the decks. If the goods are shipped as deck-load, the carrier may have excuses that would not avail him

¹ Reported by Joseph P. Hornor, Esq., of the New Orleans bar.

otherwise, but still the carrier must excuse himself for short or non-delivery.

Here the claimant, owner, says first that, by the custom of the trade over the lake and across Mississippi sound, bills of lading were not given, and that all shipments were understood to be at shippers' risk as to perils of the sea. The proof on this point is not full and satisfactory, but is conflicting, two witnesses being for, one non-committal, and one against, the alleged custom. Taking it, however, to be fully proved that such custom exists and formed part of the contract between the parties, we come to the main defense of the case, that the lumber was lost through the perils of the sea.

Under the evidence it is very questionable whether the lumber was thrown overboard to save the ship, or was washed overboard in the storm. The master swears that it was thrown overboard, and the protest signed by the master and one of the sailors says that it was washed overboard, while the sailor swears that part was washed over and part thrown overboard. If it is important for the court to find out this fact, the finding is that the lumber was thrown overboard, for it does not seem possible that the entire deck-load could have been washed overboard without greater damage to the ship than the evidence shows she suffered. There is no doubt under the evidence that when the lumber was lost there was a severe storm and violent sea, and the ship was in such stress and danger as to apparently justify the jettison of the deck-load, if not the entire cargo. In this state of the case, the libellant claims that the Hettie Ellis is still responsible, because she was brought to her position of peril by the fault and negligence of her master and crew. The facts seem to be, as far as they can be gathered from the evidence of the master and one of the crew, who were the only witnesses examined who had any knowledge of the actual circumstances, and who are apparently illiterate, ignorant sailors, with confused memories, that they had anchored every previous night of the voyage, although the weather was fair in safe places, but that on the night in question, which was dark and very foggy, and threatening to be stormy and tempestuous, they neglected to anchor behind Round island, as was usual and as other like vessels did, but attempted, with a square-bowed, flat-bottomed scow or barge, with a high deck load, and without land-marks in sight, to navigate an open sound full of shoals.

That the vessel and crew escaped at all from the stormy weather that prevailed is exceptional, and, notwithstanding the sarcastic comments of the learned proctor for claimants on "the supreme nerve, judgment, and infallible skill by which vessels are always navigated in court by lawyers," I feel compelled to find, in the present case, that the Hettie Ellis was brought into the peril of the sea which rendered the jettison necessary, if it was made, and if it was necessary, through the fault and negligence of the master and crew, and indirectly of the owner, who is responsible for such master and crew.

"There can be no doubt that a loss by a jettison occasioned by a peril of the sea is a loss by a peril of the sea. In that case the sea peril is deemed the proximate cause of the loss. But if a jettison of a cargo becomes necessary in consequence of any fault or breach of contract by the master or owners, the jettison is attributable to that fault or breach of contract, and not to sea peril, though that also may be present and enter into the case." See *Lawrence v. Minturn*, 17 How. 100, which case is invoked by proctors for both libellant and claimant, and the rule declared as above, I think, under the facts as I regard them, fixes the claimant's responsibility.

There is another view of this case that I am inclined to think equally settles the liability of the claimant, at least for a general average. Concede that the jettison was solely occasioned by a peril of the sea, and that the master and owner were without fault, and we have this case: a vessel built with a view of carrying the major part of cargo on deck, running in a trade where it is customary and necessary to load the major part of the cargo on deck, and such vessel, so built, so trading, and so loaded, is compelled, by peril of the sea, to jettison part of the cargo to save the ship and remaining cargo. In such a case is not the shipper whose goods have been so destroyed for the common safety entitled to just remuneration? In such a case the whole reason for exempting deck cargo from the benefit of general average fails, and the rule itself ought to fail.

Since 1837, in Great Britain, there has been a decided modification of the rules in relation to deck-loads. See *Lowndes, Av. 32 et seq.* In several cases cited there the right of deck cargo, under proper circumstances, to participate in general average, was recognized, notably in the case of *Johnson v. Chapman*, 19 C. B. (N. S.) 563, where it is said:

"This is an action by the shipper of the cargo against the ship-owner, and the charter-party contemplates a deck cargo. * * * Then immediately you find that the deck cargo is within the contemplation of the parties, you must deal with it as if shipping a deck cargo was lawful. When you have established that it is a deck cargo lawfully there by the contract of the parties it becomes subject to the rule of general average."

Macl. 665, says:

"Goods carried on deck give no claim to contribution, although thrown overboard for the common benefit, unless they were so stowed in accordance with a usage of the trade. This, if not the rule of English law, is at least the acknowledged rule of practice among mercantile men in this country."

And, after citing several cases, further says, page 667:

"The received opinion, therefore, now is that, by the law of this country, the jettison of deck cargo gives no claim to general average contribution, unless such mode of carriage is justified and sustained by a usage of the trade." See, also, *Fland. Shipp.* 237.

The supreme court of the United States, in *Lawrence v. Minturn*, *supra*, says on this subject:

"The extent to which we understand them (the authorities cited) to go, and the law which we intend to lay down, is this: that if the vessel is seaworthy to carry a cargo under deck, *and there was no general custom to carry such goods on deck, in such a voyage*, and the loss is to be attributed solely to the fact that the goods were on deck, and their owner had consented to their being there, he has no recourse against the master, owner, or vessel for a jettison rendered necessary for the common safety by a storm, though that storm, in all probability, would have produced no injurious effect on the vessel if not thus laden."

An attempt was made in this case to prove a custom in the trade not to give bills of lading, and exempting the ships from all liability for all goods where no bills of lading were given, and no matter how lost, or whether stowed on or under decks. As this alleged custom was not satisfactorily proved, and, if proven, would be of doubtful legality as an innovation on the laws relating to common carriers, and against public policy, I am of the opinion that in reason and upon the authorities cited, the shipper of the deck cargo on the Hettie Ellis ought to have relief against the vessel, even though the deck cargo may have been jettisoned in a peril of the sea for the common safety, and the master and owner were without fault. At all events, under the facts of this case, as developed by the evidence, I have no doubt that the judgment of the district judge, holding the Hettie Ellis liable, was in accordance with law and justice, and a decree having the effect of affirming that judgment will be entered.

DEVATO v. EIGHT HUNDRED AND TWENTY-THREE BARRELS OF PLUMBAGO, etc.

(District Court, S. D. New York. May 31, 1894.)

1. BILL OF LADING—PORT OF NEW YORK—PLACE OF DELIVERY.

The legal limits of the port of New York are such as are fixed or recognized by the statutes of the state or of the United States; and various state statutes clearly recognize a part of the western shore of Long island, including Brooklyn, as a part of the port of New York.

2. SAME—BROOKLYN.

Under the United States Statutes Brooklyn is not a port of delivery of foreign goods, and such cargo is only legally landed there as a part of the port of New York.

3. SAME—CUSTOM AND USAGE.

Where cargo is, by the bill of lading, to be delivered at a designated port of wide extent, without naming the particular place within the port, delivery must be made according to the established custom and usage of the port, and in that part of it customarily used in the discharge of similar goods. To ascertain this, proof of usage, either general or in particular lines of trade, is competent.

4. SAME—MAJORITY OF CONSIGNEES CONTROL.

A usage is valid for a majority of the consignees of the cargo of a general ship to name the place of discharge, provided it be a suitable place, and within the limits ordinarily used for the discharge of similar goods.

5. SAME—PAYMENT OF FERRIAGE OR LIGHTERAGE.

Upon such designation by the majority, the occasional payment of small sums for ferriage or lighterage to other consignees dissatisfied with the place of landing, such payments being from policy in the rivalries of trade, and neither regular nor uniform, does not make a usage binding upon the ship to make such allowances to dissentient consignees, where the place of discharge is otherwise suitable, and according to the usage of the trade.

6. SAME—CASE STATED.

Where the bark *G. M.*, from Ceylon, arrived in New York with a cargo consigned to numerous merchants, to be delivered at the port of New York, a majority of whom directed the ship to Pierrepont's stores, near Wall-street ferry, Brooklyn, and the ship discharged her cargo there, and a consignee of 823 barrels of plumbago dissented, and demanded the landing of his goods in New York city, and subsequently, under protest, took his goods from the dock in lighters, and refused to pay freight except on an allowance of \$132.22, the cost of lightering across the East river, and the plumbago was thereupon libeled for the freight, *held*, (1) that Brooklyn was within the legal limits of the port of New York; (2) that Pierrepont's stores were a suitable place of landing, and the most usual place for landing such goods, as proved by the usage of the trade for a number of years past; (3) that the usage was also proved for the majority of the consignees to direct the vessel to a particular dock, and that their direction, in this case, to Pierrepont's stores was valid and legal; (4) that no such qualification of this usage was proved as bound the ship to pay for ferriage or lighterage to consignees dissenting; and (5) that the delivery of the plumbago at Pierrepont's stores was, therefore, valid, and that the respondents were not entitled to the offset for lighterage claimed.

In Admiralty.

Owen & Gray, for libelants.

Butler, Stillman & Hubbard, for claimants.

BROWN, J. This libel was filed to recover the sum of \$2,883.62, freight alleged to be due upon 823 barrels of plumbago, brought on board the bark *Guiseppa Mazzini*, from Colombo, in the island of Ceylon, and discharged at Pierrepont's stores, Brooklyn, immediately adjacent to the Wall-street ferry. The plumbago was shipped under a bill of lading which describes the bark as "bound for New York," and that the goods were to be "delivered at the aforesaid port of New York" on payment of freight, etc. There were numerous other consignees of different portions of the cargo, under various bills of lading, quite a number of the other shipments being also of plumbago. The vessel arrived in New York on the fifteenth of January, 1882. Prior thereto a majority of the consignees, upon the solicitation of the agents of the proprietor of Pierrepont's store, had signed requests that the bark should go to Pierrepont's stores, Brooklyn, to unload. The claimants of the plumbago in suit were not consulted. They wanted their cargo landed in New York, and on learning that the bark had gone to Brooklyn, protested against her unloading there. The plumbago, however, was put upon the pier there, and subsequently taken thence by the claimants in lighters to New York. The claimants, Gantz, Jones & Co., contend in their answer that, under the bill of lading, the ship was bound to make delivery at the city of New York; that the delivery upon the dock at Brooklyn was wrongful; that while there a portion of the plumbago was injured through exposure to snow and rain; and that the claimants were subjected to the expense of

\$132.22, in the subsequent lighterage of the plumbago to New York, which they claim as an offset against any sum which may be due for freight.

Upon the trial the claim for injury to the goods while on the pier was waived, in order that a decision might be had upon the single question concerning the right of the vessel, under such a bill of lading, to make delivery of the cargo in Brooklyn, against the protest of one of the consignees, and without compensation for lighterage across the river.

For some 30 years past there has existed at this port a controversy, or something in the nature of a controversy, between ship-owners and importers as to the right of a vessel to make delivery of cargo consigned to "the port of New York" on the adjacent shores of Brooklyn, Jersey City, or Hoboken. The evidence shows that it began some 30 or 35 years ago, about which time some of the steamship lines began to go to Jersey City. Complaint was immediately made by the merchants in regard to that practice, and some compensation was paid for the extra expense of ferriage. This liability was soon avoided by an alteration of the terms of the bills of lading so as to give liberty to discharge at Jersey City; and several lines now provide generally for an option to discharge at Jersey City, Hoboken, or New York. About the same time commodious warehouses began to be erected in Brooklyn, which now extend almost continuously from Fulton ferry to below Hamilton ferry, on the Brooklyn side. These warehouses, with the docks to which they are adjacent, furnish superior facilities for the ready handling and storage of cargo; and during the last 25 years they have been more and more used for storing goods not intended for immediate consumption. In certain lines of business, the East India trade particularly, a large majority of the cargoes of late years have come to be discharged at the Brooklyn stores; and this tendency has lately been still further increased by the erection of the Brooklyn bridge, as the vessels engaged in that trade are mostly unable to go above the bridge without housing their topmasts. During the last five years, as the evidence shows, almost all the vessels from Colombo and Ceylon have discharged at Brooklyn.

Some 15 or 20 witnesses upon each side have been examined in reference to the custom of delivery. The witnesses on the part of the respondents are, for the most part, merchants or persons identified in interest with importers. Some of them, however, are entirely impartial, and have been familiar with the controversy on this subject for 25 years or upwards, and one of them has been frequently called on to arbitrate upon differences and claims for damage arising through deliveries in Brooklyn. The respondents' witnesses all testify that the practice of delivering in Brooklyn, so far as it has been the practice to unload there under bills of lading of this description, has always been more or less protested against, and a constant subject of claim for compensation on the part of those merchants who

desired their goods to be landed in New York. In a few instances the cost of lighterage has been paid; but, generally, the only compensation allowed, where any was given, was the ferry charges for trucks employed to cart the goods to New York.

On the part of the libelants, while such claims are admitted to have been made to some extent by persons who wanted their goods in New York, it is contended that such complaints are now much less frequent than formerly; that they never amounted to much, and always came from only a very small proportion of the consignees; that no payments for lighterage were known; and that the occasional sums paid for ferriage were paid from policy, in the competitions of trade, or, in a few instances, to avoid litigation, and were so small in amount as not to be worth contending for; while quite a number of the witnesses had never heard of any such objections, or any claims for compensation at all. Many witnesses for the libelants testify to the practice of late years of landing nearly all the cargoes from Ceylon at Brooklyn, as above stated; and also to the general practice of delivering cargoes at any dock in New York or Brooklyn selected by a majority of the consignees.

The first ground of defense is that a delivery at Brooklyn is not a fulfillment of the contract contained in this bill of lading, because the bill of lading describes the vessel as "bound for New York," and makes the goods deliverable "at the aforesaid port of New York." If this contention is sound, no freight was earned. *The Boston*, 1 Low. 464. This contention, however, cannot prevail, for the Brooklyn wharves are clearly within the legal limits of the "port of New York," and hence within the possible limits of the port, as commercially understood.

1. The legal limits of the port of New York must be held to be such as are fixed or recognized by the statutes of the state or the United States. No statute of the United States defines these limits with strictness. By section 2535, the state, for the purposes of the collection of the revenue, is divided into 10 collection districts, the second of which is the "district of the city of New York," comprising "all the waters and shores of the state of New York, and of the counties of Hudson and Bergen, in the state of New Jersey, not included in other districts" in which New York is made "the port of entry;" and 10 other towns and cities between Newburgh and Troy, inclusive, as well as Cold Spring and Port Jefferson, on Long island, are made "ports of delivery;" while Jersey City is made "a port of entry and delivery, with an assistant collector to act under the collector at New York." By section 2536 the revenue officers are required to "reside at the port of New York," excepting one assistant collector, "who shall reside at Jersey City." Section 2770 requires every vessel arriving from a foreign port to make entry of ship and cargo at one of the designated ports of entry, and prohibits the unloading of cargo elsewhere than at one of the designated ports of entry or delivery. The

second collection district, therefore, of which New York is the port of entry, extends from Sandy Hook to Troy, on the Hudson, and embraces the west end of Long island, including Brooklyn. New York, as "a port of entry," is clearly not co-extensive with the whole collection district, since this district embraces not only Jersey City, which is made a distinct port of entry and delivery, but also 12 other designated "ports of delivery." The unloading of goods from a foreign port at any other place than a designated port of entry or delivery is illegal, (section 2770; *U. S. v. Hayward*, 2 Gall. 510, 511,) and as Brooklyn is not a designated port of delivery, unless it were included in the port of New York as a port of entry, the unloading of any foreign goods at Brooklyn would be illegal. The long practice, however, of landing foreign goods there under the authority of the collector should be deemed conclusive evidence that Brooklyn, by common understanding, is included within the port of New York as a port of entry. In ordinary commercial usage, also, Brooklyn is not recognized, I think, in foreign commerce as a distinct port, but only as an adjunct of the port of New York. As I have said, foreign goods cannot be legally landed there at all except as a part of this port; and in foreign bills of lading, when Brooklyn is referred to, it is more usually, I think, by the names of its docks only, as a part of the port of New York, and without the mention of Brooklyn *eo nomine*. In *Carsanago v. Wheeler*, 16 Fed. Rep. 248, the ship was to proceed from Plymouth, England, to New York, "only Atlantic dock," i. e., to Brooklyn, as a recognized part of the port of New York, though Brooklyn was not named; and in *Irzo v. Perkins*, 10 Fed. Rep. 779, under a bill of lading making the goods deliverable at the port of New York, the vessel, by consent of all the consignees, also went to Atlantic dock, Brooklyn, to discharge on lighters; and such cases are very frequent.

Various statutes of the state of New York indicate more precisely the limits of the port of New York for various maritime purposes. By the act of March 30, 1855, c. 121, commissioners were appointed for the preservation of the harbor of New York from encroachments," who were empowered "to cause the necessary surveys of the said harbor, and to ascertain whether, in reference to the present and probable future commerce of the cities of New York and Brooklyn, any further extension of piers, etc., into the said harbor ought to be allowed; and to recommend the establishment of such exterior lines in different parts of the said harbor, opposite and along the water fronts of the cities of New York and Brooklyn, the county of Kings and county of Richmond, beyond which no erection should be permitted." By the act of April 16, 1857, it was made unlawful to throw into the waters of "the port of New York below Spuyten Duyvel creek, on the Hudson river, or below Throg's point, on the East river, or in the bay, inside of Sandy Hook," any cinders or ashes, etc. Many of the sections of this act (sections 1, 3, 4, 5, 6, 10, 11) obviously apply to the piers

and bulk-heads of Brooklyn as belonging to "the port of New York." By the act of April 17, 1857, c. 763, "the bulk-head line and pier line, adjacent to the *shores of the port of New York*," are declared to be as theretofore recommended by the commissioners, embracing "from a point one mile north of Spuyten Duyvel creek, thence southerly to the entrance, and along the north shores of Spuyten Duyvel creek and Harlem river, and easterly along the north shore of the East river to Throg's Neck; also from the entrance to Little Neck bay, in the county of Queens, westerly *along the south shore of the East river*, including Flushing and Gowanus bays and Newtown creek, to the westerly end of Coney island." The laws regulating "the pilotage of the *port of New York*" evidently contemplate the same territorial extent. See act of June 28, 1853, c. 467; Laws of April 3, 1857, c. 243. The same is true of the act establishing and regulating "the board of port wardens of the *port of New York*." By the act of April 14, 1857, c. 405, this board consists of nine members, "one of whom shall be a resident of the city of Brooklyn." So, also, the act concerning "the captain of the port and harbor-masters of the *port of New York*," (act of May 22, 1862, c. 487,) evidently includes the same extended territorial jurisdiction. Section 8 of the act last cited provides that "each of the said harbor-masters shall remain in and perform the duties assigned to him by the captain of the port, and shall not absent himself from the cities of New York or Brooklyn without his permission."

In view of these various statutory regulations defining the limits of the port of New York, in reference to subjects so intimately connected with commerce and navigation, as well as the frequent recognition of the Brooklyn docks in foreign bills of lading as a part of this port, it cannot be held that Brooklyn is outside of the limits of the port of New York, so as to render a delivery of cargo there necessarily a non-fulfillment of a contract to deliver at the port of New York.

2. It does not follow, however, that a delivery of cargo is necessarily a good delivery because within the legal limits of the port. Such is not the meaning or intention of the bill of lading. No one would seriously contend that under a bill of lading like this goods consigned to a merchant in New York city could be lawfully delivered at Spuyten Duyvel, some 13 miles above the Battery, at the mere option of the captain, because Spuyten Duyvel is within the geographical limits of the city and port of New York, or at Throg's Neck, or at Sandy Hook, because those places are also within the legal limits of the port.

A bill of lading is a commercial document, to be interpreted according to the usages of commerce. A port, in the commercial sense, and by the most ancient definitions, is an inclosed place where vessels lade or unlade goods for export or import. "*Portus est locus conclusus quo importantur et unde exportantur merces; idem et statio dicitur conclusus ac firmate.*" Pardessus, Lois Mar. tit. 1, p. 179. "A station (anchorage) is also so called when inclosed and made safe."

The port is not any place within the geographical limits of the same name where ships might load and unload, but where they in fact do so, *i. e.*, where they are accustomed to do so. Commercially considered, a port is a place where vessels are in the habit of loading or unloading goods; and the limits of the port, as respects a delivery under the bill of lading, turn purely upon the question of fact, within what limit ships and merchants have been accustomed to receive and deliver cargo consigned to the port designated, without any necessary regard to geographical or political divisions, or to police or statutory regulations. Consignees of goods at a designated port have a right to expect a delivery of their goods according to the established custom and usage of the port, and in that part of the port customarily used for the discharge of such goods; and the vessel is bound, and has a right, to make delivery accordingly. *Abb. Shipp.* †378; *Vose v. Allen*, 3 Blatchf. 289; *The Grafton*, 1 Blatchf. 176; *Gatliffe v. Bourne*, 4 Bing. N. C. 314, 329; *Cargo ex Argos*, L. R. 5 Priv. C. 134, 160; *Irzo v. Perkins*, 10 F&D. REP. 779.

Where the commerce of a port is increasing rapidly, the limits within which goods are deliverable must necessarily be gradually enlarged. The direction in which these limits shall extend will be determined by considerations of convenience and economy. Before the docks and piers along the lower part of New York became inconveniently crowded, and no greater convenience, economy, or dispatch were afforded at Brooklyn, no general practice of delivering cargo there, except by consent, could be deemed rightful, or in accordance with the custom of the port. But the lower part of the city has long since become incapable of accommodating the shipping of the port; and the opposite shore of Brooklyn evidently furnished, in part, the readiest means for the necessary additional accommodations. The 12 lower blocks on the East river front, embracing half the distance from the Battery to the bridge, have, for more than 25 years past, been devoted by the state statutes to special uses which exclude ordinary foreign commerce. See act of April 13, 1857, c. 367. The other docks, moreover, in the lower part of the city, are so largely appropriated for various ferries, steam-ship lines, and to special branches of trade, that comparatively few remain available for the accommodation of miscellaneous foreign shipping. While the limits of the port within which goods were usually unladen were, from necessity, therefore, continually pushing further up the East and Hudson rivers, it was impossible that the natural advantages of Brooklyn, from its proximity to the lower part of the city, and its easy approach, should not be seized and applied to the same uses.

It matters little how the appropriation of new localities for the delivery of goods originates. It is usually, doubtless, by the consent or agreement of parties, prompted by considerations of convenience and economy; such, as I am informed, has recently taken place as regards the new cotton docks and warehouses at Staten island.

But what begins in special agreement may, ere long, end in a prevailing custom, either in general trade or in a particular traffic; and the question in any particular case must be, whether the practice of landing at such parts of the port has become so general and so established as to be fairly and reasonably entitled to be recognized as within those limits wherein the merchants of the port ordinarily receive, and vessels ordinarily discharge, such goods. To show this, proof of usage is necessarily received, and such is its appropriate office. *Ostrander v. Brown*, 15 Johns. 39, 42; *The Ree-side*, 2 Sumn. 569.

In *Bradstreet v. Heron*, Abb. Adm. 209, it was held by BETTS, J., under a usage proved in that case, and upon a defense precisely similar to the defense in this case, that a delivery of goods at quarantine, during the quarantine season, was a compliance with a contract of the bill of lading to deliver at "the port of New York." The same, also, in substance, was held in the case of *Gracie v. Marine Ins. Co.* 8 Cranch. 75.

In this case, I think, the weight of evidence undoubtedly shows that the docks and warehouses of Brooklyn opposite the lower part of New York have been so long and so generally used for the delivery and storage of goods consigned to this port, especially in the trade from Ceylon and the East Indies, as to be entitled to recognition, not merely as one of the customary places of discharge within the port, but, in fact, as the chief place for the discharge of such goods. I am satisfied, from the evidence, that a great majority of the merchants in that trade have long since found it to be for their convenience and their interest to have their goods delivered at the stores there rather than in New York city. So largely has this part of Brooklyn been employed in that trade, under bills of lading like this, that if these docks and warehouses were to be suddenly destroyed, and incapable of being restored to use, the changes made necessary, especially in the eastern trade, would amount almost to a revolution. And, if this be so, it is clear that the use of these docks and warehouses, as at present established, is an integral and essential part of the established commerce of the port, for the customary delivery and receipt of goods.

In the case of a general ship it is not to be expected that all the consignees will be equally accommodated by a single place of landing. The most that can be expected is to accommodate the majority of the consignees; and if the vessel lands at a suitable wharf within the customary limits for the discharge of similar goods, and in accordance with the request of a majority of the consignees, as in this case, her obligation is performed, though the minority might find some other place of discharge more convenient.

It was not claimed in this case that the landing at Pierrepont's stores was unreasonable on account of its distance; or that the respondents would have been subjected to less expense for cartage or lighterage had the bark landed at any available pier on the New York

shore. What New York docks were available for the discharge of this bark does not appear. Had she gone to some of the up-town wharves within the present ordinary limits for discharging goods, as she might have done had there been no direction by the majority of the consignees, there is no evidence to show, and it cannot be assumed, that the respondents would have been subjected to any less expense for truckage or lighterage than they incurred through the delivery at Brooklyn.

The prevailing usage for a number of years past, to discharge nearly all cargoes like the present at Brooklyn, is not seriously denied; the respondent's evidence, on the whole, confirms it. The point they contend for is, rather, that this practice is illegitimate and illegal; and that those who do not assent to such delivery are, therefore, entitled to compensation, either for lighterage or ferriage, to New York; in other words, the respondents, while admitting the prevailing practice of discharging at Brooklyn, seek to ingraft upon it either a legal obligation, or a custom on the part of the ship, to make compensation to those who dissent. Apart from any usage to make compensation, I cannot hold the vessel legally bound to do so, for the reasons above stated. The evidence, while showing the payment, in many instances during past years, of small sums, fails, in my judgment, to establish any such general practice of this kind as amounts to a usage obligatory on the ship to allow such offsets to the comparative few who object to the landing in Brooklyn. The superior convenience of Brooklyn over the up-town docks, to which vessels might go for discharge, and the presumably less expense of landing at the former, in the absence of any proof on the subject, require the claim for lighterage and ferriage on account of landing in Brooklyn to be regarded as resting on technical grounds, rather than as meritorious and substantial. When this bark arrived in New York she was, therefore, in my judgment, entitled to consider the docks of Brooklyn as available places for the discharge of her cargo, as well as those upon the New York shore; and, in selecting the one shore or the other, she was subject only to the rules ordinarily applicable between different places of delivery in the same port. Where there are several wharves equally convenient to the carrier, he is bound to deliver at that most convenient to the shipper, if seasonably notified of such preference; and, where the consignees are numerous, a usage for the majority to name the place of discharge is valid, if the place named be suitable, and within the limits where such cargo is ordinarily landed. *The Boston*, 1 Low. 464, 466; *The E. H. Fittler*, Id. 114; 1 Pars. Shipp. & Adm. 233, note.

In the case of *Blossom v. Smith*, 3 Blatchf. 316, NELSON, J., held valid an established usage of trade less obviously reasonable than this; namely, that the largest single consignee of a cargo of naval stores, such as resin, turpentine, etc., might select a yard in Brooklyn at which the whole cargo should be delivered, and that the other

consignees must accept delivery there. The case, as reported, does not state the form of the bill of lading; but on examining the record I find that the bill of lading in that case was of the usual form, describing the vessel as bound for New York, and the cargo to be delivered to the consignees "at the port of New York," as in this case. Such cargo was not allowed to be stored in the city of New York; and the same is true in regard to part of the cargo of the bark in the present case.

The usage proved in this case, for the majority to name the place of landing, was not controverted. The same usage in other lines of trade has been repeatedly proved before me, and acted on in other cases without serious question. The bark in this case went to Pierrepont's stores, as I have already said, upon the request of a majority of the consignees. Though this did not suit the respondents, it must be assumed that it did better suit the majority than a delivery on the New York shore; and as this was within the legal limits of the port, and was also a suitable dock where such cargo is proved to have been long customarily discharged, I cannot hold that the bark, in going there in accordance with the request of the majority, failed in its duty under the bill of lading, or violated any legal right of the respondents; and I cannot, therefore, allow them the offset claimed.

The libelant is therefore entitled to a decree for \$2,883.63, the amount of freight claimed, with interest and costs.

THE CAIRNSMORE.

(District Court, D. Oregon. June 14, 1884.)

1. DERELICT—RIGHT OF FIRST SALVORS.

The bark Cairnsmore went ashore on Clatsop beach in a thick fog, and the master and crew took to the boats and left her, without, so far as appeared, any intention to return or hope of recovering her, but sold her as she lay, within two days, for the benefit of whom it might concern; but in the mean time she was taken possession of by the libelants, who proceeded at once to save her tackle, apparel, furniture, stores, and cargo. *Held*, that the vessel was derelict, and that the salvors who first got possession of her were entitled, for that purpose, to maintain the same, even against the owners or their vendees, so far and so long as they were reasonably able and had the means to save her or any part of her; but when it was manifest that they were unable to do so in any particular, as well and surely as others who might offer to assist in the enterprise, it was their duty so far to yield the possession to such others.

2. SALVAGE SERVICE—COMPENSATION OF.

Where there is neither risk of life nor property involved in a salvage service, nor any special knowledge or ingenuity required or used therein, the principal elements in the compensation of the salvor are the value of the labor and care bestowed upon the saved property, and the degree of integrity and responsibility involved in keeping it safely and duly accounting for it, together with the risk of success.

Suit for Salvage.

C. W. Fulton and Frederick R. Strong, for libelants.

Charles B. Bellinger and Rufus Mallory, for claimants.

DEADY, J. The libelants, J. E. Thomas, Thomas Doig, F. H. Ward, John Brown, James Lidwell, Duncan W. McKenzie, W. G. Ross, A. McKenzie, John Wilson, C. A. McGuire, William Stodard, and Martin Foard, bring this suit for salvage against the tackle, apparel, and certain of the furniture, stores, and cargo of the bark Cairnsmore, lately stranded on Clatsop beach, a short distance below Point Adams light. The libel contains a list of the articles saved from the bark, which includes her sails, rigging, hawser, anchor, and mooring chains, chronometer, compasses, boats, anchors, and 29 barrels of cement, alleged to be of the value of \$8,000. The claimants, J. A. Brown and W. T. McCabe, answering the libel, admit the salvage service, but allege that soon after the stranding of the vessel, and before the saving of the articles in question, except the sails, they purchased the Cairnsmore and cargo from the master for the sum of \$450, and demanded the possession of the same from the libelants, which was refused; whereby they lost the opportunity of saving both the vessel and cargo, which they were prepared to undertake with a reasonable prospect of success.

From the evidence it appears that the Cairnsmore was an iron vessel bound from England to Portland, with a cargo of cement of about 1,400 tons. On Thursday, September 27th, she went ashore on Clatsop beach, in a thick fog, with a light wind, a mile or two below Point Adams light. On the next day the master and crew left her in the ship's boat, and within a few hours were picked up by the steam-ship Queen of the Pacific, near the mouth of the Columbia river, and carried to Astoria. On Friday evening, McCabe, Duncan W. McKenzie, and several others of the libelants, having heard of the stranding, gathered in the vicinity of the wreck, and the next morning McCabe and McKenzie, by means of a small skiff, which the latter had procured, boarded the vessel, and took possession of her, and, with the aid of the rest of the libelants, commenced to wreck her. They first took off the sails, which were still set, and sent them ashore on a line from the foretop to the beach, and then commenced to remove the rigging. During the forenoon of Saturday the master of the vessel visited the beach, and returned to Astoria with the local agent of Lloyds, who had come down from there with McCabe the day before. During his short stay on the beach the master did nothing towards asserting any right to the possession of the vessel, or interfering with that of the libelants, or objecting to their action. On his way back to Astoria the master met a telegram from Portland, advising him that he had been appointed agent for the owners, and directing him to associate some one with himself, and hold a survey of the vessel, and dispose of her to the best of his ability. Thereupon the master selected his companion, Lloyds' agent, as his associate, who was also the bearer

of a message from McCabe to his clerk in Astoria to buy the vessel if she was offered for sale, and they two, concluding that they had already held a sufficient survey of the vessel, went on to Astoria that evening, and then and there sold her and her cargo, without any further notice or other bid, so far as appears, to McCabe's clerk, as a wreck, for \$450,—there being an understanding at the time between said agent and McCabe that the former should have an interest in the venture if the sale was made, as they expected it would be. McCabe went to Astoria on Sunday, and returned on Monday, when he told the libelants that he had purchased the vessel, and insisted that they should cease their work, and deliver the possession of the vessel and property to him, at the same time saying they should be paid for what they had done. The libelants refused to quit work or surrender possession of the property, but told McCabe he might continue to work with them as a salvor, or, that they were willing to stand in with him on the purchase, which they thought he ought to have made for the benefit of the whole party, as they had agreed beforehand to bid as high as \$3,000 for the wreck, if it was sold. But they would not allow him to take exclusive possession, nor put a gang of men on board to work on his account. McCabe would not accept their proposition, and they would not yield to his demand; and therefore the former did nothing more towards saving the property, and the libelants continued their operations until about November 10th, when they surrendered the vessel to the claimants. The only means they had of saving the material, besides the line from the foretop, were ox teams which they hired from the neighboring settlers. At low tide these were driven in the surf within 30 to 40 feet of the vessel, and loaded from the yard-arm with heavy articles, which were hauled ashore. There the sails and other perishable materials were stored in a tent until they could be removed to Skipanon by wagon, and thence boated to Astoria, where they are now stored. The anchors and chains were left well up on the beach, where they are now, buried in the sand. According to the testimony of McCabe he had the men and means at his command wherewith to have placed a donkey engine of 4,000 pounds weight on the vessel by Tuesday, and taken out the cargo in a few days, and thereby enabled the vessel to come ashore, out of the breakers, to a place of comparative safety, from which she might have been thereafter gotten out to sea again at some convenient time. But it does not appear that the men were on the ground, nor that the engine was ever any nearer than Astoria. After the libelants gave up the wreck, McCabe employed Thomas Doig, one of the libelants, and some four or five others, who removed from the vessel for him two anchors, weighing between three and four thousand pounds each, by lowering them from the yard-arm into a wagon and hauling them ashore. It also appears from the evidence that by Monday the vessel was beginning to fill from the water pouring in at her afterlights and companion way, and that by Wednesday the whole cargo

of cement was wet and ruined. The vessel remained intact until about February, when she broke up and went to pieces.

My conclusion from the circumstances is that the Cairnsmore, when found by the libelants, had been abandoned by her master and crew without the hope of recovery or the intent to return and reclaim her. She was then derelict, and liable to be taken possession of by the first comer. 2 Pars. Shipp. & Adm. 288; Cohen, Adm. 78. Waiving inquiry into the *bona fides* of the sale to the claimants, and assuming that it was good as against the libelants, the claimants only succeeded thereby to the rights and interests of the former owners. As against the latter or their vendees, the libelants had the lawful possession of the property, and were entitled to keep the same so far and so long as was necessary to enable them to complete the salvage service in which they were engaged. But the rights of the libelants were qualified by the circumstance of their power or competency to perform this service. And if it was manifest that with their means they could not save the property as well or as surely as others who might offer to assist or take part in so doing, they were bound to allow such others to engage in the undertaking. 2 Pars. Shipp. & Adm. 279-281. The claimants, as owners, had also the right to participate in the saving of the property, so far as such participation was plainly necessary to that end. And it is clear that such necessity existed as to the cargo, for the libelants were not prepared to get it out with the dispatch which the circumstances required. Indeed, it is very doubtful if the claimants could have gotten out one-third of it, even if they had succeeded in getting an engine on board by Tuesday. But it may be that, if the dead-lights and after companion way had been properly closed, the water might have been kept out of the hold longer and more might have been saved. Besides, as the cargo came out, the vessel would have risen up and come ashore out of the breakers, and been less liable to take in water. But the claimants were not entitled to the exclusive possession of the vessel, or to deny the libelants their right to salvage for the property already saved, or to prevent them from doing what they could to save more of it. The law favors the first salvors, and does not allow others to share with them in the enterprise and compensation, unless and only so far as there is a necessity for it. *The Ida L. Howard*, 1 Low. 2; Cohen, Adm. 82.

The claimant McCabe mistook his rights when he demanded that the libelants should "give up the ship" and turn the whole matter over to him. The libelants refused to comply with this demand, as they had a right to. And although they may have been acting under the apprehensions that they had a right, under the circumstances, to prevent McCabe from putting an engine on board, and thus aid in saving the cargo, they never actually refused to accede to any such proposition, because it was never made to him. Nor were the claimants ever in a position to make such an offer, for they had no such means or appliances on the ground or in sight, and now only claim

that they were within their reach, and, if the libelants had absolutely surrendered the possession of the vessel to them, as they required, they would have brought them into use.

The claimants' case is not one that appeals strongly to one's sense of justice. McCabe, while acting as a salvor with the libelants, privately purchased the wreck from under them, at a covert sale, for a nominal sum, and then not only refused to admit them to share in it, but actually undertook to deprive them of their possessions and right as the first salvors.

Neither do I find that the libelants are guilty of any such unskillfulness or negligence in the saving of this property as ought to prejudice their claims for salvage. The proportion that ought to be allowed them is not so easily ascertained. The allegations of the parties as to the value of the property saved are a great ways apart, and the proof on the subject is meager and unsatisfactory. Indeed, it was understood that there would be an admission or stipulation on the the subject, but I am unable to find any in the report of the testimony. Where the property is comparatively valuable, and is saved with but little labor or risk of life or property, the proportion allowed a salvor is less than when these conditions are reversed. The time occupied in this service was considerable,—probably 40 days in all,—during which time some of the libelants were employed a portion of each day. But the time employed in the surf in getting the property ashore was only about one hour out of two, as the water was too deep or rough to work in when it was above half tide. There was little or no property employed by the libelants. The teams which were used to haul the property from the vessel were all, and the risk to them was not serious. The weather was comparatively calm and mild, and there was no particular risk to life, except from exposure to cold in the surf. Neither was there any particular skill or ingenuity brought to bear upon the undertaking by the libelants. The principal elements in the value of their service are the labor and care bestowed upon the property while removing it from a place of danger to that of safety, and the integrity and responsibility involved in keeping it safely and duly accounting for it. Add to this the risk which they took of getting nothing for their labor if they did not succeed, which in this case was not very great. Allowing that the libelants were engaged in the work of saving this property 40 days, \$5 a day for each of them during the whole period, or \$2,400 in all, in addition to the \$383.82 in money which they expended for teams on the beach, transportation to Astoria, labor, and supplies, seems to me a very reasonable compensation for their care and labor. But if the property is only worth \$2,500, as alleged by the claimants, there would not be that much left after paying the costs of the proceeding; whereas, if it is worth \$8,000, as alleged by the libelants, and my impression is that this figure is much nearer the truth, the half or one-third of its value might be sufficient compensation to the libel-

ants both for their services and expenses. The reward for salvage service is affected, among other things, by the value of the property saved. This is one of the risks which wreckers take. *The Albion Lincoln*, 1 Low. 75. But in the case of a derelict, when the salvage service is considerable and the value of the property saved inconsiderable, the whole may be awarded to the salvor. *The Zealand*, Id. 1. Under the circumstances, the safest course to pursue in the matter is to make an order for the sale of the property,—a thing which ought to have been done long since, on the application of one or both of the parties,—and reserve the final award of salvage until the value of the property is thus ascertained. In the mean time, if the parties are willing to abide the general ruling in the case, they may agree, without any further proceeding, upon a disposition of the property in accordance with these suggestions.

A decree will be entered that the libelants are entitled to salvage, the amount of which will be determined when the value of the property is ascertained upon a sale thereof, which is now ordered.

THE LIZZIE HENDERSON.

(District Court, S. D. Florida. 1884.)

1. COLLISION—WEIGHT OF EVIDENCE.

Where 11 witnesses are so situated that they cannot be mistaken in regard to a fact to which they testify, and their testimony is to a positive fact, the weight of evidence is in favor of that fact, although other disinterested witnesses contradict it, testifying to a negative fact, there being ground for believing that they might have been mistaken.

2. SAME—SECTION 4234, REV. ST.—VESSEL AT ANCHOR.

A sailing vessel at anchor must show a torch-light upon the approach of a steamer, under section 4234, Rev. St., and a failure to do so is negligence.

3. SAME—DUTIES OF VESSELS—LOSS APPORTIONED.

It is the duty of a steamer to avoid a sailing vessel, but it is also the duty of the latter to afford the steamer all the means and signals the law, custom, and common prudence prescribe, to enable her to make the avoidance; and if, by a failure so to do, disaster occurs, she must bear the loss or a share thereof, according as the collision resulted from her sole or partial fault.

4. INTERPRETATION OF STATUTES.

Statutes are to be interpreted according to the manifest import of their words, and that sense of the words which harmonizes best with the context, and promotes in the fullest manner the apparent policy and object of the legislation, must be adopted.

In Admiralty. Collision.

L. W. Bethel and *G. Bowne Patterson*, for libelant.

S. M. Sparkman and *W. C. Maloney, Jr.*, for respondent.

LOCKE, J. The steam-ship *Lizzie Henderson*, while coming out of the harbor of Cedar Keys on the evening of September 5, 1880, struck the schooner *Competitor*, lying at anchor in the channel, and this is a libel to recover damages. One vessel was a steamer under

way; the other, a sailing vessel at anchor. The collision is admitted and fully proven, and the steamer, *prima facie*, so in fault that the burden of proof is upon respondent to show fault in the schooner.

In defense, it is urged that the schooner was anchored in an improper place; that she had no lights up; that she exhibited no lighted torch upon the approach of the steamer. Upon the first two grounds, as questions of fact, the testimony is directly contradictory, and by such a number of witnesses on each side, whom I have no reason, aside from the discrepancies in the testimony, to doubt, that it is impossible to determine the true state of the case with any degree of satisfaction. The schooner had been ordered to quarantine, and instead of anchoring to the eastward of the buoy which marked the limit of the quarantine ground, had anchored to the westward of it, in the channel. This was about 300 or 350 yards wide within the 12-foot mark lines. Just how far from the buoy the schooner was anchored is uncertain; the witnesses have varied from 35 yards to 200, but there was ample room for any other vessel to pass. It does not appear to have been neglect in the master of the schooner in anchoring where he did, but a misunderstanding as to the location of the quarantine ground, from the directions given him by the quarantine officer. It is not a question of importance in this case whether the Competitor was actually within the limits of the quarantine grounds, any further than to inquire whether she was anchored in an improper place, regardless of any quarantine.

In the case of *The S. Shaw*, 6 FED. REP. 93, there was a statute positively forbidding anchoring where she was in range of the lights, but there was no such rule of law or custom prohibiting anchoring here. The Competitor was prevented from anchoring near the wharf, the usual anchorage for vessels, and although the master of the steamer says it is not customary for small vessels to anchor in this part of the channel, if sufficient space is left for vessels to pass safely, such anchoring only required more diligent watchfulness and care in warning any approaching vessel. Although the Competitor was anchored between the banks of the channel, I do not consider that she was so in mid-channel as to be in fault, if she complied with the law in other respects. There was unquestionably abundant room for any vessel to pass her, and no unusual or strong current making navigation difficult, or any obstacle to prevent her being seen from a distance.

According to the testimony of Jackson, master of the steam-ship, when compared with the chart, she was 100 yards to the eastward of the sailing line, as shown by the same. But she was not so out of the way of passing vessels as to excuse her from the maintenance of the required lights, but was so anchored as to make such lights and an anchor watch an imperative necessity; and here arises a more difficult question. Eleven witnesses, the officers and crew of the Competitor, as well as the entire officers and crew of the Nonpareil, a

schooner lying within speaking distance, but about 100 yards from her, swear positively that the Competitor had a large, bright light up at the jib-lift. One party testifies to putting it up; another to having ordered and seen it put up; and all to having seen it burning, bright and clear, until the schooner was struck by the steamer, when the lamp fell out of the lantern on the deck. Two pilots, anchored some 300 yards away, the master, first and second mates, and quartermaster of the steamer, and two passengers on board her, state as positively that they saw no lights, and are confident none were shown. This conflicting evidence renders a satisfactory conclusion difficult, if not impossible, and the only thing that presents itself from which one can be assisted, is the consideration of the opportunities and facilities of each party of being thoroughly informed upon the subject testified to. No one of them is pecuniarily interested in the result of this case, and I know of no reason why as full confidence should not be given to the testimony of each one as to that of any other. Let us see if there is any way by which the difference can be accounted for. The steamer was going at the rate of eight miles an hour, under full head of steam and sail, or at the rate of 204 yards a minute. According to the most reliable testimony the schooner was not seen until the steamer was within about 80 feet of her, or some seven or eight seconds of time. The excitement and commotion at the time is testified to. The master ran to the wheel to help the man there; the mate, who was coming from aft, when he heard the outcry, rushed aft again to cast off the main-sheet; the second mate was abaft the pilot-house when he heard the commotion; and it may well be believed that none of them got more than a passing glimpse of the schooner until they struck her. The passengers were neither seafaring men, nor probably conversant with vessels or the requirements of lights. The testimony of one shows that he was mistaken as to the light on the Nonpareil, a vessel lying at a short distance, and the other saw but one vessel anchored near, while it is true there were two, both with lights distinctly visible. Everything goes to show that the steamer was running what they considered her course from the last buoy, and no one was thinking of a vessel in their way until just upon her. It was a bright moonlight night, without a cloud in the sky, within two days of full moon, the moon a little over two hours high, and the schooner so heading as to be in the full light of the moon, and there was no possible reason why she could not have been seen a half mile under the circumstances, without any light. The two pilots say they had seen her distinctly 300 or 400 yards, when they saw no lights, and to argue that she had no lights because they had not been seen by those on board the steamer when within visual distance, would equally prove that she was not there because they had not seen her. It is stated in evidence that there were good and careful men on lookout,—one in the rigging and one on the bows. While I would not deny their being there, the fact

that they did not see the schooner until she had been seen and announced by a passenger, does not show great care on their part.

It may be easily understood that in such a moment of excitement as has been shown to have been existing here, every one would be watching the schooner and where she would be struck, if at all, and take no such thought of a light as to notice it; and, had no collision occurred, been unable to say five minutes later whether she had a light or not. The testimony of the two pilots, Clark and Wilson, has been more difficult to account for, as it must be, unless the position is accepted that each one of the 11 witnesses for the libelant committed perjury. These libelant's witnesses were so situated that they could not have been mistaken. They were, a part of them, actors in furnishing the light, and all others so immediately in the vicinity that they must have known of its presence or its absence. They testified directly to a positive fact, and not to a negative one; and there can be but one of two conclusions: either that there was a light as described, or they have every one committed willful perjury, which I am not ready to accept. Can we find any grounds for thinking Clark and Wilson may have been honestly mistaken in their statements? The Competitor was nearly easterly from the Grace Darling, the pilot's vessel; almost in a direct line with a rising or newly-risen moon of full brilliancy. She was nearly stern on to them, and the fact that they might have noticed her once, or several times, even, when the light, obscured by the schooner's masts or rigging, or dimmed by the brightness of the moon, was not seen, would not be as improbable as that 11 men of presumably good reputation and character, with no inducement to false swearing, would have committed perjury. A light that was brought from the cabin and carried forward, as testified to by Clark, is conclusively shown by the testimony of those on board the steamer, as well as others, to have been after rather than before the collision, as stated. Taking the entire evidence as to the anchor-light together, I consider the weight is in favor of there being one, and I must so believe.

So far the questions have been of fact, but one of law is now presented. It is claimed and admitted that no torch-light was shown upon the approach of the steamer, as is required by section 4234, Rev. St., according to the act of February 28, 1871. In behalf of the libelant it is urged that such requirement is not for vessels at anchor, but is only intended to apply to sail-vessels under way; and this view seems to be supported by implication by the decisions in *McClosky v. The Achilles*, 23 Int. Rev. Rec. 368, and *The Wanata*, 95 U. S. 600; also, *The Sarmatia*, 2 FED. REP. 915, which have been cited. But in none of these does the question at bar seem to have been considered and determined, for in *The Achilles* only were the circumstances such as could have raised it, and in that it does not appear to have been mentioned. On the other hand, in *U. S. v. One Raft, etc.*, 13 FED. REP. 796, Judge BOND's opinion would imply that

a raft should display a torch, notwithstanding she was at anchor, although the case was disposed of on other grounds; and in *McGill v. The Oscar Townsend*, 17 FED. REP. 94, Judge WELKER remarked that "she did not display, as it was her duty, a torch-light when the lights of the Townshend first appeared, to enable them to see her and avoid a collision."

The language of the law is sufficiently extended to include anchored vessels; as well as those under way, and it must require good reasons to limit its application. As a safeguard, intended to prevent collisions, it would seem to demand as liberal a construction as could be consistent with the plainly-expressed opinion of the legislators. The act of 1871, in which this provision was embodied, was for the purpose of providing in every way possible for the safety of life and property on board steam-vessels, and may it not be presumed with reason that the legislators intended it as much for the protection of these as for the safety of the sailing vessel, and to apply as well to vessels at anchor, which might be impediments to navigation, as to those under way? Judge LOWELL seems to have taken this view of it in the case of *The Leopard*, 2 Low. 242, where he remarks: "I suppose this regulation was intended to give a warning to steamers in case of need, and one the use or neglect of which could not well be disputed." The board of supervising inspectors of steam-vessels place the same construction upon it, as in page 42 of the rules and regulations it is stated that sailing vessels shall at all times, on the approach of any steamer during the night, show a lighted torch. It is plain that the torch is designated by the law as a warning for approaching steamers; every sailing vessel is bound by law to have one at hand, and be acquainted with the requirements and use of it; and, under the circumstances, I cannot say that because the vessel was at anchor, her master was justified in neglecting the use of it. It might be urged that it was presumed that the steamer would do her duty and avoid the schooner, but such presumption cannot be relied upon until everything has been done that can be. I have no doubt that had the torch been displayed five, or even three, minutes before the collision, or even one minute, it would have been seen, and the damage avoided.

In *The Golden Grove*, 13 FED. REP. 675, the following language so fully expresses the duty of sail-vessels that I adopt it as applying here:

"While it is true that it is the duty of the steam-vessel to avoid the sailing vessel, it is no less the duty of the latter to afford the steamer all the means and signals the law, custom, and common prudence prescribe, to enable her to make the avoidance; and if, in any respect, she fails therein, and thereby produces the disaster, she must either bear the whole loss, or share thereof, as her fault was the sole or partial cause of the collision."

Considering the place in which the schooner was anchored, and the entire circumstances of the case, I must decide that it was the duty

of those on board the schooner to show a torch as provided by the statute, and not doing so was a neglect on their part.

I am not sufficiently well satisfied that it was not the intention of the legislators to have the law apply to such cases, to give an opinion in direct conflict with those already given upon the same question. In interpreting statutes "we are bound to interpret them according to the manifest import of the words, and to hold all cases which are within the words and mischiefs to be within the remedial influence of the statute;" "we must adopt the sense of the words which harmonize best with the context and promote in the fullest manner the apparent policy and object of the legislation." *U. S. v. One Raft*, 13 FED. REP. 796; citing *U. S. v. Winn*, 3 Sumn. 212; *The Enterprise*, 1 Paine, 83; *The Industry*, 1 Gall. 117. This case certainly comes within the words of the statute, and would have been remedied by an application of its provisions. If congress has neglected to provide that steam-vessels under like circumstances should comply with like requirements, it does not necessarily relieve those to which it does apply.

But while the Competitor was in this matter, in my opinion, in fault, I am none the less satisfied that there was culpable negligence on the part of the steamer. The circumstances fully satisfy me that with a reasonable degree of diligence and care the schooner would have been seen and avoided, notwithstanding the absence of a torch-light.

Each vessel was, in my opinion, in fault, and the damage must be divided between them. The decree, therefore, will follow for half damages to the Competitor.

GARDNER v. ONE THOUSAND FOUR HUNDRED AND SIXTY-SEVEN BALES OF COTTON and another.¹

(Circuit Court, S. D. Florida. November Term, 1893.)

ADMIRALTY—UNSEAWORTHY VESSEL.

Where cargo is laden on board of a ship whose owners know that she is not seaworthy, and who have put her up for a long voyage that they never intended she should complete, but intended to fraudulently break up the voyage at an intermediate port, which intention was afterwards carried out, *held*, that all the expenses of taking the vessel into the intermediate port, and her expenses there, and the cost of discharging, storing, and reshipping cargo, must be borne by the ship and her owners, and are not a legitimate charge against the cargo.

Admiralty Appeal.

Treadwell, Cleveland & G. B. Patterson, for claimants.

L. C. Bethel, for Philbrick, intervenor.

¹Reported by Joseph P. Hornor, Esq., of the New Orleans bar.
v.20,no.8—34

PARDEE, J. This cause came on to be heard on the record and evidence, and was argued, whereupon the court, being advised in the premises, doth find the following facts in the case:

(1) On June 3, 1878, the ship Marie Fredrikke, laden with a cargo of 3,601 bales of cotton, 2,000 barrels of résin, and 8,290 staves, sailed from the city of New Orleans, ostensibly on a voyage to Liverpool.

(2) This vessel in 1876, then known as the Almora, had put into Key West when on a voyage from New Orleans towards Liverpool, laden with cotton, and had there been condemned as unseaworthy. At this time she was consigned to John J. Philbrick, of Key West, and she was purchased from Philbrick by Adolphus C. Diesen, who was then in Key West, ex-bark Cadiz. Diesen had remained for some time in Key West awaiting the arrival of funds with which to purchase this vessel, and his business office at this time was at the office of the said Philbrick.

(3) In 1877 Diesen took the Almora to Pensacola, and there loaded her with a cargo of lumber for Europe. She put into Key West, leaking and in distress, and was there consigned by Diesen to Philbrick. Her cargo of lumber was discharged at Key West, and the vessel was taken by Diesen to New Orleans for repairs, leaving Key West in February, 1878.

(4) At New Orleans this vessel was put upon the dry-dock and repaired. While on the dry-dock she was libeled by Brady & McClellan, and sold to them for \$2,000. This proceeding was taken to avoid the payment of the bills incurred by the vessel at Pensacola, and the sale was made with the understanding that Brady & McClellan were to transfer the vessel back to the captain. This transfer was subsequently made to the mate of the vessel, Ernest Sissenere, a Norwegian, for \$12,000, the cost of repairs. While the vessel was at New Orleans her name was changed to Marie Fredrikke.

(5) The repairs made at New Orleans consisted mainly of new assistant keelsons, placed along-side of the main keelson; strengthening braces or arches, two in number, running the whole length of each side of the ship; sheathing and caulking.

(6) The hull of the vessel was hogged before she was placed on the dry-dock. On the dry-dock this hog was partially removed. When the vessel came off the dry-dock she settled back a number of inches towards her original shape, but was less hogged than before going upon the dock.

(7) When the vessel left New Orleans her pumps, spars, tops, and outfit were as follows:

(a) Her main pumps were two. They were so constructed that they straddled the keelson like an inverted Y. They could not be sounded, nor could they be hoisted out when the vessel was loaded, nor was there any way of reaching the bottom of these pumps. There was no sounding-well. The pump gear was very much worn, and one

of these main pumps threw very little water on the voyage. It was practically of no use whatever. The wind-mill pump consisted below deck of a single tube of iron. There was no sounding-well for this pump, and the only way of sounding it was by lifting the port-box and sounding down through the pump-tube itself. This tube ran through the assistant keelson, and the sounding-rod, going down the tube, struck on the top of a timber, which was gouged out about one and one-half inches, to let the water have access to the bottom of the tube. The assistant keelson was laid, not on the skin, but on the timbers, and the skin at the bottom of the wind-mill pump was four inches thick. A depth of eight inches of wet sounding-rod down this pump would indicate that the water was two and one-half inches over the skin or ceiling. The wind-mill pump required a breeze of five knots to work, and its boxes and joints were worn out, and wanted renewing.

(b) Several of the spars of the vessel were rotten, and needed replacement. The vessel carried but one spare spar and a half of another one. On leaving Key West, in February, 1878, she left one of her spars there. The fore and mizzen tops of the vessel were also rotten.

(c) The vessel was insufficiently supplied with provisions for a voyage to Liverpool, and there is no proof that she had sufficient water stowed under her deck for such a voyage.

(d) The steering apparatus worked very stiffly.

(e) The crew was composed of the captain, first mate, second mate, cook, nine men, and three boys,—in all, sixteen,—and was not sufficient for the voyage to Liverpool.

(8) On June 4, 1878, at New Orleans, a bottomry bond for \$10,-430.80, with interest at the rate of 20 per cent., making in all the sum of \$12,516.96, was executed by Ernest Sissenere, the mate of the vessel, and her nominal owner, which bond was payable on her arrival at Liverpool.

(9) Before the vessel left New Orleans, Diesen drew, as advances on freight, £2,174 4s. 9d., which sum represented about three quarters of the freight he would have earned by the safe arrival of the vessel at Liverpool.

(10) In going out of the mouth of the Mississippi the vessel struck on a mud lump near the end of Eads' jetties. She grounded at about noon on June 5th, and remained there until June 7th, about 2 o'clock p. m. The vessel grounded because her steering apparatus worked heavily, and those in charge of her wheel could not throw it quickly enough to follow the tow-boat. During the whole of the time the vessel lay upon the lump the weather was fine, and the sea almost calm. The vessel was not in motion, and made no water. Her sails were set all the time, and at night there was only a one-man watch kept on deck. The character of the bottom where the vessel lay was soft mud. It is an ordinary incident of navigation for vessels to stick on the mud lumps near the mouth of the Mississippi without

suffering other damages than such as result from delay. This vessel received no damage by reason of sticking on the lump save delay, and probable loss of about 30 feet of false shoeing. False shoeing is timber from 6 to 10 inches deep, spiked on the lower edge of the keel, not bolted through, for the purpose of making the vessel hold the wind and not drift. On the afternoon of the seventh of June, a breeze springing up, the vessel, with all her sails set, slid off the lump, and for the next two or three hours made about four knots an hour.

(11) On the voyage to Key West the weather was fine. No storm, or even fresh breeze, was experienced. The vessel carried all her sails during all the voyage, with the exception of her maintop-gallant sail for a few hours. Much of the time the vessel was without steerage way. On the voyage the vessel leaked no more than vessels of her age and loading usually leak. The wind-mill pump did not work on the voyage, and the starboard main pump threw but very little water. The water on the voyage came up no higher than an inch or two up on the resin which was used for dunnage, and was controlled by a single pump.

(12) On June 17th the vessel dropped anchor outside the reef at Key West. Within an hour or two after this Capt. Diesen, the second mate, and two of the crew, went to Key West, and landed at Philbrick's wharf. The vessel did not come to Key West until June 24th, remaining during the whole week outside of the reef. On June 24th she was towed into Philbrick's wharf. Capt. Diesen and the second mate remained in Key West until the vessel reached the dock. The two of the crew who left the vessel with Diesen on June 17th are said to have returned on June 19th. One of these had a bone felon and the other a disgusting disease. During the whole of the time the vessel remained outside the reef, viz., from June 17th to June 24th, she did not leak more than vessels of her age and loading usually do. On several of the nights of the week June 17th-24th there was a one-man watch on deck only.

(13) On June 18th Joseph C. Whalton, Jr., the acting agent of underwriters at Key West, notified Philbrick and Diesen, at Philbrick's office, that he represented underwriters on the cargo of the vessel, and was requested by them to attend to their interest therein.

(14) On June 19th Diesen bought the hull and materials of the brig Mohawk, which vessel had been consigned to Philbrick, and was sold under condemnation. On or about that day Diesen declared in Key West that he intended to take this brig to Norway, and that his mate was to take the Marie Fredrikke there, and that he desired to purchase the cargo of the brig Mohawk to use as ballast, partly for the brig and partly for the vessel. Philbrick, on or about June 20th, paid for the hull and materials of the Mohawk, bought by Diesen.

(15) On June 9th Whalton showed to both Philbrick and to Diesen other dispatches he had received from the underwriters on the cargo of the vessel, asking that the discharge be prevented until the arrival

of a special agent sent from New York. On June 19th both Philbrick and Diesen declared separately to Whalton that the Marie Fredrikke would come up to the dock on June 21st, and begin to discharge on June 24th. On June 21st Whalton again communicated with Diesen, sending him a copy of the dispatch that day received by him from underwriters, to advise the master to await the arrival of the special agent, and to protest against discharging at that time.

(16) On June 24th, at about 4 P. M., the vessel came to Philbrick's dock, and a survey was held upon her. The report of the surveyors stated that the vessel was leaking eight inches an hour. The evidence shows that no particular examination was made as to the rate the vessel was leaking, and that she was not leaking at any unusual rate. The surveyors were accompanied by Diesen to the vessel, and he returned with them to Philbrick's office. The report is in the handwriting of Philbrick.

(17) On June 24th, at Key West, the vessel was in as good a condition of seaworthiness as when she left New Orleans, except the loss of the false shoeing referred to, tenth finding. On the night of June 24th, and on all other nights while the vessel lay at Philbrick's dock or at Key West, there was a one-man watch on deck.

(18) On the night of June 24th Whalton served on Diesen, at the vessel, a protest against discharging the vessel. On June 24th Diesen signed and sent to Whalton a letter, in Philbrick's handwriting, falsely stating that the vessel since his arrival off Key West had been leaking badly, requiring the constant service of the crew at the pumps, and on June 28th Capt. William R. Gardner, the special agent spoken of, arrived at Key West, and at his request the discharging of the vessel was discontinued. The discharge was resumed on July 4th, and continued until and including July 6th, when the vessel was sent to quarantine.

(19) Between June 28th and July 4th Diesen was urged by Capt. Gardner, and by Capt. Conway, an agent of the New Orleans underwriters, to discharge only cargo enough to repair his main pumps; to take on board a steam-pump which threw 1,200 gallons a minute, an engineer, coal, and extra men, all free of expense to him, and proceed on his voyage. This he refused to do. On August 7th the vessel came back from quarantine to Philbrick's dock, and the discharge was recommenced, and continued until August 12th, by which time all of the cotton had been discharged, and all the resin, save 800 barrels left in her for ballast.

(20) A second survey, held on August 15th, recommended that the vessel be hove down. This was not done until September 23d, Philbrick refusing to have his dock used for the purpose until then. On September 19th Diesen left Key West in the Mohawk, having given a power of attorney to Philbrick to act for him. The top sides of the vessel were not caulked before she was hove down, as should have been done. The vessel leaked so much when being hove down that

they were obliged to right her. In doing this she broke away, her main and mizzen masts went overboard, and she became a wreck.

(21) The said ship Marie Fredrikke, when she sailed from New Orleans in June, 1878, was not in a condition as to her hulls, spars, tops, pumps, and steering apparatus to withstand the ordinary perils of the sea, wind, and waves, in a voyage to Liverpool. She was in as good condition when she arrived in Key West as when she left New Orleans, except the loss of about 30 feet of false shoeing, heretofore referred to. She could not have been repaired and supplied at Key West, so as to make her seaworthy for the continuance of the voyage to Liverpool, without extraordinary delay and expense, even if the hull could have been repaired and made seaworthy at all.

(22) When the Marie Fredrikke sailed from New Orleans, in June, 1878, it was not with the *bona fide* intention of her master and owner to prosecute a voyage to Liverpool, but it was their intention to consign the ship and cargo in Key West and break up the voyage, as was subsequently done. That Philbrick, the petitioner in this case, was aware of the intention of the master and owner of the Marie Fredrikke does not appear from the evidence, nor does his good faith in the transactions for which he claims compensation affirmatively appear.

(23) On October 7th the libel claiming the possession of 1,467 bales of cotton, part of the cargo of said ship, was filed herein, and the answer was filed on October 9th. On October 10th a decree was made awarding possession of the cargo claimed to the libelant, on giving stipulation to pay the charges, if any, which Philbrick was entitled to. The question of what if any charges were to be allowed to Philbrick was ordered to be brought in by petition and answer. The petition of the said Philbrick was filed herein on November 19th, and the answer thereto on the same day.

(24) From the evidence, and as reported by the master, whose report is not excepted to, the 1,467 bales of cotton involved in this case, if liable to petitioner on account of the matters charged in the petition, would be chargeable, on account of general average, in the sum of \$3,684.12, and on account of charges against cargo in the sum of \$1,764.57, making a total of \$5,448.69 due from February 24, 1879, all as per master's report in the record.

And thereupon the court finds the following conclusions of law:

(1) The expenses and charges incurred in taking the Marie Fredrikke into the port of Key West, in wharfage, storage, labor, wages, subsistence of crew, surveys, etc., and in discharging, storing, and reshipping cargo, all as determined by the approved master's report, aforesaid, should be borne by the ship and her owners, and are not a legitimate charge against the cargo.

(2) The petition of Philbrick herein should be dismissed, with costs.

CLARE, Adm'r, etc., v. PROVIDENCE & S. S. Co.

(Circuit Court, S. D. New York. June, 1884.)

1. COLLIDING STEAMERS—LAW AS TO NAVIGATING IN A FOG.

The law requires that every steam-vessel shall, when in a fog, go at moderate speed, and the theory that full speed is the safest speed when offered as an excuse for infringing the law, cannot be accepted by the courts.

2. SAME—WILLFUL BREAKING THE LAW ENTAILS UPON THE LAW-BREAKER FULL CONSEQUENCES OF HIS ACT.

One who takes a course forbidden by law does so at his peril, and the excuse that the unlawful way is the best way will not save him.

In Admiralty.

Isaac N. Miller, for plaintiff.

Wheeler H. Peckham, for defendants.

COXE, J. This action is brought by Almira R. Clare, as administratrix of Charles C. Clare, her deceased husband, to recover damages of the defendants for having negligently caused his death. The defendants are common carriers, and on the eleventh of June, 1880, they were the owners of the two steamers, the *Narragansett* and the *Stonington*. On the evening of that day the former was proceeding from New York to Stonington, Connecticut, and the latter from Stonington to New York, via Long Island sound. At about 11:30 P. M., which was their usual hour for meeting, the two vessels collided, the *Narragansett*, upon which the plaintiff's intestate was a passenger, took fire and sank, and he was drowned. The sound at this point is about 12 miles wide. The night was still and dark and there was a dense fog. Both vessels were upon the same course, going at about 11 knots (between 12½ and 13 miles) per hour. This was their usual rate of speed. Though it was customary for the *Stonington* to make her trips with two pilots, on this occasion she had but one. When she first sighted the *Narragansett* the latter was about 150 feet distant, headed across the *Stonington's* bow. The *Stonington* then gave signals in quick succession to slow down, to stop, to back water, and to back strong. It was then too late. There was not time enough to stop. The *Stonington* was, prior to the collision, engaged in signaling approaching vessels to go to the right by short blasts upon her whistle. She was also blowing fog whistles about three times per minute. She heard the *Narragansett's* fog whistle when the latter was from three to five minutes off, apparently about a point and a half on her port bow. The wheel of the *Stonington* was then put hard a-port and her head turned about five points to the right, but her speed was not slackened. The captain of the *Narragansett*, on the contrary, testified that he made the *Stonington* a point or a point and a half on his starboard bow, and he gave orders to starboard his helm.

The defendants introduced testimony to prove that experience has demonstrated that in fogs on Long Island sound accidents are less

likely to occur if vessels run at full speed. The sound is navigated by taking a course from light to light. In thick weather it is customary, after leaving one light, to run the time nearly up which is required to make the next light, at the usual rate of speed. The boat is then stopped and feeling her way cautiously by sounding she makes the second light, and this is repeated through the sound.

It is urged that if the rate of speed is changed or the boat stopped, except in the vicinity of a light, the reckoning will be lost, or at least less accurately attained. That if the steamer is slowed down in the strong currents and crossed tides of the sound the danger of drifting or running onto the rocks, reefs, and points, which everywhere abound, is vastly increased. In short, it is maintained by those accustomed to the navigation of the sound that by keeping up the regular speed they are better able to make their courses, handle their boat, and tell their whereabouts than by adopting a different rule.

The defendants introduced the record of the proceedings in the district court in the matter of the *Narragansett*, taken under the act of March 3, 1851, entitled, "An act to limit the liability of ship-owners and for other purposes," and they insist that the decree there rendered constitutes a bar to this action. The court decided that this position was well taken as to the *Narragansett*, but that in so far as the plaintiff's right to recover depended upon the negligence of the *Stonington*, which was not surrendered, the proceedings in the district court were not a bar and that the question whether or not the *Stonington* was at fault should be submitted to the jury. The jury found for the defendants and the plaintiff now moves for a new trial on several grounds, only one of which will be considered.

It is urged that the verdict should be set aside as contrary to evidence and to law, for the reason that there was a clear and palpable violation of sailing rule No. 21. The rule is as follows:

"Every steam-vessel, when approaching another vessel, so as to involve risk of collision, shall slacken her speed, or, if necessary, stop and reverse; and every steam-vessel shall, when in a fog, go at moderate speed." Rev. St. § 4233, p. 818.

No case has been found, where this rule was under consideration, which holds that $12\frac{1}{2}$ or 13 miles an hour is moderate speed for a steam-vessel in a fog. On the contrary, the decisions are unanimously the other way. *The Pennsylvania*, 19 Wall. 125, (7 knots;) *The Colorado*, 91 U. S. 692, (5 or 6 miles;) *The Blackstone*, 1 Low. 485, (8 knots;) *The Rhode Island*, 17 Fed. Rep. 554, (15 miles;) *The State of Alabama*, Id. 847, (8 or $8\frac{1}{2}$ knots;) *The City of New York*, 15 Fed. Rep. 624, (10 knots;) *The Eleanora*, 17 Blatchf. C. C. 88, (between 5 and 6 miles;) *The Leland*, 19 Fed. Rep. 771, (8 miles;) *The Bristol*, 4 Ben. 397, (16 miles;) *The Hansa*, 5 Ben. 502, (7 knots;) *The Manistee*, 7 Biss. 35, (7 miles.)

It is true that the foregoing are causes in the admiralty, and the criticism is made that the question of speed was determined as a ques-

tion of fact. It is urged by the defendants that, because one court concludes upon the evidence before it in a particular case that eight knots per hour, for instance, is immoderate speed, no reason is therefore suggested why another tribunal, in different circumstances, should reach the same conclusion. That to argue to the contrary is tantamount to the absurdity of contending that because a jury determined that 25 miles an hour is too high a rate of speed for a railroad train at a particular crossing, every other jury in similar cases should be constrained to find the same way. This position would quite likely be well founded if the only questions decided were questions of fact, but it will be observed that in several of the cases referred to, some of which were not presented to the court upon the trial or argument, a construction is placed upon rule 21, that in all circumstances "moderate speed" means less than usual speed.

In *The Pennsylvania*, 19 Wall. 125, the court, at page 133, say:

"Our rules of navigation, as well as the British rules, require every steamship, when in a fog, 'to go at moderate speed.' What is such speed may not be precisely definable. It must depend upon the circumstances of each case. That may be moderate and reasonable in some circumstances which would be quite immoderate in others. But the purpose of the requirement being to guard against danger of collisions, very plainly the speed should be reduced as the risk of meeting vessels is increased. * * * And even if it were true that such a rate (7 knots) was necessary for safe steerage, it would not justify driving the steamer through so dense a fog along a route so much frequented, and when the probability of encountering other vessels was so great. It would rather have been her duty to lay to."

In *The Blackstone*, 1 Low. Dec. 485, the court, adopting the language of another case in the same circuit, says, at page 488:

"What would be moderate speed in the open sea, would not be allowable in a crowded thoroughfare or in a narrow channel. And under the same circumstances in other respects, the speed should be the more moderate according as the fog is more dense. The only rule to be extracted from the statute and a comparison of the decided cases is, that the duty of going at a moderate speed in a fog requires a speed sufficiently moderate to enable the steamer, under ordinary circumstances, seasonably, usefully, and effectually to do the three things required of her in the same clause of the statute, viz., to slacken her speed, or, if necessary, to stop and reverse."

In *The Colorado*, 91 U. S. 692, the court, at page 702, use this language:

"Different formulas have been suggested by different judges as criterions for determining whether the speed of a steamer in any given case was or was not greater than was consistent with the duty which the steamer owed to other vessels navigating the same waters; but perhaps no one yet suggested is more useful, or better suited to enable the inquirer to reach a correct conclusion, than the one adopted by the privy counsel. *The Batavier*, 40 Eng. Law & Eq. 25. In that case the court say, 'At whatever rate she [the steamer] was going, if going at such a rate as made it dangerous to any craft which she ought to have seen, and might have seen, she had no right to go at that rate.'"

In *The Rhode Island*, 17 Fed. Rep. 554, the court says, page 557:

"The rate of speed at which the Rhode Island was going in a dense fog, viz., 15 miles per hour, is far beyond that 'moderate speed' which the rules of navigation permit. This has been so often discussed, and the prior adjudications are so numerous and uniform, that it cannot be deemed longer an open question."

In *The State of Alabama*, Id. 847, the court says, page 852:

"The failure to slacken speed in this fog must be set down as one fault in the steamer. Although the fog was not dense, it was nevertheless evidently such a fog as materially to interfere with the timely observation of other vessels, and therefore increased materially the dangers of navigation. To go at full speed in such a fog is not a compliance with rule 21, which requires steamers in a fog to go at moderate speed. * * * No steamer's speed is moderate in the sense of rule 21 so long as she is going at her ordinary full speed. She is required to moderate and reduce her speed according to the density of the fog and the increased difficulty of discovering danger, and of adopting timely means to avoid it. * * * Without determining whether 8 or 8½ knots would or would not be a moderate rate for vessels of much higher ordinary speed in so light a fog as prevailed on the night of this collision, I must hold it not moderate for this steamer, because not moderated or reduced from her ordinary speed."

In *The City of New York*, 15 FED. REP. 624, the court, having under consideration rule 21, says, at page 627:

"This rule plainly imposes upon a steamer two duties: (1) To proceed in a fog at a *moderate speed*; (2) in approaching another vessel so as to involve danger of collision, to *slacken* her speed, and, if necessary, to stop and back. * * * Whatever 'moderate speed' may be, under given circumstances, * * * it is, at least, something materially less than that full speed which is customary and allowable when there are no obstructions in the way of safe navigation. To continue at full speed, therefore, as the steamer in this case substantially did, or until the bark was in sight, was a clear violation of the statutory obligation to go at moderate speed."

In *The Eleanor*, 17 Blatchf. C. C. 88, the court, at page 100, says:

"A simple slackening of speed by a steamer in a fog is not always enough. She must run at a moderate speed, and is never justified in coming in collision with another vessel, if it be possible to avoid it. This implies such a speed only as is consistent with the utmost caution. * * * Her rate of speed must be graduated according to the circumstances. The more dense the fog the greater the necessity for moderation."

In *The Leland*, 19 FED. REP. 771, the court, at page 773, says:

"It is an undoubted violation of the sailing rules for a steamer to run at a reckless or dangerous rate of speed in a fog. What is a moderate, and what is a dangerous, rate of speed, are, of course, to some extent, comparative terms, depending upon surrounding circumstances. * * * This rate of speed, (8 miles per hour,) I have no doubt, was too great in a dense fog, in the night-time, upon waters where the liability to collision was so imminent as on the waters of Lake Michigan, even at this early season of the year."

In *The Manistee*, 7 Biss. 35, the court says:

"I know what steam-boat men say, that they must make their time; that they must run in a fog. But they cannot be permitted to run with their usual speed in a fog, surrounded by sail-vessels, against which they are liable to collide at any moment."

The conclusion derived from these authorities is: That "moderate speed" means moderated speed; reduced speed; less than usual speed. It was not the intention of congress that steam-vessels should run as fast in a fog as in fair weather. Applying the rule so construed to the Stonington, there is no possible escape from the conviction that she was guilty of a grave maritime fault. The law said to her that she must not run at the rate of 11 knots an hour in a fog, and, yet, in total disregard of the statute, she was running at 11 knots an hour, at midnight, in a dense fog, and at a time when she knew that she was in close proximity to the colliding vessel. She was going so fast that all efforts to avoid or mitigate the collision were unavailing. It can hardly be contended that this high rate of speed did not produce or contribute to the accident. Had the steamer been going at a less rate not only would she in all probability have heard the signals sooner, but she could have stopped in less space, and, though the collision might have occurred, the blow would have been less severe. Within the cases cited, it must be said upon this evidence that the Stonington was at fault, and that the finding of the jury exculpating her was not in accordance with the evidence and the law.

It is thought that the sailing rule referred to, which has its counterpart in the English admiralty, contains provisions the wisdom of which can hardly be disputed. If in the opinion of others it states an erroneous principle of navigation, it behooves those interested to petition congress for its repeal, or modification so far as it relates to Long Island sound. While it remains the law it is incumbent upon the courts to see that it is properly enforced. Those who violate it do so at their peril. If the owners of vessels navigating the sound choose to take a course forbidden by law, they should clearly understand that when loss and injury happen they must take the consequences, and that the excuse that the unlawful way is the best way, will not be accepted by the courts.

A new trial is ordered.

THE UNION and others.

(*District Court, N. D. Illinois. 1884.*)

ADMIRALTY—JURISDICTION—ARBITRATION.

It is not the province of an admiralty court to investigate the conduct of arbitrators in a matter previously submitted to them, and to review their award.

In Admiralty.

W. M. Condon, for libellant.

Schuyler & Kremer, for the tug Union.

W. L. Mitchell, for the schooner R. B. King.

BLDGGETT, J. The libelant in this case seeks, as owner of the schooner Floretta, to recover damages sustained by said schooner in a collision between said schooner, while in tow of the tug Union, and the schooner R. B. King. The collision occurred on the nineteenth of August, 1882, near the entrance to Chicago harbor. Among other defenses urged in the case is an award made by arbitrators, to whom the matters arising out of such collision was submitted by the parties interested. It appears, from the proofs and pleadings, that libelant was, at the time of the collision, owner of the Floretta. The Vessel-owners' Towing Company was owner of the tug Union, J. L. Higgle being president of the company and acting in its behalf, and J. C. Dunbar was master of the schooner R. B. King, and acted in the matter of the arbitration in behalf of her owner. The agreement for submission to arbitration was as follows:

"CHICAGO, August 24, 1882.

"Know all to whom these presents may concern, that we, the following parties, J. L. Higgle, of the Vessel-owners' Towing Company, representing the tug Union, and J. V. Taylor, representing the schooner Floretta, and Capt. J. C. Dunbar, owner of the schooner R. B. King, do hereby agree to leave to arbitrators the collision that happened between the three said vessels on the morning of the nineteenth of August, 1882, about one mile or thereabouts from Chicago harbor. We have also agreed to the following arbitrators: Capt. William Keith and Capt. William Cary, and, if they cannot agree, to be left to a third party to be appointed by them.

[Signed]

"J. L. HIGGLE,

"President of the Vessel-owners' Towing Company.

"J. C. DUNBAR.

"J. V. TAYLOR."

And, under this agreement, the arbitrators named made an award as follows:

"CHICAGO, September 5, 1882.

"J. L. Higgle, J. V. Taylor, and J. C. Dunbar.—GENTLEMEN: We, William Keith and William Cary, do herewith give you our decision in damage case of schooner Floretta and R. B. King and tug Union. We hold schooner Floretta responsible for her own damage through action of her master, Capt. S. Murphy, for giving four different orders, and thus free tug Union from all responsibility. We hold schooner R. B. King responsible for her own damage for not keeping proper lookout.

WILLIAM KEITH.

"WILLIAM CARY."

In the fifth article of the libel, the fact that the matter was submitted to arbitration and an award made in pursuance thereof is stated, but it is also alleged that libelant had no notice of the hearing before the arbitrators, and no opportunity to present proofs; and also that libelant was induced to sign the agreement to arbitrate by misrepresentation made by Higgle, the president of the towing company; and therefore libelant is not bound by the award, and is entitled to recover upon the original cause of action. The only question I deem it necessary to consider is the effect of this submission and award as a defense in this case. I think there can be no doubt

that the agreement for arbitration in this case is sufficiently full and explicit to define the controversy and subject-matter upon which the arbitrators were to act. It gives the date and place of the collision, the vessels concerned in it, and their owners, and provides for the selection of an umpire by the two persons named as arbitrators, if they cannot agree. The award, on its face, shows that the arbitrators acted upon the matter submitted to them, and made an award fully within the powers with which they were clothed.

The rule as to the effect of an award is stated by Judge STORY in his learned work on Equity Jurisprudence, § 1452:

"It is well known that when a suit is brought at common law upon an award, no extrinsic circumstances, or matters of fact *de hors* the award, can be pleaded or given in evidence to defeat it. Thus, for example, fraud, partiality, misconduct, or mistake of the arbitrators is not admissible to defeat it. But courts of equity will, in all such cases, grant relief, and upon due proof set aside the award."

This award, being within the powers of the arbitrators, must be held final, until set aside by a direct proceeding for that purpose in a court of equity; it cannot, as it seems to me, be attacked collaterally in a case like this. The award merges the original cause of action, and extinguishes the contract or tort on which the right of action was founded. This position is fully sustained by several cases in the supreme court of Illinois, and by a large number of text-writers, which I need not take time to quote. *Eisenmeyer v. Salter*, 77 Ill. 515; *Haddaway v. Kelly*, 78 Ill. 286; *Morse*, Arb. 490; *Story*, Eq. Jur. § 1458; *Varney v. Brewster*, 14 N. H. 49. It is no part of the functions of a court of admiralty to correct mistakes, reform contracts, or relieve persons from contracts obtained by fraud. It follows, therefore, as a necessary conclusion, that an admiralty court, which is not a court of equity within the meaning of the constitution of the United States, is not clothed with jurisdiction to inquire into the action of these arbitrators, and set aside their award on proof outside of the submission and award itself, for any irregular action on the part of the arbitrators, or for any fraud practiced on the libellant to induce him to submit the differences in question to arbitration. The only authority which seems to support the exercise of such a power by a court of admiralty is the case of *Taber v. Jenny*, 1 Spr. 315. But in that case the question of jurisdiction was not raised or considered by the court, and I do not, therefore, deem it controlling or binding on other courts. In cases where a submission to arbitrators and award are palpably void upon their face, they would furnish no bar to proceeding in admiralty on the original cause of action; but it is otherwise when the award is apparently valid upon its face, and extrinsic facts must be resorted to for the purpose of avoiding it.

It is true that courts of law have in many cases set aside awards when matters pending in a suit before such courts have been submitted to arbitration, and, either by statute or by agreement of par-

ties to such submission, the award was to be made a rule of court, or basis for some future action by the court. So, too, as in the case of *The Sparkle*, 7 Ben. 528, when a contract comes before a court of admiralty in a cause of which it has jurisdiction, it will look into the equities of such contract, and not execute it if inequitable. But there the court has jurisdiction of the subject-matter, and simply looks into the equities of the parties under the contract itself, and, finding it inequitable, refuses to enforce it. But in this case the parties made a submission of their differences to arbitrators voluntarily, so far as appears upon the face of the papers, when no suit was pending, and, if by reason of any extrinsic facts the award of these arbitrators ought not to be binding, it does not come within the province of a court of admiralty to inquire into these facts and set aside the award, which it must do before it can proceed to the merits of the original controversy, the mere fact that the original cause of action was within the jurisdiction of admiralty does not clothe this court with power to act upon this contract of submission and declare it void, because its execution was obtained by the fraud of Higgle, nor to say that the award is inoperative by reason of irregularity or misconduct of the arbitrators, or by reason of their mistake or errors of judgment in the matter over which they had full jurisdiction. The controversy in this case at present is not whether the tug Union and schooner King, or either of them, are liable for the damages sustained by the Floretta, but whether the decision of these arbitrators, an independent tribunal to whom the parties submitted the controversy in regard to those damages, shall stand.

Entertaining these views, I have not examined carefully into the proof bearing, on the conduct of the arbitrators in the matter of notice to the libellant, as to the time when they would hear proof and act in the case, nor as to the alleged misconduct of Mr. Higgle, by which the libellant was induced to sign the statement, nor have I examined the elaborate report of the commissioner and proofs as to who was blamable for the collision, because I consider those questions are at an end, if this court has no jurisdiction to inquire into the validity of this award and its binding effect.

The case will therefore be dismissed for want of jurisdiction, and without prejudice to the libellant's right to take such action, as he may be advised to set aside the award. In dismissing the case, however, I shall do it upon the terms that each party shall pay the costs of their own witnesses in the case, because I think this award should have been brought to the attention of the court, and the judgment of the court taken upon it, as to whether it was a bar to further proceedings upon the original cause of action, without the expense of taking the large amount of testimony which has been put into the record. Each party will be required to pay their own costs, and each pay one-third of the commissioner's costs, there being three parties to the contest.

THE MINNIE and another.

(District Court, D. Connecticut. May 20, 1884.)

1. LIBEL—NEGLIGENCE.

Where a tug, engaged in towing, carries a barge too near a shoal, and does not protect her from the foreseen danger from a passing vessel, although she has an opportunity to do so, she is liable, in an action for libel *in rem*, for damages occurring through her negligence.

2. STEAM-VESSEL—DUTY IN NARROW CHANNEL—LIABILITY FOR FAILURE OF DUTY.

Where a steam-vessel is about to pass through a narrow passage in which is a tug and its tow, it is her duty to go slowly and carefully, in order to avoid the danger resulting from rapidly passing very near another vessel; and when damage occurs through failure to do her duty in this respect, she is liable for it.

In Admiralty.

Wilhelmus Mynderse and Joseph F. Mosher, for libelants.

Samuel Park, for the Minnie.

Thomas M. Waller and Wm. P. Dixon, for the Doris.

SHIPMAN, J. This is a libel *in rem* by the owners of the barge H. S. Van Santvoord against the tug Minnie and steamer Doris, to recover the amount of the damages to the barge, her furniture, contents, and cargo, which were caused by the alleged negligence of the two other vessels. On March 9, 1883, the barge H. S. Van Santvoord, owned by the libelants, and laden with 605 tons of coal, was taken in tow at Communipaw, New Jersey, by the steam-tug Minnie, to be towed through the harbor of New York and Long Island sound to New London. The barge was made fast along-side the port side of the tug Wyoming, which was made fast along the port side of the tug. Two other barges were made fast along the starboard side of the tug in a similar manner. This is the usual and proper way of conveying a tow through Hell Gate. The four barges carried 1,800 tons of coal. The tug can easily tow 3,000 tons. With the barges so made fast the tug proceeded safely across the harbor of New York and up the East river until she had reached a point in Hell Gate between the Middle Ground and the Sunken Meadows. The Van Santvoord was close to the Sunken Meadows, the tide was flood, and the tug and tow were going at the rate of six miles per hour. At this time the freight steam-propeller Doris was about 500 feet behind the tug and tow, and was also bound up the East river on a course corresponding closely with that of the Minnie, and at a speed of 12 miles per hour. The Doris has a registered tonnage of 1,096 tons, and draws 12 to 14 feet of water when loaded. She gave a signal of one blast of her steam-whistle to signify to those in charge of the Minnie that she was intending to pass the Minnie on her starboard side. This signal was heard and understood by the officers of the Minnie, but was not replied to, and her course was not altered. Her captain testified: "I did not answer the Doris' signal, because I had no idea that the man

was going to cramp me in there." The result showed that the Minnie had permitted the Van Santvoord to be too near the rocks upon the Sunken Meadows, for the Doris, coming up without slackening her speed, and being not over 25 feet from the outside barge on the star-board side of the tug, and too near the tug and tow, created so much motion as to swing the head of the tug and tow a few feet nearer the shoals. The Van Santvoord struck upon the shoal, slid off into deep water, and forthwith sunk with her cargo and all her furniture, except a writing-desk and the yawl-boat. Before she struck, and after the Doris had reached and had begun to pass the tow, the captain of the tug, fearing that the result would be to drive his tow upon the shoals, ordered all the helms to be ported, which was done, but it was too late to counteract the effect of both the tide and the Doris.

The Minnie and the Doris are each responsible for the accident. The Minnie carried the barge too near the shoal, and did not protest against what she knew to be a dangerous undertaking on the part of the Doris, but trusted that she either would not come too near, or would stop. The Minnie had the tow in complete control, and helped to cause the accident by her positive action in being too near the rocks in the existing state of the tide, and thus forcing the barge into a place of danger, and by her inaction in not refusing to permit the Doris to pass when the captain knew that "there was hardly room to pass."

The Doris was in fault in attempting to go through too narrow a passage at a full rate of speed. It was her duty, if she did not want to go through the south and more infrequently used channel, to slow up and permit the tug and tow to get out of the way, or to go slowly and carefully, and avoid the danger resulting from rapidly passing very near another vessel. *The C. H. Northam*, 13 Blatchf. C. C. 31. The effect of the presence of the Doris, probably, was to move the heavy tug and tow but a very few feet, but that was enough to crowd the barge upon the rocks.

Let there be a decree against the Minnie and Doris, and their respective stipulators, each for one-half of the entire damage and costs; any balance of such half which the libelants shall not be able to enforce against either vessel to be paid by the other vessel, or her stipulators, so far as the stipulated value extends; and a reference to a commissioner to ascertain the damages.

LAND COMPANY OF NEW MEXICO, (Limited,) v. ELKINS and others.

(Circuit Court, S. D. New York. June 7, 1884.)

1. JURISDICTION OF CIRCUIT COURT—CITIZEN OF THE DISTRICT OF COLUMBIA.

The jurisdiction of the circuit court does not extend to a controversy between an alien and a citizen of the District of Columbia, the latter not being a citizen of a state within the meaning of the acts conferring jurisdiction upon the circuit courts.

2. SAME—WANT OF JURISDICTION AS TO ONE DEFENDANT.

Where a bill must be dismissed as to one defendant for want of jurisdiction as to him, and as to the other defendants no relief can be awarded without injuriously affecting the interests of the one over whom the court does not have jurisdiction, the court will not decree, and in such a case will refuse, a preliminary injunction.

3. SAME—ACTION BY ASSIGNEE—EQUITABLE TITLE.

In a suit by the assignee of an equitable title to obtain a conveyance of the legal title, the assignor is not an indispensable party if the assignment is an absolute one. But where the assignee founds his right on an executory agreement, the assignor is a necessary party.

4. PRACTICE—AMENDMENT OF BILL.

An amendment cannot be allowed which would, in effect, amount to the institution of a new and materially different suit, either as to parties or cause of action.

Motion to Dismiss.

Sterne & Thompson, for complainant.

Shipman, Barlow, Laroque & Choate, for Elkins.

R. A. Prior, for Butler and Smoot.

WALLACE, J. The complainant, a British corporation, has filed this bill against Elkins, a resident of New York, Smoot, a resident of the District of Columbia, Butler, a resident of Massachusetts, and three other defendants,—alleging, in substance, that Elkins, Smoot, and three others entered into an agreement for the joint purchase of a tract of land in New Mexico; that the land was purchased, and the title taken in the name of Elkins; that Smoot advanced his share of the purchase money, and under the terms of the agreement became entitled to a conveyance of an undivided fifth part of the land; that the complainant has acquired Smoot's interest by a purchase; that Elkins has recognized the purchase by complainant of Smoot's interest; that Smoot has assumed to assign and convey the interest acquired of him by complainant to the defendant Butler; and that Elkins refuses to convey the same to complainant, and threatens to convey the same to Butler.

The bill prays for a conveyance by Elkins of Smoot's interest to the complainant, and for an injunction against Elkins, Smoot, and Butler from interfering with complainant's interests.

The defendant Smoot moves to dismiss the bill as to him for want of jurisdiction. This motion must prevail, because it is well settled that a citizen of the District of Columbia is not a citizen of a state within the meaning of the judiciary act and the subsequent acts con-

ferring jurisdiction upon the circuit courts of the United States, and the jurisdiction of this court does not extend to a controversy between an alien and a citizen of the United States who is not a citizen of a state. *Hepburn v. Ellzey*, 2 Cranch, 445; *Barney v. Baltimore City*, 6 Wall. 280; *New Orleans v. Winter*, 1 Wheat. 91.

The complainant moves for a preliminary injunction against Elkins, and he resists the motion upon the ground that no relief can be decreed against him upon the bill. His contention is that Smoot is an indispensable party to the suit, and as there can be no decree against Smoot there can be none against him. If Smoot's interest in the controversy is such that a final decree could not be made against Elkins without affecting that interest, or leaving the controversy in such condition that its final determination may be inconsistent with justice, the court will not proceed in his absence. *Williams v. Bankhead*, 19 Wall. 563; *Florence Co. v. Singer Co.* 8 Blatchf. 113; *Mallow v. Hinde*, 12 Wheat. 193; *Bank v. Carrollton Railroad*, 11 Wall. 624. If the complainant had acquired Smoot's interest in the lands by a transfer, absolute and fully executed, the latter would not be a necessary party to the controversy. *Blake v. Jones*, 3 Anst. 651. An assignor who has made an absolute assignment of his interest need not be a party to a suit by the assignee to enforce the equitable title acquired by the transfer against a third party, even when the former retains the legal title. *Barb. Parties*, 463; *Trecothick v. Austin*, 4 Mason, 41; *Ward v. Van Bokkelen*, 2 Paige, 289-295. But the agreement under which the complainant acquired Smoot's interest in the land is executory, and Smoot is now asserting a right to transfer the same interest to Butler. A decree cannot be made without affecting his rights. If Elkins is adjudged to convey to complainant, Smoot's interest in the lands will be divested. Not being bound by the decree, he might still contest with Elkins and insist that he account for the value of the interest conveyed to complainant under the decree; but this might be a barren remedy. As Smoot cannot be made a party, no decree can be obtained by the complainant for the relief prayed in the bill. The motion for an injunction must therefore be denied.

The complainant cannot be permitted to amend its bill, as is suggested in its behalf, by omitting all the parties but Elkins, and proceeding against him upon the theory that complainant has acquired Smoot's interest by an absolute and unconditional transfer. An amendment cannot be allowed which would, in effect, amount to the institution of a new and materially different suit, either as to parties or to cause of action. *Goodyear v. Bourn*, 3 Blatchf. 266; *Oglesby v. Attrill*, 14 Fed. Rep. 214.

FLEISHER and others v. GREENWALD and others.

(Circuit Court, N. D. Iowa, W. D. June 23, 1884.)

1. JURISDICTION OF FEDERAL COURTS—DEEDS OF ASSIGNMENT.

A United States circuit court may entertain jurisdiction of a bill to set aside as fraudulent a deed of assignment at suit of a resident of a state other than that of the assignor and assignee, when the amount involved exceeds \$500.

2. SAME—ADJUDICATION OF STATE COURT—EFFECT IN OTHER STATE.

One who is not resident in the same state with a certain mortgagor, is not bound by an order of the state court adjudicating the validity of the mortgage as against his equities.

In Equity.

J. H. Struble, J. H. Swan, and A. J. Taylor, for complainants.

Joy & Wright and Lake & Harmon, for defendants.

SHIRAS, J. From the averments of the bill filed in this cause it appears that during the year 1882, and for some time previous thereto, Samuel Greenwald was engaged in the mercantile business at Le Mars, Iowa. On the twenty-seventh of November, 1882, he executed a chattel mortgage on his entire stock in trade, and store furniture and fixtures, to the First National Bank of Le Mars, to secure the payment of four promissory notes of \$1,000 each, two of which were then past due, but which were, by the provisions of the mortgage, extended to December 10, 1882. This mortgage was recorded December 5, 1882. On the fourth of December, 1882, said Greenwald executed four other mortgages on the same property to secure four notes of \$1,000 each held by the First National Bank of Independence,—one note of \$1,000 due Jane Myers, one note of \$500 due August Myers, and one note of \$2,000 due Jennie Greenwald; and on the fifth of December, 1882, he executed two mortgages on said property to O'Brien Bros. and August Myers to secure the sums of \$800 and \$1,347.25; and on the sixth of December, 1882, he executed a further mortgage on the same property to James Hopkins & Co. to secure payment of the sum of \$2,500. On the seventh of December, 1882, C. Gotzian & Co., of St. Paul, brought an action in attachment, in the district court of Plymouth county, Iowa, against Greenwald, the attachment being levied on the stock of goods described in the mortgages. Thereupon the First National Bank of Le Mars brought an action in replevin in the circuit court of Plymouth county, Iowa, against the sheriff of said county, claiming the right to the possession of the goods seized under the attachment by virtue of the chattel mortgage above described. The goods were taken upon the writ of replevin, and delivered to the First National Bank of Le Mars. On the eleventh day of December, 1882, said Greenwald executed a general deed of assignment, for the benefit of his creditors, to Pitt A. Seaman. In the mean time John V. Farwell & Co., A. L. Singer & Co., and David Adler & Sons, creditors of Greenwald,

brought action at law in the United States circuit court against Greenwald, writs of attachment being sued out in each case. These writs were served by the marshal by seizing the goods then in possession of the First National Bank of Le Mars. Upon motion made in the United States circuit court, it was held that the goods in the possession of the First National Bank were within the custody and control of the state court, the bank having gotten possession thereof by the writ of replevin sued out in that court, and being bound to obey the final order of that court, which might adjudge a return of the goods on part of the bank. For this reason it was held that these goods were not subject to be levied upon by virtue of the writs of attachment issued from the United States court, and the marshal was ordered to deliver up possession thereof to such person as the state court should designate. At the April term, 1883, of the circuit court of Plymouth county, in which was pending the replevin suit brought by the First National Bank of Le Mars, it was proven in that cause that the debt due the bank had been paid from sales of the mortgaged property, and the bank disclaimed any further interest in said goods, and it also appeared that the claim due C. Gotzian & Co. had been paid, and the attachment suit had been dismissed. Thereupon the other mortgagees and Pitt A. Seaman, the assignee, appeared by intervention in that cause, and procured an order from the state court directing the First National Bank of Le Mars to deliver up possession of so much of the stock as remained in its hands to the assignee, subject to the chattel mortgages thereon, the assignee being directed to pay them in the order in which they were given. The assignee, who had previously filed his bond in the circuit court of Plymouth county, received the goods under this order. To these proceedings in the state court the complainants were not parties. In the mean time the complainants had procured judgment in the United States court against Greenwald for the sum of \$1,072.50, and issued execution thereon, garnishing the several mortgagees and the assignee. On the fourteenth of July, 1883, complainants filed the present bill in equity in this court, making Greenwald, the several mortgagees, and the assignee defendants, and charging that the chattel mortgages executed by said Greenwald are fraudulent and void against creditors, and that the assignment made to Seaman was not in good faith for the benefit of creditors, but was made for the purpose of aiding the mortgagees to secure the property under their mortgages, and to prevent creditors from asserting their rights and equities against the mortgages. To this bill the mortgagees and assignee interpose demurrers, and the case is now before the court upon the questions thus presented.

The first point made in argument is that this court, in ordering the attached property to be delivered up by the marshal, has recognized the fact that the property is under the control of the state court in such sense that it cannot be reached by any process from, or order made by, this court, and therefore this bill should not be

entertained. Upon the motions made in the attachment proceedings it was held that the property replevied in the state court by the First National Bank of Le Mars could not be attached on process from this court, because it belonged to the state court to determine in the replevin suit whether the property should, or should not, be returned to C. Gotzian & Co., from whom it was taken. The proceedings in the replevin suit have been wholly terminated. When the replevin action came before the state court for adjudication, it appeared that the debt due Gotzian & Co. had been settled, and they disclaimed any further interest in the goods. It also appeared that the debt of the bank had been paid, and thereupon it delivered up possession of the goods, under the order of the court, to the assignee. This terminated the control of the state court over the goods in the replevin proceedings.

The questions now presented arise under the assignment proceedings, and are not affected by the orders made in the replevin proceedings. The possession of the court under the latter proceeding was ended when the court, by its own order, directed the goods to be delivered to the assignee. The main question at issue is presented in a twofold aspect; *i. e.*, (1) whether this court can entertain jurisdiction of the issues touching the validity of the deed of assignment; and (2) can it entertain jurisdiction of the issues touching the validity of the chattel mortgages?

Upon the first question, it is strongly contended in the argument, that the property in the possession of the assignee under the deed of assignment is under the control and possession of the state court wherein the assignment proceedings are pending, in such sense that no other court can properly exercise jurisdiction over questions affecting the property; or, in other words, that the jurisdiction of that court is exclusive in the premises. When the question to be determined pertains solely to the mode of administering the trust, and the procurement of the orders necessary for its proper enforcement, under the provisions of the statute of Iowa, it may well be that no other court will interfere therewith. *Perry v. Murray*, 55 Iowa, 420; S. C. 7 N. W. Rep. 46, 480. When, however, the question is as to the validity of the deed of assignment itself, can it be said that no other court can properly entertain jurisdiction thereof? The assignee having accepted the trust under the deed, is not in a position to question its validity. The deed may be perfectly valid between the assignor and the assignee, and yet invalid and void as against one or all of the creditors. Strictly speaking, the property covered by the deed of assignment is not in the possession of the court wherein the assignee files his bond and inventory, and to which he reports his doings, as provided for in the state statute. The title and possession pass from the assignor to the assignee by virtue of the deed of assignment and the possession taken thereunder. The assignee is not appointed by the court, nor is the property taken by virtue of any writ, process, or

order of the court. The execution and delivery of the deed of assignment create a trust in the assignee, and, under the provision of the state statute, the court in which the assignee files his bond becomes charged with the duty of enforcing the trust, and to that end has full control over the assignee. In order to enable that court to properly discharge the duty thus imposed upon it, it is doubtless true that no other court will attempt to control the distribution of the funds realized from the property under the deed of assignment. In this respect the control of the court, in which the assignment proceedings may be pending is akin to the control of probate courts over the distribution of estates of decedents. In such cases, however, other courts may entertain jurisdiction of many questions which exist between creditors and others interested, and the executor may be called into other courts for the purpose of determining questions which are connected with the course of administration.

Thus, in *Payne v. Hook*, 7 Wall. 425, it was held that the United States circuit court had jurisdiction of a suit in equity against an administrator, filed for the purpose of calling him to account for the manner in which he had performed his duties as administrator, and requiring him to pay over the proper amount coming to complainant as one of the distributees of the estate.

In *Yonley v. Lavender*, 21 Wall. 276, it was ruled that a creditor might sustain a bill in the United States court to compel an administrator to convert the assets of an estate into money and apply the same in payment of the debts.

In *Shelby v. Bacon*, 10 How. 56, the complainant filed a bill in equity in the United States circuit court for the Eastern district of Pennsylvania against John Bacon and others, to whom the bank of the United States had executed an assignment for the benefit of creditors, praying a decree that the assignees be required to pay the debts due complainants. The defendants pleaded to the jurisdiction, on the ground that the assignment was under the control of the court of common pleas of Philadelphia, which court had ample powers to enforce the trust. The supreme court held that the plea was insufficient, ruling that if the assignees "had reduced to possession the whole amount of the assets of the bank, and held them ready for distribution, could it be doubted that the complainant would have a right to file his bill in the circuit court, not only to establish his claim against them, but also for a proportionate share of the assets? The circuit court could not enjoin the court of common pleas, nor revise its proceedings, as on a writ of error, but it could act on the assignees, and enforce the rights of the plaintiff against them."

In *Gaines v. Fuentes*, 92 U. S. 10, it appeared that a will had been duly admitted to probate in the proper court of the state of Louisiana. A bill to annul the instrument and have the same declared void was brought in the state court of Louisiana by complainant, who was a citizen of New York, the defendants being citizens of Louis-

iana. Complainant removed the cause into the United States circuit court, and the question of the jurisdiction of the United States court was carried to the supreme court, which held that the jurisdiction existed.

In *Ellis v. Davis*, 109 U. S. 485, S. C. 3 Sup. Ct. Rep. 327, it is held that the United States circuit courts, as courts of equity, have no general jurisdiction of the question of affirming or annulling the probate of a will; yet if, by the law obtaining in a state, a suit to annul and set aside the probate of a will, can be maintained in the courts of the state, it may also be maintained in the federal court, when the parties on one side are citizens of the state where the will is proved, and on the other, are citizens of other states.

Under the statutes of Iowa, the circuit court of the state is clothed with probate powers, and by section 2553 of the Code it is enacted that "wills, foreign and domestic, shall not be carried into effect until admitted to probate as hereinbefore provided; and such probate shall be conclusive as to the due execution thereof, until set aside by an original or appellate proceeding."

In *Leighton v. Orr*, 44 Iowa, 680, following *Havelick v. Havelick*, 18 Iowa, 414, and *Gilruth v. Gilruth*, 40 Iowa, 346, it was held that the district court of the state had jurisdiction of an original proceeding to annul and set aside a will which had been duly admitted to probate in the proper circuit court.

Under these several decisions, it is clear that this court could entertain jurisdiction of an original proceeding to annul and set aside a will which had been admitted to probate in the circuit court of the state, provided the parties in interest were citizens of different states, and the amount involved exceeded \$500. Why, then, may it not, under like circumstances, entertain jurisdiction of a bill to set aside as fraudulent a deed of assignment? The state courts unquestionably have jurisdiction to entertain an original proceeding, either at law or in equity, attacking the validity of an assignment. *Van Patten v. Burr*, 52 Iowa, 518; S. C. 3 N. W. Rep. 524. Indeed, it is not perceived how the validity of an assignment can be determined, save in a proceeding other than the mere assignment proceeding, and which is therefore, as to it, an original cause. There is no provision in the chapter of the Code of Iowa regulating assignments which provides a mode for testing the validity of the deed of assignment. Whether the attack be made by garnishing the assignee and raising the issue upon his answer, or by levying a writ of attachment or execution on the property, or by a bill in equity, the proceeding is not a part of the administration under the deed of assignment, but is an independent cause, and jurisdiction thereof is not confined to the court in which the assignee has filed his bond. Any one whose legal rights are affected thereby may contest the validity of the assignment, and to that end may invoke the aid of either the district or circuit court of the state; and if he is a citizen of a state other than that of

which the assignor and assignee are citizens, and the amount involved exceeds \$500, he may invoke the aid of the United States circuit court. *Adler v. Ecker*, 1 McCrary, 256; S. C. 2 FED. REP. 126.

In the case under consideration the complainants are citizens of Illinois, and the defendants are citizens of Iowa, the amount involved being over \$500. Under these circumstances, it is clear that complainants have a right to contest the validity of the assignment, and no reason exists why this court may not entertain a bill in equity filed for that purpose.

2. Upon the question of the jurisdiction of the court to hear and determine the issues touching the validity of the mortgages, it is first urged in argument that the order made by the circuit court of Plymouth county in the action in replevin, wherein it was found that the several mortgages were valid liens upon the property, paramount to the assignment, and entitled to be first paid out of the proceeds realized from the goods, is an adjudication, binding on complainants, of the question of the validity of the mortgages. It will be remembered that complainants were not parties to this proceeding. The utmost that can be claimed for this order is that it establishes, as against the assignee, the validity of these several mortgages, and determines that the assignee takes only the interest of the assignor in the property left after payment of the mortgages. Under the statute of Iowa, regulating assignments for the benefit of creditors, the assignee succeeds to the rights of the assignor, and does not represent the equities of the creditors arising from matters *dehors* the deed of assignment. *Rumsey v. Town*, *post*, 558. As the complainants were not parties to the proceedings in the circuit court of Plymouth county, and as their right to contest the validity of the mortgages is not derived from the deed of assignment, and as this right was not represented by the assignee, it follows that the order and judgment of the circuit court of Plymouth county is not binding upon complainants as an adjudication of the validity of the mortgages as against the equities of complainants.

The further point made, that this court will not entertain jurisdiction of the question of the validity of these mortgages, for the reason that all such questions should be determined in the assignment proceedings, has been fully considered, and decided adversely to the position of defendants, in the case of *Simon v. Openheimer*, *post*, 553. And, following the ruling made in that cause, it must be held that the point is not well taken.

Considerable stress is laid in the argument, on behalf of defendants, upon the point that the entire right of complainants to maintain their bill is based upon the fact that a writ of garnishment had been served upon the several mortgagees and upon the assignee. If the service of the writ in question created an equitable lien upon the property, then it is clear that, to properly enforce it, it is necessary that the validity of the mortgages and deed of assignment shall be de-

terminated, and to that end a bill in equity is a proper remedy. If the service of the writ of garnishment created no lien upon the property, still it appears that complainants are judgment creditors, and are entitled to a creditor's bill to reach the property of the debtors, and to that end are entitled to question the validity of conveyances made by their debtor with intent to hinder, delay, and defraud creditors.

It has been strongly urged in the argument that the allegations of fact in the bill contained are not sufficient to justify granting any relief to complainants. The points presented, however, are not such as can be fully and properly heard on the demurrer, and their further consideration will be postponed until the evidence is submitted.

The demurrers are therefore overruled, with leave to defendants to answer in 30 days.

SIMON and others v. OPENHEIMER and others.

AYRES v. HAMRICK, Assignee, and others.

OPENHEIMER, Sr., v. HAMRICK and others.

(Circuit Court, S. D. Iowa, C. D. May Term, 1884.)

1. MORTGAGE—NEGLECT TO RECORD DESTROYS LIEN AS AGAINST PARTIES WITHOUT NOTICE.

The neglect of a mortgagee of a chattel mortgage to record the instrument within the time when he should have done so, through which neglect innocent parties have been led to intrust goods with the mortgagor, deprives the mortgage of its character as a prior lien as against such innocent parties.

2. SAME—RIGHTS OF A SUBSEQUENT MORTGAGEE.

A second mortgage incumbers only the remnant left after satisfying the first; and the holder of a judgment, who defeats the first mortgage as against himself, comes in before the second mortgagee, up to the amount of the first mortgage.

In Equity.

Wright, Cummins & Wright, for Simon, Strauss & Co.

O. B. Ayres and Mitchell & Dudley, for O. B. Ayres.

James D. Gamble, for Allen Hamrick, assignee.

SHIRAS, J. During the early part of the year 1881, J. Openheimer and Eli Openheimer were partners in business at Knoxville, Iowa, under the firm name of J. Openheimer & Son. The son sold his interest to the father, who continued the business under the name of J. Openheimer. On the thirteenth day of April, 1881, the firm executed a chattel mortgage upon their stock in trade to O. B. Ayres, in the sum of \$2,000, and on the twenty-sixth of July, 1881, J. Openheimer executed a second mortgage upon the stock to Ayres, in the sum of \$2,500, both mortgages being given to secure Ayres against

loss by reason of indorsements made by him upon notes of the mortgagors, which were discounted by the Marion County and Knoxville banks. Neither of these mortgages were filed for record in the recorder's office of the county until the twenty-seventh of December, 1881. On that day Openheimer executed a third mortgage upon the same stock of goods to his brother Eli Openheimer, Sr., to secure payment of three promissory notes, amounting in the aggregate to the sum of \$2,752.37, and payable in June, September, and December, 1882. On the thirty-first of December, 1881, J. Openheimer executed a general assignment for the benefit of creditors to Allen Hamrick, who qualified under the provisions of the state statute, filing his bond and inventory in the district court of Marion county, Iowa, and took possession of the stock in trade covered by said mortgages. Up to the time of the execution of the assignment to Hamrick, the mortgagors had remained in possession and control of the stock covered by the mortgages, selling therefrom in the usual way of trade, and using the proceeds of sales as they deemed best.

On the sixteenth of January, 1882, Simon, Strauss & Co. brought an action at law against J. Openheimer, based upon indebtedness for goods sold, and recovered judgment in the sum of \$5,537.54, which judgment is wholly unsatisfied. The complainants Simon, Strauss & Co., and the Marion County and Knoxville banks, and Eli Openheimer, Sr., filed their claims with the assignee. On the twenty-first of April, 1882, O. B. Ayres and Eli Openheimer filed separately their petitions in the district court of Marion county against Allen Hamrick, assignee, setting up the chattel mortgages executed to them, claiming a prior lien thereunder of the property in possession of the assignee, and asking that the assignee be required to pay in full the amounts due on the mortgages. The assignee filed answers to the petitions, contesting the validity of the mortgages. On the twenty-first of April, 1882, Simon, Strauss & Co. filed a petition in equity in the district court of Marion county, making Jacob Openheimer, Eli Openheimer, Sr., O. B. Ayres, and Allen Hamrick defendants, and setting forth that they, complainants, were judgment creditors of Jacob Openheimer; that the chattel mortgages held by Ayres and Eli Openheimer, Sr., were fraudulent and void as to them; that the assignee had possession of the mortgaged property; and praying that the mortgages be declared void as to complainants, and the property or its proceeds be applied in payment of the judgment in their favor. Simon, Strauss & Co. also intervened in the proceedings brought in the district court of Marion county by Ayres and Openheimer, and attacked the validity of the mortgages held by the petitioners.

In these three several proceedings—to-wit, the petitions filed by Ayres and Openheimer against the assignee, wherein Simon, Strauss & Co. had intervened, and the petition filed by Simon, Strauss & Co., as complainants, against Ayres, Hamrick and Openheimer—petitions

for removal of the causes from the state to the federal court were filed by Simon, Strauss & Co., the assignee uniting in such application in the case brought by Eli Openheimer, Sr. Upon the filing of the transcripts in this court, motions to remand, on ground of want of jurisdiction, were filed, and at the May term, 1883, were submitted to the court, and overruled by his honor, Justice MILLER. The issues were then completed, the evidence taken, and the causes submitted at one hearing.

Upon the argument, counsel for the mortgagees have ably presented anew the questions touching the jurisdiction of this court that were embraced within the motion to remand, submitted at the May term, 1883. It is not proposed to re-examine these questions at the present time. The ruling then made, being an adjudication thereof, must stand as the law of the case; and it having been then adjudged that these causes were properly in this court, the present examination will be confined to the other questions presented on the record.

Substantially the points at issue between the parties are: (1) Can the assignee, holding under the deed of assignment executed by the mortgagor, question the validity of the mortgages in the interest of the general creditors; or is such right confined to creditors having a lien on the property, or having judgment at law, with a right to perfect a lien upon any property that may be discovered? (2) Are the chattel mortgages executed by J. Openheimer to O. B. Ayres and Eli Openheimer void as against either the assignee, or Simon, Strauss & Co., judgment creditors?

From the evidence submitted it appears that the mortgages were given to secure an actual subsisting indebtedness, and they are therefore valid as between the mortgagor and mortgagees. When the deed of assignment was executed by the assignor, it conveyed to the assignee the equity of redemption belonging to the mortgagor, including the right to hold any surplus left after payment of the amounts due upon the mortgages. *Gimble v. Ferguson*, 58 Iowa, 414; S. C. 10 N. W. Rep. 789. The evidence, therefore, does not develop a state of facts which enables the assignee to successfully contest the validity of the mortgages. The debts described in the mortgages being actually due from the mortgagor, the title passed by the execution of the mortgages, and the instruments were therefore valid and binding upon the mortgagor. Under these circumstances, the assignee stands in the same position as the assignor, under the statute of Iowa. He takes the property subject to all the rights and equities which the mortgagees could have asserted against the assignor. *Roberts v. Corbin*, 26 Iowa, 315; *German Savings Inst. v. Adae*, 8 FED. REP. 106; *Stewart v. Platt*, 101 U. S. 731; *Rumsey v. Town*, post, 558. Having been given to secure an actual indebtedness, the validity of the mortgages can only be questioned by a creditor who can show a superior right or equity, and who has taken the proper steps to assert the same by obtaining a lien upon the property, or a judgment

with the right to a lien, if property can be discovered. Wait, Fraud. Conv. § 73.

Simon, Strauss & Co. occupy this position, and it is within their power to question the validity of the mortgages. By the bill filed in the cause by them begun as complainants, and by the petitions of intervention by them filed in the proceedings instituted by the mortgagees, they raise the question of the validity of the mortgages as against themselves. Upon this issue the evidence shows that the mortgages to Ayres were not recorded until December 27, 1881, having been executed and delivered,—the one in July and the other in April previous. During this time Openheimer remained in possession of the stock with the consent and knowledge of the mortgagee, selling from the stock in the usual course of his trade, and using the proceeds for purposes other than the payment of the mortgage debts, and he also bought on credit, between April and December, and mainly in August and September, from Hirsh, Mayer & Co., Kuhn, Nathan & Fisher, Cahn, Wampold & Co., Hart Bros., and Simon, Strauss & Co., goods to the amount of \$5,674.23. The parties selling the goods had no notice or knowledge of the existence of the mortgages at the time of selling the same. The goods thus purchased were added to the stock covered by the mortgages; which stock, when it was taken possession of by the assignee, inventoried at \$8,542.54. Under such circumstances, the mortgagee is estopped from asserting that he has, under his mortgage, a valid lien superior and prior to the rights of the creditors. Knowing that the mortgagor was dealing with the stock as his own, and that third parties would be justified in believing that the stock belonged to Openheimer, free from any lien, the mortgagee stands by and permits him to hold himself out to the world as the owner of the stock free from liens, and to buy on credit a very large quantity of goods, which were added to the stock and thereby made subject to the lien of the mortgage, as between the mortgagor and mortgagee. Having chosen to keep the knowledge of the existence of his mortgages from the public, when he should, in good conscience, have given publicity thereto, and having thereby misled the creditors into making large sales of goods on credit to the mortgagor, he should not now, when it is to his advantage, and to their injury, be allowed to assert that he holds a valid prior lien upon the stock of the common debtor, the larger part of which consists of the very goods sold by the creditors in ignorance of the existence of the mortgage.

Under the facts proven by the evidence, and under the rule laid down in *Crooks v. Stuart*, 2 McCrary, 18; S. C. 7 FED. REP. 800; *Argall v. Seymour*, 4 McCrary, 55, and *Robinson v. Elliott*, 22 Wall. 513, it must be held that the mortgages executed and delivered to Ayres are in fact fraudulent against Simon, Strauss & Co., and that the latter, as against Ayres and those claiming under him, are entitled to the proceeds of the mortgaged property.

The mortgage to Eli Openheimer, Sr., was executed December 27, 1881, and possession of the stock was taken by the assignee December 31st. It is not proven that there was any understanding between the parties thereto that would invalidate the mortgage, and the evidence fails to disclose facts which would justify the court in holding the mortgage void. It was promptly recorded on the day it was executed, and hence it must be held to be valid and binding.

The mortgage to Openheimer, by its terms, expressly provided that it was subject to the mortgages to Ayres, and only reached the surplus left after payment of the amounts due Ayres. In the proceeding brought by Openheimer to enforce payment of his lien he does not question or contest the priority of the mortgages to Ayres. All that he contracted for, and all that he claims, is to have the surplus left after payment of the Ayres mortgages applied to the payment of the debt due him.

It is a matter of indifference to him whether the sum needed to pay the Ayres mortgages is paid to Ayres or to Simon, Strauss & Co. Equitably, therefore, the amount that would otherwise be payable to Ayres or the banks, under the chattel mortgages, should be paid to Simon, Strauss & Co., and the surplus, or so much thereof as may be needed, should be paid to Eli Openheimer, Sr., in satisfaction of his mortgage.

It follows, therefore, that, in the case of *Simon, Strauss & Co. v. Jacob Openheimer et al.*, complainants are entitled to a decree declaring the chattel mortgages executed to O. B. Ayres to be void as against complainants, and that the sums otherwise payable to said Ayres and those claiming under him, in discharge of said mortgages, shall be applied upon the judgment in favor of complainants.

In the case of *O. B. Ayres v. Allen Hamrick et al.*, the intervenors, Simon, Strauss & Co., are entitled to a decree declaring and establishing their right to the fund claimed by Ayres.

In the cases of *Eli Openheimer, Sr., v. Allen Hamrick, Assignee, et al.*, complainant is entitled to decree declaring his mortgage valid, the amount due thereon to be paid out of the surplus left after payment of sums adjudged to be paid to intervenors, Simon, Strauss & Co.

RUMSEY and others v. TOWN and others.*(Circuit Court, S. D. Iowa, C. B. May Term, 1884.)***1. INSOLVENCY LAW OF IOWA—RIGHTS AND LIABILITIES OF ASSIGNEE.**

The assignee succeeds to all the rights of his assignor and is affected by all the equities against him; but equities or rights belonging to a creditor are not by operation of law transferred to the assignee.

2. SAME—JURISDICTION OF THE COURTS.

The state court in which the assignee files his bond is charged with the duty of carrying out the provisions of the Iowa insolvent law; but other courts may entertain jurisdiction of cases settling the rights of parties who are interested in the estate.

3. SAME—ORDER APPROVING PAYMENT OF MORTGAGE DEBT.

The court that controls the proceedings in assignment does not, by an order approving the payment of a mortgage debt by assignee, adjudicate the question of the validity of the mortgage.

4. SAME—NEGLECT TO RECORD MORTGAGE—SUBSEQUENT CREDITORS WITHOUT NOTICE.

The neglect of a mortgagee to file his chattel mortgage deprives him of his right, as against a subsequent creditor, without notice, of the mortgagor; and after assignment by the debtor he is on a like footing with all creditors, without notice, of a date prior to the recording of the mortgage.

In Equity.

Wright, Cummins & Wright, for complainants.

C. C. Cole and Goode, Wishard & Phillips, for defendants.

SHIRAS, J. On the thirty-first day of July, 1880, Robinson & Atherton, a firm doing business at Des Moines, Iowa, executed a chattel mortgage on their stock of merchandise to the defendant Cole to secure him against liability as an indorser upon their note for \$1,500. The note was executed for the purpose of raising money to meet their indebtedness, and was secured by the indorsement of C. C. Cole, with the chattel mortgage to him upon their stock in trade. The note, with the mortgage as collateral thereto, was negotiated with J. J. Town, O. Noble, and T. H. Delamater, doing business in Des Moines under the name of "The Valley Bank." The bank held the mortgage without recording it until October 6, 1880, when it was filed for record. During the interval between the date of the mortgage and the recording of the same the mortgagors remained in full possession of the property therein described, selling therefrom in the usual course of their trade and applying the proceeds to their own use.

Previous to the execution of the mortgage in question the complainants, L. M. Rumsey & Co., a firm doing business in St. Louis, Missouri, had sold goods on credit to Robinson & Atherton, and had also sent to them certain goods to be sold on commission. During the months of July and August, 1880, complainants endeavored to procure the return to them of the commission goods intrusted to Robinson & Atherton. After some correspondence between the parties, the latter firm proposed to buy these goods, and on the nine-

teenth of August, 1880, a contract of sale was made, and Robinson & Atherton bought the goods on a credit of 40 days, giving an acceptance therefor in the sum of \$683.12. When this sale was made, complainants had no knowledge of the existence of the chattel mortgage held by the Valley Bank, which, by its terms, covered all goods added to the stock after its date, and therefore included the goods thus bought of complainant.

On the thirteenth day of October, 1880, Robinson & Atherton made a general assignment for the benefit of creditors to one William Foster, who accepted the trust, and filed his bond and inventory, as required by the statute of Iowa, in the circuit court of Polk county, Iowa. The assignee took possession of the stock in trade of his assignors, and thereupon the Valley Bank filed a petition in the state court for the foreclosure of the mortgage held by them, making Robinson & Atherton, and Foster, the assignee, defendants thereto. No hearing was had, nor was any decree entered in this cause, it appearing that assurances were given to the complainant that the mortgage would be paid by the assignee without contest. The assignee sold the goods, and, from the proceeds, paid to the Valley Bank the amount due upon the note of Robinson & Atherton, and thereupon the foreclosure suit was dismissed. In the mean time the complainants herein brought an action at law in the state court, aided by an attachment, against Robinson & Atherton upon their acceptance for \$683.12, and served a notice of garnishment upon the assignee, William Foster. In this cause complainants recovered judgment against Robinson & Atherton for the amount due on the acceptance, and they took the answer of the garnishee, in which he set forth that he held the goods transferred to him under the deed of assignment executed by Robinson & Atherton; that he had sold the property, realizing about \$4,000 therefrom, and had paid the amount due on the mortgage to the Valley Bank, and other claims, leaving in his hands about \$1,200. Upon this answer, the plaintiffs in attachment moved for judgment against the garnishee, on the ground that there was then left in the hands of the garnishee more money than was needed to pay the debt due plaintiffs, and that the assignment to Foster, the garnishee, was void upon its face for several reasons set forth in the motion. The state court overruled this motion, holding the assignment to be valid. The complainants did not file their claim under the assignment, nor did they receive any dividend therein. The assignee, from the funds in his hands, paid the expenses of the assignment, and divided the balance left among the creditors of Robinson & Atherton, who had filed their claims with him, and filed a final report in the circuit court of Polk county, in which he set forth the payment by him of the amount due to the Valley Bank in satisfaction of their mortgage. This report was approved by the state court, and the assignee was discharged from further duty under the assignment.

On the third day of August, 1881, complainants filed a bill in the

present cause, making Town, Noble, and Delamater, partners doing business under name of the Valley Bank, C. C. Cole, and Robinson & Atherton, defendants, and praying that the mortgage held by the Valley Bank be declared void as against complainants, and that the fund received thereunder be subjected to the payment of the debt due complainants from Robinson & Atherton, evidenced by the judgment obtained in the state court, upon which it was averred an execution had been issued and returned wholly unsatisfied. To this bill the defendants interposed a demurrer, which was overruled, and thereupon the defendants, with leave of the court, filed answers to the bill, and issue being joined thereon, the cause was submitted upon the pleadings and evidence.

In the first place, it is contended on the part of the defendants that this court should not entertain jurisdiction of this proceeding, in which is involved the validity of the chattel mortgage executed by Robinson & Atherton, because that question properly belonged to the state court, in which the assignment proceedings were had. And further, that the proceedings in the circuit court of Polk county amount to an adjudication of the question as between the Valley Bank and complainants.

The first question to be determined is as to the effect of an assignment for the benefit of creditors under the Iowa statutes, and the power and rights thereby conferred upon the assignee. Does the assignee represent the rights and equities of the several creditors so that these, no matter how they originate, must be enforced through the assignee, or does he represent the title and estate of the assignor, with the right as a trustee thereof to do that which is necessary for the fulfillment of the trust in the interest of the beneficiaries? The ordinary rule laid down by the authorities is that the assignee succeeds to the rights of the assignor, and is affected by all the equities against him. Burrill, Assignm. § 391; *Stewart v. Platt*, 101 U. S. 731. In New York, Connecticut, and other states the power of the assignee is enlarged by statutory enactment so as to include the right to treat as void all transfers and acts done by the assignor in fraud of creditors. The Iowa statute regulating assignments for the benefit of creditors, being chapter 7, tit. 14, Code, clearly recognizes the fact that an assignment is a purely personal right of the debtor in the first instance. There is no mode by which a debtor can be compelled to make an assignment; it is wholly for the debtor to determine whether he will or will not make an assignment, and also to whom the assignment shall be made. The statute, however, regulates the assignment when made, and provides for the mode of carrying out the trust created by the deed of assignment. Section 2127 of the Code defines the powers of the assignee as follows:

"Any assignee, as aforesaid, shall have as full power and authority to dispose of all estate, real and personal, assigned, as the debtor had at the time of the assignment, and to sue for and recover in the name of the assignee

everything belonging or appertaining to said estate, *and, generally, do whatsoever the debtor might have done in the premises.*"

This section is wholly silent touching the rights and equities of creditors, and would seem to measure the rights of the assignee by those of the debtor. All property belonging to the estate passes to the assignee, and he can recover the same by proper suit in his own name. If any property actually belonging to the debtor is in possession of third parties, or if the legal title thereto is in a third party, the assignee may recover the same by proper action. Thus, if the debtor has, in fraud of creditors, conveyed property to a third party, thus concealing it from creditors, but actually being the owner thereof, the assignee can maintain suit therefor, under the section of the Code in question, because in truth the property thus transferred belongs to the debtor, and passes by the deed of assignment to the assignee. In such a case, equity would not aid the debtor in recovering the property, not because he is not really the owner thereof, but because he had been guilty of a fraud, and therefore within the rule that "he that hath committed iniquity shall not have equity." The assignee, however, would not be affected by this disability, not being personally a party to the fraud, and he could, therefore, be heard to assert that the property in question really belonged to the estate of which he was trustee.

When, however, a given question turns upon equities or rights belonging to one or more of the creditors, can it be maintained that by operation of law these equities have been transferred from the creditors to the assignee? Certainly at common law no such effect can be attributed to the deed of assignment executed by the debtor. The statute of Iowa regulating assignments does not in express terms so declare; and in the absence of positive enactment enabling the assignee to enforce the equity of the creditor, it is difficult to see upon what the claim is based. For illustration, take the case of a mortgage executed upon a stock of merchandise by A. to B., to secure a debt due the latter. A. executes and delivers the mortgage without any agreement that the same shall be withheld from record, and, in fact, he may suppose that B. has recorded it. A. remains in possession, and continues to buy and sell in the ordinary way of his business. Instead of promptly recording the mortgage, B. intentionally withholds the same from the record, concealing its existence with the intent that A. may be thus enabled to buy goods on credit and add them to the stock covered by the mortgage, which, by its terms, includes all goods added to the stock after the execution of the mortgage. C., in ignorance of the existence of this mortgage, sells goods on credit to A., which are added to the stock, and then B. records his mortgage. Thereupon A. makes an assignment under the state statute for the benefit of creditors. As between A. and B. the mortgage is valid, being given by A., in good faith, to secure a debt actually due B. The only person whose rights are affected thereby is C.

v.20,no.9—36

If he chooses so to do, he can contest the validity of the mortgage on the ground that B. misled him to his injury by concealing the existence of the mortgage, and withholding the same from the record. This, however, is an equity wholly personal to C., which he may enforce or not as he pleases. Upon what ground can it be successfully claimed that the deed of assignment, executed by A., conveys this equity, existing in favor of C., to the assignee? It will be noticed that the equity in favor of C. does not grow out of the title or right existing in A., and which passes by the deed of assignment. C.'s equity grows out of the wrong acts of B., and in effect is the right to estop B. from asserting that the title of his mortgage exists as against C. This equity on behalf of C. is not affected by the act of A. in making the assignment, nor does the assignee, under the Iowa statute, become vested with the right to enforce it.

Consequently the claim made in this case, that the making of the assignment to William Foster conferred upon him the right to enforce the equities of complainants, as against the mortgagees Town *et al.*, cannot be sustained. For the same reasons the fact that the deed of assignment having been executed, the assignee gave bond and filed the proper schedules and inventory in the circuit court of Polk county, did not, *ipso facto*, confer upon that court the exclusive jurisdiction to hear and determine all questions existing between the creditors of Robinson & Atherton.

The statute of Iowa regulating assignments requires certain steps to be taken, reports made, and orders procured for the proper fulfillment of the trust conferred by the deed of assignment on the assignee. The state court, in which the assignee files his bond, is charged with the duty of carrying out these provisions of the statute, and no other court will interfere therewith or attempt to assume the performance of the duties required of the court having charge of the assignment under the state statute. But it is equally clear that other courts may entertain jurisdiction of cases settling the rights of parties who are interested in the estate. Thus the assignees may maintain actions in other courts for the recovery or protection of the property belonging to the trust. Creditors may sue the debtor in any proper court, for the purpose of establishing the existence of a debt against the assignor. Disputes touching the title to property, between the assignee and third parties, may be adjudicated by other courts, and in these and other instances that might be named, the exercise of jurisdiction by other courts does not in any just sense interfere with the jurisdiction of the court having control of the assignment proceedings.

The question of the validity of the chattel mortgage held by the Valley bank, as against complainants, could be heard and determined without interference with the jurisdiction of the circuit court of Polk county, and hence the point made that that court alone had jurisdiction of the question cannot be sustained.

The cases cited by counsel for defendants in support of the proposition that "the court first having control of the case has the right to settle every question that may arise in the case," to-wit, *Peck v. Jenness*, 7 How. 624; *Freeman v. Howe*, 24 How. 450; *Peale v. Phipps*, 14 How. 374; and *Buck v. Colbath*, 3 Wall. 341, do not sustain the application to the case at bar that counsel seek to make of the general proposition above given.

In *Buck v. Colbath*, the proper application of the rule is explained, it being stated that—

"It is not true that a court, having obtained jurisdiction of a subject-matter of a suit, and of parties before it, thereby excludes all other courts from the right to adjudicate upon other matters having a very close connection with those before the first court, and, in some instances, requiring the decision of the same questions exactly. In examining into the exclusive character of the jurisdiction of such cases, we must have regard to the nature of the remedies, the character of the relief sought, and the identity of the parties to the different suits."

The facts in *Buck v. Colbath* were that Buck, as marshal of the United States court in Minnesota, levied a writ of attachment upon certain goods as the property of the defendant in the attachment proceeding. Colbath sued Buck in trespass in the state court, claiming that the property levied on belonged to him. The supreme court held that the state court could rightfully entertain jurisdiction of the action in trespass, although the property was in the possession and under the control of the United States court.

The case of *Perry v. Murray*, 55 Iowa, 416, S. C. 7 N. W. Rep. 46, 680, is also pressed upon the attention of the court as a decision made upon the point under consideration. The supreme court of Iowa in that case held that an order of the district court, having control of an assignment, directing the payment of a *pro rata* dividend among the creditors, was an adjudication between the creditors which could not be collaterally attacked. The statement of facts shows that the assignment was made by George Stever and N. S. Averill; that the plaintiffs and other creditors duly filed their claims with the assignee, but no claim was made by plaintiffs to priority over other creditors; that after the expiration of three months the assignee made his report to the court, no exception being made thereto, and thereupon the court ordered the payment of a *pro rata* dividend among all the creditors, to which order no exception was taken. Some months afterwards the plaintiffs filed their petition, asking the court to marshal the assets, and for an order directing the assignee to pay the creditors of the firm of Stever & Averill in full before making payment to the other creditors. Under this state of facts it was held that the order for payment of a dividend was an adjudication upon the question of distribution of the assets held under the assignment among the creditors who had filed their claims, and that it could not be collaterally attacked, it being further ruled that the court in which the assignment was filed must of necessity be vested with

the power to determine priorities among the creditors, or otherwise the payment of dividends could not be safely ordered. To this decision, and the reasoning upon which it is based, we can see no good ground of exception. In that case the plaintiffs sought, by an independent proceeding, to compel the assignee to marshal and distribute the assets in his possession in a manner wholly-different from that prescribed in the order of the court made in the assignment proceedings, thus endeavoring to subject the assignee to different and contradictory orders. The contention of the plaintiffs was that under the deed of assignment they were entitled to the marshaling of the assets in the manner claimed, and the ruling of the court was that such order should be sought in the assignment proceedings proper; and as the plaintiffs had filed their claim under the assignment without claiming a preference as firm creditors, and had allowed the court to act upon the report of the assignee, and adjudicate upon the mode of distribution, without exception thereto, such order must stand as a judgment upon the question, binding upon plaintiffs so that it could not be attacked in a collateral proceeding. The true scope of this decision is indicated in the opinion by the reference to the prior decision in the case of *Wurtz v. Hart*, 13 Iowa, 515. In that case it is said that "it was never intended by the statute that all the various rights and equities of creditors should be settled exclusively and only in the manner there pointed out." If the present proceeding was against the assignee, and the relief sought was the procurement of an order directing or controlling the assignee in the distribution of the assets held by him under the deed of assignment executed by Robinson & Atherton, then the ruling in *Perry v. Murray* would be applicable; but in this cause no relief is sought against the assignee, nor is there any right or priority asserted under the deed of assignment. The trust treated by the execution of the assignment has been fully executed. The proceedings in assignment have been carried to completion, and the assignee has been discharged. The rights of the assignee, and the control of the state court over him, are at an end.

The question now to be determined is one arising between the Valley Bank and complainants, and no good reason is perceived why complainants are barred from investigating the question by force of the proceedings had in the circuit court of Polk county. Of course, had complainants appeared in that court, and by any proper proceeding against the Valley Bank raised or presented the question of the validity of the chattel mortgage as against complainants, then the action of the state court thereon would have been an adjudication to which full faith and credit would be due, and which would preclude a re-examination of the same issue in any other court. It is urged in argument that this effect must be given to the order made by the state court approving the report of the assignee, in which report was set forth the fact that the assignee had paid the amount due on the mortgage to the Valley Bank. It is not claimed that any issue was in

fact made between the assignee and the Valley Bank touching the validity of the chattel mortgage, much less between the complainants and the bank, or that the court heard and decided the same. The argument is, in effect, that such issue might have been properly raised in that court, and therefore the order approving the action of the assignee must be held to be an adjudication of the question. The order of the court may well be a protection to the assignee, but it cannot be held to be an adjudication of rights and equities not arising out of the deed of assignment, and existing between complainants, who were not in fact parties to the assignment proceedings, and Town, Noble & Co., who held under a mortgage, and not under the assignment.

The conclusions reached upon these propositions are (1) that, under the statute of Iowa, a deed of assignment for the benefit of creditors does not confer upon the assignee the right to enforce special equities existing on behalf of one or more creditors, as against other creditors, so as to deprive the creditor of the right to assert, in his own name and right, such equity against a third party; (2) that while the filing of a bond and inventory by the assignee, in either the district or circuit court of the state, confers upon that court control over the assignee, and over the trust committed to him, with the right to make the necessary orders for the distribution of the assets under the deed of assignment, it does not confer upon that court exclusive jurisdiction over all questions arising between creditors touching their rights and equities in the premises; (3) that an order made by the court having control of the assignment proceedings, approving the payment, by an assignee, of a mortgage upon the assigned property, is not an adjudication of the validity of the mortgage, as against creditors not appearing in the assignment proceedings, and whose rights, as against the mortgage, are not conferred by the deed of assignment.

It will be remembered that the money received by Town, Noble & Co. was not paid to them by reason of the assignment to Foster, but because they held a chattel mortgage upon the property. Town, Noble & Co. did not claim a right to or lien upon the goods under the assignment, but under the chattel mortgage, which they claimed gave them the prior and paramount right to the possession of the goods, and to be first paid out of the proceeds. They instituted an independent action to enforce their rights as against the assignee as well as against Robinson & Atherton. The assignee, however, recognized and acknowledged the prior right of the mortgagees, and thereupon, with their assent, sold the goods and delivered to the mortgagees so much of the proceeds as was needed to pay their claim. The case in fact stands, therefore, just as it would if the mortgagees had taken possession of the goods under the mortgage and converted them into money. So far as it affects the rights of complainants, it makes no difference whether the goods were converted into money through a

sale by the sheriff or by the assignee. In either case the money passes into the hands of the mortgagees as the proceeds of the mortgaged property, and the right of the mortgagees to hold the same in either case is based upon the mortgage.

It is urged with much force in argument that complainants have no superior equity to the proceeds of the mortgaged property over Town, Noble & Co., because the debt due the latter is equally meritorious with that due complainants, and that if Town, Noble & Co. are now deprived of the benefits of the mortgaged property they can receive nothing upon their debt under the assignment. It does not appear, however, that laches can be imputed to the complainants. Within a week after the filing of the assignment complainants brought their action at law to recover judgment against Robinson & Atherton. As the possession of the stock of goods was then with the assignee, they were not in fault in not obtaining a special lien upon the property. They could not sustain a bill in equity against the mortgagees until they had procured a judgment at law and a lien thereunder, or the return of an execution unsatisfied. The delay in procuring judgment in the law action was not due to any fault upon their part. As soon as they were in a position to attack the validity of the mortgage they did so, by filing the present bill. In the mean time Town, Noble & Co. had, through the agency of the assignee, converted the mortgaged goods into money, and the assignment proceedings were closed up. It is doubtless true that Town, Noble & Co. have lost the right to claim any benefit from the assignment, but it is not perceived that this result is in any sense due to the acts or failure to act on part of complainants.

The complainants show to the court that there is justly due to them from Robinson & Atherton a given sum, for which they have a judgment, and that Town, Noble & Co. have in their hands certain goods, or the proceeds thereof, heretofore belonging to their debtors, and they ask the aid of the court to reach the fund, and subject it to the payment of their judgment. Town, Noble & Co. assert their right to the fund under the chattel mortgage executed by Robinson & Atherton, and its validity being impeached by complainants, the question to be determined is whether it is valid as against complainants. While, therefore, it is true that a decision adverse to Town, Noble & Co. may work a hardship upon them, this result is not attributable to the laches of complainants, and the rights of the parties are therefore left dependent upon the validity or invalidity of the chattel mortgage. Upon this question, it appears from the evidence that Town, Noble & Co., to whom the chattel mortgage was delivered in July, did not record the same until in October following; and from the date of the delivery of the mortgage until the property passed into the possession of the assignees they permitted the mortgagors to remain in possession of the stock in question, and to sell and deal with the same as their own property, without accounting for the proceeds thereof,

and without applying the same to the payment of the mortgage debt. It also appears that complainants, after the execution, but before the recording of the mortgage, and without notice of its existence, sold goods on credit to Robinson & Atherton, which, becoming part of the stock, came under the lien of the mortgage. The facts, therefore, bring the case clearly within the rules announced in *Crooks v. Stuart*, 2 McCrary, 13; S. C. 7 FED. REP. 800; *Argall v. Seymour*, 4 McCrary, 55; and *Robinson v. Elliott*, 22 Wall. 513, and the mortgage must be held invalid and void as against the complainants.

So far as the defendant Cole is concerned it does not appear that he ever reaped any benefit from the mortgage. On the contrary, it appears that the mortgage, although executed to him as grantee, was delivered to Town, Noble & Co. when the loan was effected, and passed from the control of the defendant Cole at that time. The failure to record the mortgage, and the other facts rendering the mortgage void, are attributable, not to Cole, but to Town, Noble & Co., and hence the defendant Cole is not personally responsible to complainants herein.

Complainants are therefore entitled to a decree declaring the chattel mortgage void as to them, and estopping defendants from asserting any prior right thereunder against the fund realized from the sale of the mortgaged property, and ordering said Town, Noble and Delamater to pay to complainants, within 60 days from date, the amount due complainants on the judgment in their favor against Robinson & Atherton, with interest and costs, and that if said sum is not paid as ordered that execution against said parties may issue for the collection of said sum.

SPINK v. FRANCIS and others.¹

WILLIAMS v. SAME.¹

(Circuit Court, E. D. Louisiana. June 2, 1884.)

EQUITY JURISDICTION.

A court of equity can interfere, by an order, with a party conducting a criminal procedure only when the parties sought to be enjoined have, as plaintiffs, submitted themselves to the court by a bill of equity as to the matter or right affected by or involved in the criminal procedure; but the pursuer and pursued must be identical in the case, *i. e.*, the defendant in the bill and in the indictment must be the same person, and the person preferring the bill and the criminal charge must also be the same. As to parties and controversy the inquiry is analogous to that in regard to the plea of *lis pendens*.

On Demurrers, and on Motions to Quash Restraining Orders. See S. C. 19 FED. REP. 670.

¹Reported by Joseph P. Hornor, Esq., of the New Orleans bar.

Joseph P. Hornor and Francis W. Baker, for complainants.
James R. Beckwith, for defendants.

BILLINGS, J. When these causes were before the court last, the court laid down the limit within which a court of equity could interfere by an order with a party conducting a criminal procedure, and beyond which there can be no interference, as follows: "It is when the parties sought to be enjoined have, as plaintiffs, submitted themselves to the court by a bill of equity as to the matter or right affected by or involved in the criminal procedure." 19 FED. REP. 671. Leave was given, *ibidem*, to amend the bill so as to show this fact.

The only question which need be considered now is whether the plaintiffs have brought themselves, by their amendment, within this limit. The original criminal jurisdiction in chancery has long been obsolete. The learning relating to the question is confined to a few cases, viz.: *Mayor of York v. Pilkington*, 2 Atk. 302; *Montague v. Dudman*, 2 Ves. 396; *Atty. Gen. v. Cleaver*, 18 Ves. Jr. 211; and *Saull v. Browne*, L. R. 10 Ch. App. Cas. 64.

In the first of these cases, which was a case where plaintiffs claimed the sole right of fishing in the Ouse, and they had filed a bill, in which they submitted that matter to the chancellor, and afterwards proceeded by indictment for an interference with the same right, Lord HARDWICKE illustrated his view of the authority of the chancellor by the case of a bill to quiet possession, by a party plaintiff, who should afterwards prefer an indictment for a forcible entry and says this court would stop the indictment.

In *Atty. Gen. v. Cleaver*, 18 Ves. Jr. 220, Lord ELDON defines the authority of the preceding case as follows:

"Lord HARDWICKE held that he would deal with the subject with reference to what was civilly in question between the plaintiff and defendant, though, also, the subject of criminal prosecution; but I do not find that he thought himself justified in that with regard to other persons who had not themselves resorted to him."

In *Saull v. Browne* Lord CAIRNS says:

"I should be unwilling to express any doubt that there may be cases in which criminal proceedings instituted by a party to a suit, in this court, are so identical with the civil proceedings as to induce this court to order that the same person shall not at the same time *pursue his remedy* in this court, and pursue another remedy which ranges itself under the head of criminal jurisdiction."

The authority of the chancery court is therefore limited to a plaintiff in the equity proceedings, and comes from the general authority of courts of chancery to control the conduct of parties who seek its aid in furtherance of their civil rights. Story, Eq. Jur. § 893. The case which is recognized as establishing the rule (Lord HARDWICKE's) makes it apply only to a case where a plaintiff in equity attempts to resort to a criminal procedure to enforce against the defendant the same rights which he is pursuing against the same defendant in the equity cause. It is the double harassing, *first*, by the equity suit,

and, *second*, by the criminal procedure, that the equity court interrupts. This is the ground upon which the queen's counsel, who argued in support of the injunction, placed the application in *Saull v. Browne, supra*. But the pursuer and pursued must be identical in the cases,—i. e., the defendant in the bill and in the indictment must be the same person,—and the person preferring the bill and the criminal charge must also be the same. As to parties and controversy the inquiry is analogous to that in regard to the plea of *lis pendens*.

The amendment is, in effect, that the defendants have submitted as plaintiffs the matter or right involved in the criminal proceedings to this court in four enumerated cases. An examination of these records shows that the defendants here have appeared in some of the causes as original plaintiffs, and in one cause as intervenors, where they should be classed as plaintiffs, for the purpose of determining this matter, and have submitted to the court the matter or right here involved as between themselves and other parties, and that they have never submitted to this court such matter or right as between themselves and the plaintiffs in these bills who were not parties to those other causes, nor does it appear that they were privies to the parties there. It was not, therefore, their right which was submitted in these equity causes, but a similar right. I think, therefore, by the authority of the original case, and of those cases which have followed it, that the plaintiffs have not, by the amendment, placed themselves in the category of those who can ask an order to operate upon the defendants, and that, therefore, the restraining order must be vacated, and the demurrer to the amended bill sustained.

OGLESBY *v.* ATTRILL and others.CASSARD *v.* SAME.GILLESPIE *v.* SAME.HELLMAN *v.* SAME.CHISM *v.* SAME.FEE *v.* SAME.SEARS *v.* SAME.*Circuit Court, S. D. New York. June 5, 1884.)*

1. PRACTICE—RES ADJUDICATA—ACTION BY STOCKHOLDER.

To a bill filed by a stockholder of a corporation to rescind a sale of his stock, which he was induced to make by the fraudulent practices of the defendant, the defendant pleaded a former adjudication in his favor in an action at law between the parties, in which the complainant sought to recover damages of the defendant for the fraud. *Held* that, although the case made by the bill as to the details of the transaction and the matters of evidence of fraud differed from the case tried in the former suit, the *gravamen* of the case was the same in each, and the judgment in the former suit was *res adjudicata*.

2. SAME—WHAT ISSUE IS CONCLUDED BY.

The matter in issue or point in controversy, which is concluded by a former judgment, is that ultimate fact, or state of facts, upon which the verdict was based.

3. SAME—WRIT OF ERROR—AFFIRMANCE OF JUDGMENT.

On a writ of error taken from the judgment in the former suit the judgment was affirmed. *Held*, that the effect of the judgment was not impaired because the appellate court, in affirming the judgment, did not, in the opinion delivered, consider the question whether the conduct of the defendant was fraudulent or not.

In Equity.

Miller, Peckham & Dixon, for complainants.

Roscoe Conkling and S. G. Wheeler, Jr., for defendant.

WALLACE, J. 1. The questions raised by the demurrers to the amended and supplemental bills were considered and decided adversely to the defendants on a former occasion, when the demurrers to the original bills in several of these cases were heard by this court. As the present bills, except in the suits of Oglesby and Cassard, are the same as the former respecting all material matters, and as the additional facts now alleged in the bills of Oglesby and Cassard are only important for the purpose of anticipating and assailing matters of defense to the bills, it would not be profitable, and is deemed unnecessary, to reconsider what was then deliberately determined.

2. The pleas filed in the cases of Oglesby and of Cassard set up a good defense to the bills. One of the issues litigated in the former

suit between the parties, which is pleaded as a bar, was whether complainants Oglesby and Cassard had been induced to part with their stock in the Crescent City Gas-light Company by the fraudulent acts of the defendant in inducing the directors of the company to concert and carry out a scheme of wanton and illegal assessments upon the stock, and of other oppressive conduct towards the complainants, to enable him to purchase the stock for a mere nominal price. It appears by the averments of the plea, and more fully by the record, which is made a profert, as well as by the record and opinion in the case on writ of error to the supreme court, used by stipulation upon the hearing, that this issue was presented by the pleadings, was submitted specifically to the jury, and was decided adversely to the complainants. It is perfectly clear that the complainants sought to recover damages in that suit for the loss of their stock by reason of the frauds which are the *gravamen* of the present cause of action. The case made by the bill differs in matters of evidence from that tried and determined in the former action, and the complainants now seek a rescission of the transfer of the stock, and an accounting instead of the damages which they then claimed; but the cause of action is the same. The matter in issue or point in controversy, which is concluded by a former judgment, is that ultimate fact or state of facts upon which the verdict was based. *Smith v. Town of Ontario*, 18 Blatchf. 454¹; *King v. Chase*, 15 N. H. 9. In the former suit the matter in issue or point in controversy was whether the defendant had fraudulently obtained the complainants' stock by manipulating the management of the corporation so as to coerce them to sell it to him. This having been decided against the complainants, they are concluded from reopening that controversy, although the incidents of the transaction and the evidence, as now presented, may vary materially from those relied on in the former suit. The case of *Price v. Dewey*, 11 FED. REP. 104, is quite analogous to this, and is in apposite. The judgment in the former suit has never been reversed, although it was reviewed on writ of error by the supreme court. The complainants cannot escape its effect as an estoppel because the judge who delivered the opinion of the supreme court affirming the judgment did not deem it necessary to consider whether the point now in controversy was properly decided against the complainants in the court below or not. What the supreme court adjudged was that the judgment should be affirmed. What the court said is valuable as a contribution to the general fund of legal learning; but if the court had given very poor reasons for their conclusions, the effect of the adjudication would have been the same.

In view of these conclusions, it is unnecessary to consider the effect of the former suit as an election of remedies.

¹S. C. 4 FED. REP. 386.

WESTERN UNION TELEGRAPH CO. v. BALTIMORE & O. R. CO.

(Circuit Court, D. Maryland. May 26, 1884.)

1. CORPORATION—LICENSE TO MAINTAIN TELEGRAPH LINE—EXPIRATION OF CHARTER.

A license was granted on June 18, 1853, by the Baltimore & Ohio Railroad Company to the Western Telegraph Company (a Maryland corporation) to maintain a telegraph line along the railway so long as the grantee existed as a telegraph company. At the time of the grant the telegraph company held control of the Morse patents for 14 years from June 20, 1840, and its charter was for 30 years from February 4, 1847; that is to say, to expire February 4, 1877. *Held*, that the license lasted no longer than the corporation to which it was granted, and expired by its own limitation on the fourth of February, 1877.

2. SAME—REINCORPORATION—NEW CORPORATION.

The telegraph company, before the expiration of its charter under provisions contained in the general incorporation act of Maryland, passed in 1868, caused itself to be incorporated under that act as the "Western Telegraph Company of Baltimore City," to continue for 40 years. *Held*, that the corporation thus formed was a new and different corporation, and not a continuation of the old one, and that the old corporation had gone out of existence and the license was at an end.

In Equity.

Charles J. M. Gwinn and Wager Swayne, for complainant.

John K. Cowen and William F. Frick, for defendant.

WAITE, Justice. In the view I take of this case the only material facts are these:

The Western Telegraph Company was incorporated by the general assembly of Maryland on the fourth of February, 1847. Laws 1846, c. 39. Section 17 of the act of incorporation, is as follows: "And be it further enacted, that this act of incorporation shall inure for 30 years from its passage, and the legislature reserves to itself the right to alter or annul this act of incorporation at pleasure." This company had the control of the use of the Morse patent for the electro-magnetic telegraph in the territory covered by its charter. The patent extended for 14 years from June 20, 1840. The Baltimore & Ohio Railroad Company, being desirous of having the free use of a line of telegraph between the *termini* of its road, on the eighteenth of June, 1853, entered into a contract with the Western Telegraph Company for that purpose. In this contract the railroad company is denominated "the parties of the first part," and the telegraph company "the parties of the second part." By article 1 the railroad company granted "to the said parties of the second part a license, as long as the said parties exist as a telegraph company, to erect and maintain a line of magnetic telegraph upon and within the limits of the said road, provided that the position of the posts or wires of the said telegraph company shall be such as shall be approved by the officers of the said railroad company." Provision was then made for the building of a substantial line of telegraph, to consist of two wires, if necessary, by the railroad company, which, when built, should become the property of the telegraph company. After stating the plan agreed on for working the line, including the prompt transmission of all messages on the business of the railroad company free of charge, the contract proceeded as follows: "(9) In the event of a dissolution of the said telegraph company, or a suspension of operation on their part, either voluntary or in consequence of legal process of any kind, then the said railroad company shall be at liberty and are authorized to take charge of the said telegraph line for their own purposes, with the appurtenances, until the said telegraph company shall resume active opera-

tions; and it is expressly understood that no interest which the said telegraph company may have in said line shall be assignable so as to affect or impair, in any manner, the rights of the railroad company under these articles of agreement." Under this license and agreement the necessary posts and one line of wire were put up by the railroad company, from Ellicott's Mills, west. Afterwards, on the twelfth of September, 1855, a supplemental agreement was entered into between the parties, under which a line was put up from Ellicott's Mills to Camden Station, and a second wire put on from Camden Station to Cumberland. In 1859 the Western Telegraph Company leased the line to the American Telegraph Company, a New Jersey corporation, and in June, 1866, the American Telegraph Company assigned its lease to the Western Union Telegraph Company, a New York corporation. In 1871 or 1872 the Western Union Company put up a new wire on the line from Baltimore to Cumberland, at a cost of \$9,664.60.

On the thirtieth of March, 1868, a general incorporation act was passed by the general assembly of Maryland, (Laws 1868, c. 471,) which provided, among other things, for the formation of companies "for constructing, owning, or operating telegraph lines in this state, where the principal office of said corporation is located in this state." Section 24, class 11. By section 75 any existing corporation of the state, formed for any of the purposes mentioned in the act, might "cause itself to be incorporated under this article," [act,] provided, on due notice to the stockholders, two-thirds of all the shares should be voted in favor of the measure.

"Sec. 75. And be it further enacted, that if, at such meeting, or any adjourned meeting of said stockholders, a sufficient number of votes, as aforesaid, shall be given in favor of causing said corporation to be incorporated under this article, then the said meeting * * * shall determine the number of shares into which the capital stock of the new company shall be divided, and the rule of the apportionment thereof, and the person who shall be entitled to hold the same, and also the name by which said new corporation shall be known, and a certificate shall be made out and signed by the president of said meeting, showing the compliance by said corporation * * * with the requirements of this article in that behalf, and the said certificate shall also show the proposed name of the new corporation, which shall always include the name of the county or city in which it may be formed, the former name of said corporation, the object and purpose for which the new corporation is sought, the terms of its existence, not to exceed forty years, and the articles, conditions, and provisions under which the incorporation is formed, the place or places of business where the operations of the corporation are to be carried on, and the place in the state in which the principal office of the corporation will be located, the amount of the capital stock of the corporation, the number of shares, and the amount of each share, and the number of trustees, directors, or managers who shall manage the concerns of the corporation for the first year.

"Sec. 76. And be it further enacted, that the said certificate shall be signed and sworn to or affirmed by the chairman of said meeting, and shall also be signed by the president of the said corporation, and attested by its seal, and shall be thereupon submitted to judicial inspection; * * * and thereupon the said corporation shall be a body corporate, in fact and in law, under the name set forth in the said certificate, and shall be subject to all the provisions, and entitled to all the powers and privileges, conferred by this article, so far as the same are applicable to the said corporation; and the former charter of said corporation shall be deemed to be thereupon surrendered, and all the property and assets belonging to the said former corporation, of whatsoever nature and description, and all the debts and liabilities of said former corporation, of whatsoever nature or description, shall * * * be devolved upon the said new corporation, which shall, for this purpose, be regarded as sub-

stituted by operation of law in the room and stead of the former corporation, and all pending proceedings at law or in equity, on behalf of or against said former corporation, may be amended at the instance of either party, so that the new corporation shall be substituted as complainant, plaintiff, or defendant, as the case may require, in lieu and in place of the old corporation."

The charter of the Western Telegraph Company expired on the fourth of February, 1877, but on the eighth of January, 1877, the company, availing itself of the privileges of sections 74, 75, and 76 of the act of 1868, c. 471, formed a new corporation under the name of the "Western Telegraph Company of Baltimore City," to continue for 40 years. At the expiration of the term of the original charter, the Baltimore & Ohio Railroad Company notified all the several telegraph companies that the licenses granted by the contract of 1853, and the supplementary contract of 1855, were at an end, and that if there were any wires or instruments on the line belonging to either of the telegraph companies they would be given up at once on application to the railroad company. This bill was filed by the Western Union Company to enjoin the railroad company from preventing its operation of the line, and from permitting any other company to use it.

The court of appeals of Maryland, at the October term, 1876, decided in *Sprigg v. Western Telegraph Co.* 46 Md. 67, that the stockholders of the Western Telegraph Company had the legal right to form a new corporation under the act of 1868, c. 471, and that for this purpose the requisite majority could bind the minority. But whether the corporation thus formed would be a new one, or simply a continuation of the old one, was not decided. The facts did not present that question, for the suit was begun by the holder of but two shares of the stock of the old corporation to enjoin the company and the majority stockholders, who were made defendants, from reorganizing under the act. The holding was that there was nothing in the original act of incorporation "to prevent a majority of the stockholders from organizing under the act of 1868," and "that the proposed organization * * * is not liable to the objection that it will effect a radical and fundamental change in the objects and purposes for which the original company was chartered."

The question which meets us at the outset is whether the license granted to the Western Telegraph Company by the agreement of 1853 is still in force? The license was to continue "so long as the said parties of the second part exist as a telegraph company." The "parties of the second part" were the Western Telegraph Company. That company was, by its charter, limited in its existence to 30 years from February 4, 1847, or to February 4, 1877. If the rights of the parties rested on this charter alone, no one would contend that either the company or its stockholders were entitled to use the railroad as a way for a telegraph line after the date of the expiration of the charter. This makes it necessary to inquire whether the formation of the "Western Telegraph Company of Baltimore City," under the act of 1868, operated in law as a prolongation of the existence of the Western Telegraph Company so as to avoid the termination of the license. The language of the act of 1868 is that "any corporation heretofore formed * * * may cause itself to be incorporated under this ar

ticle." And if the necessary vote at the meeting of the stockholders "is given in favor of causing said corporation to be incorporated under this article," the meeting must "determine the number of shares into which the stock of the new company shall be divided, and the rule of apportionment thereof, and the persons who shall be entitled to hold the same, and also the name by which said new corporation shall be known." After this is done, a certificate must be made out showing "the proposed name of the new corporation, which shall always include the name of the county or city in which it may be formed, the former name of said corporation, the objects or purposes for which the new corporation is sought, the term of its existence, not to exceed forty years, and the articles, conditions, and provisions under which the incorporation is formed, the place or places of business where the operations of the corporation are to be carried on, and the place in this state in which the principal office of the corporation will be located, the amount of the capital stock of the corporation, the number of shares, and the amount of each share, and the number of trustees, directors, or managers who shall manage the concerns of the corporation for the first year." When this certificate shall be judicially determined to be "in conformity with law," and properly recorded, "the said corporation shall be a body corporate in fact and in law, under the name set forth in the said certificate, and shall be subject to all the provisions, and entitled to all the powers and privileges, conferred by this article, so far as the same are applicable to the said corporation, and the former charter shall be deemed to be thereupon surrendered, and all the property and assets of the former corporation, * * * and all the debts and liabilities, * * * shall * * * be devolved upon the said new corporation, which shall, for this purpose, be regarded as substituted by operation of law in the room and stead of said former corporation. * * *"

From this it seems to me clear that the "Western Telegraph Company of Baltimore City," formed under the act of 1868, is, in fact and in law, a different corporation from the "Western Telegraph Company" incorporated in 1847. The corporation under the act of 1868 was, by operation of law, invested with all the property and subjected to all the liabilities of that of 1847, but as corporations they were separate and distinct things. That under the act of 1868 had the same stockholders, at first, as that of 1847; but it had a new name and new powers, and was subject to new obligations. The general objects and purposes of the two corporations were the same, but their corporate existences different. The act of 1868 does not provide for the continuing of old corporations, but for the creation of new ones; not for amending charters, but for surrendering them. The old corporation is to go out of existence, when the new one comes in, and thus the new cannot be a prolongation of the old.

Such being the case, I am of the opinion that the license of 1853 expired, by its own limitation, on the fourth of February, 1877, if not

on the eighth of January previous, when the charter of the Western Telegraph Company was surrendered and that to the Western Telegraph Company of Baltimore City obtained. The grant was for so long a time as the Western Telegraph Company existed as a telegraph company; that is to say, so long as the Western Telegraph Company existed as a telegraph corporation. The license lasts no longer than the corporation to which it was granted. The ninth clause of the contract does not affect this question, because the Western Telegraph Company has never resumed operations. It was dissolved on the eighth of January, or, at the latest, on the fourth of February, 1877. After that time the Western Union Telegraph Company, as lessee of the line, stands in no better situation than its lessor, the Western Telegraph Company.

I have not referred to the peculiar description of the Baltimore & Ohio Company in the contract, as *parties* of the first part, and the Western Telegraph Company, as *parties* of the second part, because to my mind it has no significance. The railroad company contracted with the telegraph company, and there is nothing whatever in the agreement to indicate that they, or either of them, represented or intended to represent their stockholders in any other way than in their corporate capacities. This peculiarity in the language of the contract is due to the form of expression adopted by the draughtsman, rather than to any matter of substance affecting the agreement.

This disposes of the case, so far as the further use of the line by the Western Union Company is concerned. The license from the Baltimore & Ohio Company having expired, the telegraph company has no longer a right to use the railroad for the operation of its telegraph line. Its rights in that particular expired with those of the Western Telegraph Company, and, as the license to the Western Telegraph Company was only to continue so long as that company existed, it did not pass, as property of that company, to the Western Telegraph Company of Baltimore City, upon its formation.

The only remaining questions are in reference to the rights of property in the material composing the physical structures of the line. The Western Union Company, as lessee, does not own any of this material, unless it may the wire put up in 1872. It acquired from the Western Telegraph Company a right to use the line as built so long as that company could use it. When its right to use the line was gone, all its interest in the physical structure was gone, except so far as it may have itself built the line or furnished the material. So far as the posts and the two wires put up by the railroad company are concerned, the Western Telegraph Company of Baltimore City can alone make claim to them. Such property rights as the Western Telegraph Company had in them passed to the new company on its organization under the operation of the act of 1868. As to the wire put up by the Western Union Company, the facts are not sufficiently devel-

oped, either by the pleadings or the evidence, to enable me to determine satisfactorily what the rights of the parties are.

In my opinion, therefore, the bill should be dismissed, but without prejudice to a further action for the recovery of the wire put up by the Western Union Company.

BOND, J., concurred.

ERVIN and others v. OREGON RY. & NAV. CO. and another.

(Circuit Court, S. D. New York. June 6, 1884.)

1. CORPORATIONS—RIGHT OF MAJORITY OF STOCKHOLDERS TO WIND UP—MOTIVES.

A majority of stockholders were authorized by law to dissolve the corporation and distribute its property, and availed themselves of their power to do so according to the forms of law, but sold the property to themselves at an unfair appraisal. *Held* that, although the court would not inquire into the motives of the majority as to those acts which were within the exercise of their legal powers, they had no right to sell the property to themselves at an unfair price, and must account to the other stockholders for its value.

2. SAME—APPROPRIATION OF CORPORATE PROPERTY.

Although a majority may have full power to bind the whole body of stockholders in respect to all transactions within the scope of the corporate powers, they have no right to exercise that power in order to appropriate the corporate property to themselves at an inadequate price.

3. SAME—SALE OF CORPORATE PROPERTY—RIGHTS OF MINORITY—ACCOUNTING.

Where the corporation is practically dissolved, and all its property sold by the action of the directors and a majority of the stockholders, the minority stockholders may maintain a suit in equity directly against the persons who have thus dissolved the corporation, and who have purchased the property, for an accounting, without making the corporation a party.

4. SAME—PARTIES—ACTION TO COMPEL ACCOUNTING.

Such a suit may be brought by one or more of the minority stockholders without making the other minority stockholders parties.

In Equity.

Butler, Stillman & Butler, for complainants.

Holmes & Adams, for defendants.

WALLACE, J. The principal questions raised by the demurrers to this bill are whether the Oregon Steam Navigation Company is not an indispensable party whose absence renders the bill defective, and whether the bill states a cause of action in equity. The substantive allegations of the bill are that at the time the several transactions complained of took place the complainants were stockholders of the Oregon Steam Navigation Company, a corporation of the state of Oregon; that in 1879 that company had a capital of \$5,000,000, divided into 50,000 shares, was prosperous, owned large properties, and had a valuable business; that in that year the defendant Villard conceived the scheme of acquiring control of the company and its property for his own benefit, and with this view caused another

corporation, the defendant the Oregon Railway & Navigation Company to be organized under the laws of Oregon, to which the property of the first-named company was to be transferred; that he procured himself to be elected president of the new company; that he then purchased 40,000 shares of the old company and transferred his purchase to the new company, receiving for himself a large profit by the transaction; that thereupon he and the new company concerted and consummated the design of winding up the old company, of acquiring all its property and business for the benefit of the new company, and of excluding the minority stockholders of the old company from their just interest in the assets; that in this behalf they caused a board of directors favorable to their scheme to be chosen for the old company by voting the stock owned by the new company, and, under a statute of Oregon, which permits such a corporation upon a vote of a majority of the stock to dissolve and dispose of its property, the defendants procured the dissolution and a sale and transfer of all the property and franchises of the old corporation to the new corporation.

Respecting the proceedings which took place, and the manner in which the dissolution of the old company and the transfer of its property and franchises to the new company was effected, the bill sets forth with particularity and in detail the history of the transactions. Villard, who was president of the new company, was elected president of the old company, and the directors of the new company were elected directors of the old company. Resolutions were then adopted concurrently by the board of directors of each company, on the part of the old company proposing, and on the part of the new company accepting, the purchase of all the property and franchises of the old company by the new company, at a valuation to be fixed by two appraisers, one to be selected by the old company, and one by the new company. The appraisers were selected, and agreed upon a valuation of the property at \$2,300,000, which was equivalent to 46 per cent. of the par value of the stock of the old company. Thereupon the requisite corporate action was taken by both companies to sanction and confirm the transfer at the price fixed by the appraisers, concluding with a meeting of the stockholders of the old company called to effect a valid dissolution. At this meeting 46,249 shares of stock were represented, all of which were owned by the new company, or in its interest, except 456 shares owned by one Goldsmith, who had opposed the proceeding, but had been placated by the defendants. By the vote of the stock owned by the old company, a resolution was adopted confirming all that had been done by the directors; confirming the sale at the appraisalment which had been made; authorizing the dissolution of the corporation; and directing the directors to carry into effect the dissolution, the sale, the settling of its business, the division of the proceeds of the sale among the stockholders, and the cancellation of all outstanding certificates of stock with all

practicable dispatch. The resolution, so far as it relates to the dissolution, is as follows: "That the said Oregon Steam Navigation Company be and hereby is dissolved, to take effect upon the transfer of the company's property, the settling of its business, and the division of its capital stock." The board of directors then met and took formal action pursuant to the resolution of the stockholders; and thereafter sent notice, under the company's seal, and signed by its treasurer, to all stockholders, stating that the company was duly dissolved, all its property conveyed to the Oregon Railway & Navigation Company, and that a final dividend of \$46.97 per share had been declared payable to each stockholder upon the surrender of his certificates of stock.

The bill also alleges that the property of the old company thus sold was appraised at a grossly inadequate price; that no money passed or has ever been actually paid by the new company to the old company, although the directors went through the form,—those of one company of delivering, and those of the other of accepting, a check for the purchase money; that such stockholders of the old company as have surrendered their certificates of stock have been paid the final dividend by the new company, and the new company now holds itself out as ready to pay the remaining stockholders in the same way.

The complainants having refused to consent to the proceedings which have taken place, or to participate in the so-called dividend, have filed this bill in behalf of themselves as minority and dissenting stockholders, and in behalf of all other stockholders who may desire to join. The prayer for relief is, among other things, that the several acts of the defendants complained of be declared fraudulent and void; that the defendants be adjudged to pay complainants, and such other stockholders as may join them, their proportionate share of the value of all the property and franchises of the Oregon Steam Navigation Company; and that the Oregon Railway & Navigation Company be adjudged to hold the property it acquired as trustee for the complainants, in proportion to their holdings of stock in the former company, and that complainants have a lien thereon.

For the purposes of the demurrers, and assuming the facts alleged in the bill to be true, the case disclosed may be briefly stated as follows: A majority of the stockholders of a corporation resolve to avail themselves of their power as a quorum to sacrifice the interests of the minority stockholders for their own profit, by dissolving the corporation, and selling its property and franchises to themselves at half their real value. This scheme they have carried out, and now retain its fruits. They have thrust out the complainants, the minority, from their position as stockholders, terminating their relations with the corporation as such, and have deprived them from realizing what would belong to them upon a fair disposition and division of the corporate property. The defendant the Oregon Railway & Navigation Company is this majority of stockholders, and the defendant Villard is a privy and confederate in the whole transaction.

It is to be observed that the proceedings of the defendants were not outside of the charter or articles of association of the corporation, but, on the contrary, were carefully pursued according to the form of the organic law. They had a right to dissolve the corporation and dispose of its property and distribute the proceeds. The minority cannot be heard to complain of this because the laws of Oregon permitted it, and because it is an implied condition of the association of stockholders in a corporation that the majority shall have power to bind the whole body as to all transactions within the scope of the corporate powers. *Durfee v. Old Colony & F. R. R. Co.* 87 Mass. (5 Allen,) 242; *Bill v. Western Union Tel. Co.* 16 FED. REP. 19. Nor does it matter, in legal contemplation, that the majority were actuated by dishonorable or even corrupt motives, so long as their acts were legitimate. In equity, as at law, a fraudulent intent is not the subject of judicial cognizance unless accompanied by a wrongful act. *Clarke v. White*, 12 Pet. 178. In other words, if the majority had the right to wind up the corporation at their election, and they availed themselves of it in the mode which was permitted by the organic law of the corporation, neither a court of law or equity can entertain an inquiry as to the motives which influenced them. The power to do this was undoubted. The right of the majority to sell the property to themselves at their own valuation is a very different matter; it cannot be implied from the contract of association, and will not be tolerated by a court of equity. As is said by MELLISH, L. J., in *Menier v. Hooper's Telegraph Works*, 9 L. J. Ch. App. Cas. 350, 354. "Although it may be quite true that the shareholders of a company may vote as they please, and for the purpose of their own interests, yet the majority cannot sell the assets of the company and keep the consideration, but must allow the minority to have their share of any consideration which may come to them." If the majority sell the assets to themselves they must account for their fair value. They cannot bind the minority by fixing their own price upon the assets. A majority have no right to exercise the control over the corporate management which legitimately belongs to them for the purpose of appropriating the corporate property or its avails to themselves, or to any of the shareholders, to the exclusion or prejudice of the others. *Brewer v. Boston Theater*, 104 Mass. 378, 395; *Preston v. Grand Collier Dock Co.* 11 Sim. 327; *Hodgkinson v. National Live Stock Ins. Co.* 26 Beav. 473; *Atwood v. Merryweather*, L. R. 5 Eq. 464, note.

In *Gregory v. Patchett*, 33 Beav. 595, the property of a company was transferred to two shareholders in lieu of their shares, and the company was thereby practically put an end to, and the debts were thrown on the remaining shareholders. This was sanctioned by a majority of the shareholders at a general meeting; but it was held that the majority could not bind the minority in such a transaction, and it was set aside.

These observations sufficiently indicate the conclusion that the complainants are entitled to equitable relief upon such a state of facts as is exhibited by the bill. The question remains whether that relief can be obtained in the present suit. The defendants insist, by their demurrers, that the Oregon Steam Navigation Company is an indispensable party to the controversy. They also insist, in argument, that all of the stockholders of that company are indispensable parties, if the corporation is not a party. There does not seem to be any good reason why the Oregon Steam Navigation Company should be deemed an indispensable party. It is not a going concern. If the sale of the property should be set aside the corporation would be only a dry trustee for the purpose of dividing the property among the beneficial owners. The reason why such a trustee is required to be a party to a suit respecting the property is in order to bind the legal title by the decree. But here there is no trustee to dispute the legal title with the defendants. The majority stockholders exercised their lawful power to dissolve the corporation and sell its property, and they thus terminated the conventional relations between the corporation and its stockholders. They could not, however, defeat the equitable owners of the assets from following them into the hands of the defendants, and calling upon the defendants to account for their fair value. Although the resolution of the last stockholders' meeting declared that the corporation "was thereby dissolved, to take effect on the transfer of the company's property, the settling of its business, and the division of its capital stock," the board of directors were constituted the body to carry the resolution into effect. They proceeded to carry it into effect by settling its business, disposing of all its property, declaring a final dividend, and notifying the stockholders that the corporation was dissolved. Generally, it is no doubt true that the legal existence of a corporation only ceases when the surrender of its franchises has been accepted by the state. But the statute of Oregon, authorizing a dissolution upon the majority vote of stockholders, would seem to be an acceptance in advance. Although the corporation may not be effectually extinguished as against creditors, there is no difficulty in concluding that it is so far extinct that it cannot stand in the way of the enforcement by its former stockholders of their equitable rights to a fair accounting from those who have assumed to distribute its assets. *Gregory v. Patchett*, 33 Beav. 597-608; *State Savings Ass'n v. Kellogg*, 52 Mo. 583; *Perry v. Turner*, 55 Mo. 418.

It is urged that if the corporation is not a necessary party to the suit, no relief can be had unless all the stockholders are made parties. This point is not specifically presented by the demurrers; but if no relief can be decreed until such absent parties are brought in, it would seem that the objection might be considered, upon the demurrer for want of equity. See *Vernon v. Vernon*, cited in Story, Eq. Pl. § 543, note. Who these stockholders are, and whether they are within the

jurisdiction of the court, does not appear. If the only relief prayed by the bill, or which could be granted upon the facts alleged, were a rescission of the sale of the property, the objection might be fatal. *Ribon v. Railroad Cos.* 16 Wall. 446. No relief could be granted without affecting the rights of every stockholder. But the redress which is given to a *cestui que trust*, or an equitable owner of a fund, in case of a fraudulent purchase by the trustee or other fiduciary, is either rescission or account, at the election of the injured party. *Bisp. Eq.* 239. Here the complainants pray for an account, and the decree may limit them to that relief. No rights of the other stockholders will be affected if such relief is granted to the complainants. Although the defendants may be called upon to meet similar claims in behalf of other stockholders, that circumstance does not stand in the way of the complainants. It suffices that relief can be granted which will not affect the rights of other stockholders. Nor does it matter that there may be other stockholders of the corporation who co-operated with the defendants in the wrongs complained of. The theory of the bill is that these defendants, while occupying the fiduciary relation towards the complainants of equitable joint-owners of the property, bought it themselves at an inadequate price, and by unfair means. They are in the position of *quasi* trustees, who have been guilty of a fraudulent breach of their trust. The right of action in such case is *ex delicto*, and the tort may be treated as several or joint, and the trustees have no right of contribution as between themselves. *Peck v. Ellis*, 2 Johns. Ch. 131; *Miller v. Fenton*, 11 Paige, 18; *Heath v. Erie R. Co.* 8 Blatchf. 347; *Wilkinson v. Parry*, 4 Russ. 272; *Franco v. Franco*, 3 Ves. 75.

In conclusion, it may be said that it does not lie with the defendants, who claim to have sold and divided the assets of the corporation among those who were stockholders, so that each is entitled to a specified proportion as a final dividend, to insist that others, who were also stockholders, have any interest in the question whether the sum which has been set aside for the complainants is their fair share or not. The other stockholders can acquiesce or ratify if they please. The complainants cannot be affected by their action, and do not have any interest in it. The complainants occupy substantially the position of creditors of the corporation, seeking to obtain satisfaction of their just claim out of the fund in the hand of the defendants, and having an equitable lien. Such creditors can pursue the fund wherever they can find it, without making the stockholders parties, or bringing in all who are liable to account to the fund or have an interest in its distribution. *Hatch v. Dana*, 101 U. S. 205.

These views meet the important questions raised by the demurrers. The other grounds of demurrer have been considered, and are deemed to be untenable.

The demurrers are overruled.

CURRY and another, Assignees, etc., v. McCauley and others.

(Circuit Court, W. D. Pennsylvania. May 23, 1884.)

1. MORTGAGE—ASSAILABLE FOR CONSTRUCTIVE FRAUD—BANKRUPTCY—MORTGAGEES' SURETIES ON BOND.

Where a mortgage is given to indemnify the mortgagees as sureties of a mortgagor on a bond, the consideration being legal and sufficient, it is only assailable for constructive fraud as a preference forbidden by the bankrupt law.

2. MORTGAGE—EXECUTION AND DELIVERY—COMPLETE TRANSACTION—VALIDITY.

When a mortgage is executed and delivered, nothing further is necessary to its validity as a complete transaction.

3. FRAUD ON CREDITORS—BANKRUPTCY PROCEEDINGS—MORTGAGE—FAILURE TO RECORD—TWO MONTHS LIMITATION.

Where a statute forbids a preference of creditors within two months prior to the commencement of bankruptcy proceedings, and a mortgage is given by the bankrupt long before the proceedings in bankruptcy, but is not recorded until within the two months prior to the commencement of such proceedings, there being no evidence of fraudulent intent in making it, the mortgage will not be declared fraudulent on account of the failure to previously record. *Blannerhasset v. Sherman*, 105 U. S. 100, distinguished.

3. BANKRUPT CREDITORS—BENEFIT—EQUITABLE INTEREST IN MORTGAGE.

Where a party has simply an equitable interest in a mortgage, a court will not establish an unwilling connection with it on her part, in order that a benefit may be conferred upon other creditors of a bankrupt.

4. COURT OF EQUITY—JURISDICTION—BANKRUPTCY—FAILURE TO ACCOUNT FOR MORTGAGE SECURITY.

Where a bankrupt act prescribes the mode of proceeding and the penalty, when the holder of a mortgage security refuses to account for it, a court of equity will not take jurisdiction of it.

5. SAME—ADEQUATE REMEDY AT LAW.

Where there is a remedy plain and adequate at law, a court of equity will not take cognizance of a claim.

In Equity. Appeal from the decree of the district court.

Geo. M. Reade and Geo. Shiras, Jr., for appellants.

B. L. Hewitt and S. Schoyer, Jr., for Mrs. Freed.

McKENNAN, J. Several distinct causes of complaint are conglomerated in this bill: (1) It is alleged that McCauley and Baker, two of the respondents, were sureties of the bankrupt in a bond given to Dr. Alexander Johnston, the executors of whose will transferred the same to his daughter, Mrs. Jane Freed; that some time after the execution of this bond the bankrupt executed and delivered to McCauley & Baker a mortgage upon the real estate described therein to indemnify them as his sureties in said bond; that the said mortgage was a fraudulent preference, and therefore praying that it be so declared, and ordered to be given up to be canceled. (2) It is further alleged that Mrs. Freed, being the owner of the bond aforesaid, and beneficially secured by the said mortgage, made proof of said bond as an unsecured claim against the bankrupt's estate, and presented the same as such at a general meeting of the bankrupt's creditors, and therefore praying that the proof of her claim be expunged, and she be ex-

cluded from participating in the distribution of the bankrupt's estate unless she shall renounce "all present and future claims and title to any benefit and advantage to be derived from said mortgage whatsoever." (3) And it is further alleged that John Lloyd entered into the possession and enjoyment of the mortgaged premises; and praying that an account be taken of the rents and profits of said premises during the period of his occupancy thereof.

Objectionable as this bill is, then, on account of its blending matters of independent and incongruous character, it has been fully discussed upon its merits, and hence it is not improper to consider and dispose of it in that aspect. The mortgage referred to in the bill was given to indemnify the mortgagees, as the sureties of the mortgagor, in a bond executed and delivered to Dr. Alexander Johnston on the first of May, 1874. It was therefore founded upon a legal and sufficient consideration, and, if assailable at all, it can only be for constructive fraud as a preference forbidden by the bankrupt law. The mortgage is dated May 8, 1875, and was recorded on the seventeenth of September, 1875; and although the bill alleges that it was antedated and was withheld from record in pursuance of a secret and unlawful agreement to that effect, yet these allegations are unsupported by sufficient proof. Hence, the point of time with reference to which the validity of the mortgage is to be determined is the eighth of May, 1875. But the bankruptcy proceedings were not commenced until November 11, 1875, so that the statutory limitation of two months within which the giving of a preference is forbidden had elapsed, and the mortgage was not open to question.

It is, however, urged that, as the mortgage was withheld from record until within two months from the filing of the petition in bankruptcy, the statutory period is to be computed from the date of recording. But when the mortgage was executed and delivered nothing further was necessary to its validity as a complete transaction. It has therefore been held in Pennsylvania, by a long series of decisions, that, as between the parties, a mortgage takes effect upon delivery, and that an unrecorded mortgage is good against an assignee for the benefit of creditors, the heirs of the mortgagor, and every one claiming under him who had notice of the mortgage before his rights attached. And it has been held by the supreme court that a preferential security must be obtained within the period prescribed by the bankrupt law to render it questionable, and that the acquisition of a lien, by placing it upon record within that period, will not subject it to the operation of the prohibitory provisions of the act. *Clark v. Iselin*, 21 Wall. 375, etc.; *Watson v. Taylor*, Id. 378. Nor are these and other decisions of the supreme court to the same effect overruled and changed by *Blennerhassett v. Sherman*, 105 U. S. 100. In that case the mortgage in question was held to be actually fraudulent, and therefore void at common law, because given in pursuance of "a premeditated and con-

trived purpose to deceive and defraud other creditors of the mortgagor." Almost the entire opinion of the court is taken up with a discussion of the evidence to demonstrate this, and, certainly, when this conclusion was reached, the pivotal question in the case was effectually disposed of; but it is added that "a mortgage, executed by an insolvent debtor with intent to give a preference to his creditor, who has reasonable cause to believe him to be insolvent, and knows it to be made in fraud of the provisions of the bankrupt act, and who, for the purpose of evading the provisions of that act, actively conceals and withholds it from record for two months, is void under the bankrupt act, notwithstanding the fact that it was executed more than two months before the filing of a petition in bankruptcy by or against the mortgagor." This must be understood as predicated of the special facts in the case, from which it was apparent that the mortgagor and mortgagee were animated throughout by "a premeditated and contrived purpose to deceive and defraud other creditors of the mortgagor." There is certainly no equivalent evidence of fraudulent intent in this case. The mortgage was delivered to the mortgagees without qualification, but with the unrestricted right on their part to record it whenever they thought proper to do so, and it was not recorded for over four months simply for the reason that they did not regard it as necessary for their protection to record it sooner. I am of opinion, therefore, that the validity of the mortgage cannot now be questioned.

Dr. Johnston died before the date of the mortgage, and neither his executors or Mrs. Freed, their assignee, are parties to it. They had no knowledge of its execution, and are not, therefore, privy to it in any sense. It was a transaction solely between the bankrupt and his sureties in the bond to Dr. Johnston, and was obviously intended to indemnify them as such sureties. One of its conditions is that the debt for which they were sureties should be paid by the bankrupt mortgagor. Hence it is claimed that Mrs. Freed stands in such a relation to the transaction as to furnish a foundation for the relief prayed against her. That Mrs. Freed is not a holder of the mortgage, in any legal sense, is clear, and whatever right in equity may be open to her to claim the benefit of it as a security for her debt held by the sureties for their indemnification, she cannot be compelled to assume the position of a holder of it. That is dependent upon her own option, guided solely by her irresponsible judgment as to what is best for her interests. She has not done anything to change her equitable relation to it, and the court cannot establish an unwilling connection with it on her part that a benefit may thereby be conferred upon the other creditors of the bankrupt. But if she were a holder of it as a security, the bankrupt act prescribes the mode of proceeding in such case, and the penalty for refusal to account for it. For this reason alone the prayer of the bill ought to be refused.

The claim set up against John Lloyd is not cognizable in equity.

His liability is purely legal, and the law furnished a plain and adequate remedy.

Upon the whole case the complainants are not entitled to the relief prayed, and the bill must be dismissed, with costs.

STEVENSON v. MAYOR AND ALDERMEN OF THE CITY OF CHATTANOOGA.

(Circuit Court, E. D. Tennessee, S. D. April 17, 1884.)

EASEMENT—RIGHTS IMPLIEDLY RESERVED BY OWNER IN STREET DEDICATED TO A CITY.

The municipal authorities of a town cannot deprive the owner of land, who has simply dedicated to the public an easement to pass over it, of any use of the land dedicated not inconsistent with the full enjoyment of the easement.

In Equity.

Key & Richmond, for complainant.

H. M. Wiltse, for respondent.

KEY, J. Complainant alleges that he is the owner of a parcel of land lying on the Tennessee river, in the northern part of the city of Chattanooga. Three of the streets of the city—Market, Broad, and Chestnut—run, as he insists, to this land, but have not been extended through it to the river. He says that for many years he has used this real estate as a wharf, and has expended large sums of money in preparing and improving it, and keeping it in repair, for the purposes to which it has been appropriated. The public, for many years, have used it as a wharf, and he says he has charged and received wharfage for all such goods and merchandise as have been discharged, from vessels navigating the river, upon the wharf.

It appears that on May 18, 1883, the corporate authorities of Chattanooga passed the following ordinance:

An ordinance to provide for defining the streets of the city at the Tennessee river, and to make it a misdemeanor for any person to collect wharfage within the limits of any street.

Section 1. Be it ordained, by the mayor and aldermen of the city of Chattanooga, that the city engineer shall cause stakes or monuments to be set so as to indicate the boundaries of streets at the Tennessee river.

Sec. 2. Be it further ordained, that it shall be a misdemeanor for any person or company or incorporation to collect wharfage, or in any way interfere with or obstruct the discharge of cargoes of freight, within the boundaries of streets as so indicated, or with the removal of same after it is discharged, on any pretense or claim of a right to wharfage on such freight.

Sec. 3. Be it further ordained, that it shall be a misdemeanor for any person to charge or collect any wharfage or towage for the landing of any boat or craft within the limits of any street, as defined by the stakes or monuments above provided for, or in any way to interfere with the landing of

boats or the discharge of their cargoes within such streets, on any claim or pretext of a right to collect wharfage or towage.

Sec. 4. Be it further ordained, that any person convicted of any of the offenses herein described shall be subject to a fine of not less than ten dollars nor more than fifty dollars, at the discretion of the recorder, for each and every offense.

Sec. 5. Be it further ordained, that this ordinance shall take effect and be in force from the date of its passage.

It is quite evident that the complainant never conveyed that part of this property claimed for the streets to the city, or that the city, by any authoritative act, had appropriated the land to that purpose, or paid complainant its value. But, I think, it is equally clear that the public has used these streets and regarded them as such. Buildings have been erected upon the blocks adjoining them, but not upon the streets. They have been used and are necessary as approaches to the wharf, and to close them would virtually cut the public off from the wharf, and Market street leads to, and for many years has been used as, an approach to a public ferry. Besides all this, complainant, in some of his deeds of lease and conveyance, has described the property as embracing these streets. I conclude, therefore, that the land occupied by these streets was dedicated by complainant to that use, or the public has become entitled so to use them by prescription. But this use is a mere easement. The legal title remains in complainant; or, if not, the title would revert to him were the streets discontinued, and the public cease to use them as public highways. The city or the public are not entitled to their use for any other purpose. The law of the state imposes upon the defendant the duty of keeping these streets in repair, and free from obstruction, so that the people may pass over them conveniently. But the manifest purpose of the ordinance is, not to open and improve these streets for travel, but it is to convert the *termini* of the streets at the river into wharves, at which boats and other water-craft may land and discharge their cargoes without the payment of wharfage or other charge. The effect of the ordinance is, after the complainant, by the authority of the city, had established and improved his wharves, and opened streets to them through his lands, to take away the value and use of his wharves, by converting the streets which he had dedicated to the public for one use, to another and different purpose. Substantially, it is depriving him of the use of his property without compensation. I think it plain and palpable that this cannot be done. If the defendant allow freights to be discharged on these streets, and boats to be landed at them, it cannot prevent complainant from entering thereon and collecting such wharfage as the law and ordinances of the city authorize. He has the right to enter upon those streets to collect the fees or charges, if defendant direct or permit the vessels and goods to land there. He has parted with no right to the land thus used as streets, except that he has given it to the public to use as a highway. He has not given to the city or the public the right to use it as a free

wharf. It would be inequitable and violative of his constitutional rights, both state and federal, thus to deprive him of the value and use of his property; and the provisions of the ordinance referred to, so far as they undertake to do this, are void.

The defendant will be perpetually enjoined from enforcing, as against the complainant, the provisions of the second, third, and fourth sections of the ordinance of May 18, 1883, or from otherwise preventing him from collecting such wharfage as he may be entitled to.

The court being of the opinion that defendant is liable for the amount of such actual wharfage and towage as complainant has been prevented from collecting by reason of the provisions of the ordinance mentioned, the clerk of this court, as special commissioner, will hear proof, and report, at as early a day as convenient, what the amount of such wharfage and towage is; bond and security having been required of the defendant for the payment thereof at the commencement of this litigation, upon condition that defendant failed therein.

(May 9, 1884.)

Motion for an Attachment for Disobedience to an Injunction.

Key & Richmond, for complainant.

H. M. Wiltse, for respondent.

KER, J. The bill was filed in this cause, alleging that respondent, without authority, had run Market, Broad, and Chestnut streets through his wharf property to the Tennessee river; had ordained that steam-boats and other water-craft might land at the ends of these streets and discharge their cargoes upon the streets, and has prevented complainant's agents from entering thereon to collect wharfage. A decree was but a few days ago pronounced in the cause, declaring that the streets named had, by dedication, been extended to the river, and the public had an easement therein,—that is, to use them as streets,—but that respondent could not prevent complainant and his agents from entering upon these streets and collecting wharfage upon such merchandise as might be discharged thereon; and respondent was enjoined from doing so. Defendant now seems to have changed front, and has declared that boats shall not land and load and unload their cargoes at and upon these streets, and has arrested the master of a boat who has done so. This, complainant alleges, is a violation of the injunction, and he has asked that the mayor of the city, by whose order the arrest was made, be attached for contempt.

Whatever bearing the decree may have on the present attitude of the parties, it cannot be said that the point involved in this contention was explicitly decided in the original cause, and hence there is no ground for the attachment asked; but as the decree alluded to is not final, and as the parties desire a construction of its terms in so far as the present state of the case is concerned, and as the petition and answer raise the question, we may as well do so.

It must be remembered that the parties are in a court of equity. It has already been decided that respondent had no right to throw open the streets above mentioned as wharves, and to prevent complainant from collecting wharfage upon them. Without any change of circumstances, or any difference in the condition of things in the neighborhood of the property, the streets are closed against the landing of boats and the discharge of freights. The position of things is reversed, and for no apparent reason, except that the streets are not allowed to be barred against the entrance of complainant. So soon as they are opened to him they are closed against boats and freight. This is personal legislation, if it may be called legislation, intended to operate against the complainant. If its purpose be to injure and destroy his property or its value, it is but a continuation of the object already expressly enjoined, and should not be tolerated unless the action of respondent is authorized by law.

It should be kept in mind that respondent has paid nothing for these streets, so far as they extend through complainant's property. He converted his property into a wharf and allowed the streets to run through it so that the public might reach the wharf and the river. There is no other use for these streets except for the ferry on Market street. The city has never marked out and graded these streets as such. Broad street cannot be traveled for a considerable distance before the wharf is reached. So undefined and unknown were the boundaries of this portion of the streets that respondent, on the eighteenth day of May, 1883, provided by ordinance "that the city engineer shall cause stakes or monuments to be set so as to indicate the boundaries of the streets at the Tennessee river," and, as already stated, appropriated that section of the streets to free wharves. The respondent did not then consider that it was necessary to open the streets, but it provided that they should be defined and marked so that the public might use them as wharves. Now that they cannot be so used they are thrown open, and boats and goods warned away from them. These streets, except Market, and the wharf are precisely alike in grade, in appearance, in construction, and in all other respects. They are alike open to travel. Vehicles pass over the wharf just as they do the streets, and there is nothing to indicate where one begins or the other ends, unless it be the stakes provided for by the ordinance of May 18, 1883. The public have used the streets and the wharf indiscriminately, and for many years, and such use is the most convenient that can be made consistent with the objects to which the property has been devoted. No new public necessity or convenience has arisen to be met by a change in the character of the property. It was made into a wharf and the streets dedicated to its use as such. The city was not bound to accept the property, and has not done so by any formal act, unless the ordinance of May 18, 1883, be considered such formal acceptance, and that act was in derogation of the original object of the dedication. It is only by long

user that such acceptance can be presumed, and that user has been consistent with the original purpose.

At common law, a dedication does not pass a fee or freehold in the soil, nor give any right to the profits of the soil. It only serves as an estoppel *in pais* to the owner of the soil to assert any rights of possession inconsistent with the enjoyment of the uses to which the dedication was made. Washb. Easem. 220. A dedication may be made without writing by act *in pais* as well as by deed. It is not at all necessary that the owner should part with the title which he has, for dedication has respect to the possession, and not the permanent estate. Its effect is not to deprive a party of his land, but to estop him, while the dedication continues in force, from asserting that right of exclusive possession and enjoyment which the owner of property ordinarily has. Where, as in the case of a highway, the public acquire but a mere right of passage, the owner, who makes the dedication, retains a right to use the land in any way compatible with the full enjoyment of the public easement. Id. 216; *Hunter v. Trustees*, 6 Hill, 411; *Tallmadge v. East River Bank*, 26 N. Y. 108; *Dubouque v. Maloney*, 9 Iowa, 455. The public takes no more than the owner gives. Where a plat of land has been dedicated as a public square, the authorities of the town were prohibited from making use of the land for purposes inconsistent with its use as a public square. *Abbott v. Mills*, 3 Vt. 521; *State v. Catlin*, Id. 530; *Pomeroy v. Mills*, Id. 279; *Cincinnati v. White's Lessees*, 6 Pet. 431. It follows that the municipal authorities cannot deprive the owner of land, who has simply dedicated to the public an easement to pass over it, of any use of the land dedicated not inconsistent with the full enjoyment of the easement.

In this case the result deducible from the foregoing principles has been admitted and strengthened by respondent's action. May 4, 1870, respondent passed the following preamble and resolution:

"Whereas, doubts exist in the minds of some as to whether the right of wharfage on the river front in Chattanooga belongs to the corporation or to the owners of the fee in the soil, such doubts being calculated to embarrass and delay the improvement of the wharves necessary to accommodate the trade of the town and increase its commerce; and, whereas, the owners of the fee have retained possession of the river banks ever since the establishment of the town, insisting upon their right of ownership of the wharves, and still contending for the same; and, whereas, in the opinion of the board of mayor and alderman, the rights of wharfage belong to the owners of the fee, subject only to the usual control as to rates of charges, kind of improvements to be made, etc.: It is, therefore, in order to put the question at rest,—

"Resolved, by the mayor and alderman of the town of Chattanooga, that they do hereby renounce all claim to the ownership of the wharves within the corporation, reserving the right to keep the same open as wharves in commercial towns may lawfully be kept open, to regulate tolls, charges about landing, and such other legal supervision and control as may be legally exercised over wharves which belong to individuals."

Chattanooga Ordinances 263.

This does not purport to surrender any right the city had, but must be regarded as a high character of testimony in the shape of a solemn and deliberate admission as to complainant's right to wharfage.

Market street differs, in one respect, from Broad and Chestnut. It is, and for many years it has been, used as an approach to a public ferry. This ferry is not at the foot of the street, but above it, and the east side of Market street has been used to go to and from this ferry. The end of the street ending on the river has been a landing for steam-boats and other water-craft, at which goods have been discharged from and loaded upon them. There has been no other use for this part of the street, except for the period during which a military bridge crossed the river at that point. There is no other use for it now. Like Broad and Chestnut, it runs to the river and stops there. It meets nothing but water-craft plying up and down the river, and carries to and from it nothing but the people and freights coming and going up and down the river. There is no inconsistency in its use as a landing for boats and freights, and by the public in a full and free use of the easement of passing over it to and from the river and its boats.

On May 22, 1867, the city passed an ordinance providing—

“That the two ferry landings within the corporate limits of the city shall be and are hereby established and located as follows: The upper ferry landing shall be above the foot of Market street, and as near thereto as convenient for the free passage and use of the ferry-boats, so as not to interfere with the piers of the destroyed military bridge. The other ferry landing shall be immediately below the paved wharf known as the steam-boat landing. All ferry-boats are required to land and discharge passengers and property at one of the ferry landings hereby established. Steam-boats are hereby required to land between the ferry landings.” Chattanooga Ordinances, 265.

This includes the streets in controversy.

From these regulations it appears that the city, up to the passage of the ordinance which led to this litigation, had made no distinction between the use of the streets and of the wharf upon the river front, and not only permitted, but required, that boats should land between the ferry landings, leaving them free to choose the point of landing so as not to obstruct the ferries, without regard to streets.

So far as that portion of Market street is concerned which has been used as an approach to the upper ferry, the city has the right and power to prevent its obstruction; but this part of the street does not extend to the river, as the ferry is above the foot of Market street. Nor can it be denied that the city has the power to protect and preserve the easement given to the public by complainant. It may prevent his inclosure of the streets, or his obstruction of them in anywise inconsistent with their free and full use, but it has no power to prevent his use of them in a manner consistent with the purpose to which they were dedicated, and especially when the usage of years, many of them, has confirmed and approved of that dedication. Should the changes and necessities of the future lead to other means of in-

gress and egress in this part of the city, should it become necessary to establish other ferries, or to build bridges across the river, whether the streets mentioned may be used for such purposes it is not expected that we should now decide, as the question has not arisen, and may never arise. Our determination of the controversy must be controlled by things as they have been and are, so far as they affect it.

I conclude that complainant and all others have the right to land and discharge cargoes in Market, Broad, and Chestnut streets, at the water's edge, and that respondent has not the authority to prevent it. But, so far as Market street is concerned, this right to land must be so exercised as not to obstruct the way to and from the upper ferry.

HENTZ and another v. JEWELL.

(Circuit Court, S. D. Mississippi. June Term, 1881.)

1. CONTRACT FOR FUTURE DELIVERY—VALIDITY.

To render a contract for the future delivery of commodities invalid there must at the time of its creation be a *mutual understanding* between the parties that no delivery is to be made, but the difference between the contract price and the market price at the time fixed for delivery paid.

2. SAME—PROMISSORY NOTE—CONSIDERATION.

Where the consideration for promissory notes is money advanced under contracts for future delivery of cotton, and commissions thereon, the notes are valid.

At Law.

R. S. Buck and E. D. Clark, for plaintiffs.

W. L. Nugent and T. A. McWillie, for defendant.

HILL, J. The questions of fact as well as of law are by written stipulation submitted to the court upon the pleadings and evidence. The suit is brought to recover the amount due upon two promissory notes,—one dated November 1, 1879, for the sum of \$4,727.27, payable 90 days after date, and the other dated November 15, 1879, for \$4,727.26, payable at 90 days, and both signed "J. D. Jewell & Bro." The declaration alleges that W. A. Jewell, the defendant, was a member of the firm of J. D. Jewell & Bro., and one of the makers of said notes.

One of the defenses set up against a recovery upon these notes, and the only one that demands special attention, is want of consideration, the averment of the plea being that the notes were given to the plaintiff for money advanced by them to pay losses sustained by Jewell & Bro. in dealing in what is known as "cotton futures;" that is, contracts for the sale or purchase of cotton to be delivered at a future day, and that the contracts were gambling contracts.

The question raised by this defense is one of no little interest, as these cotton contracts are becoming so numerous and of such immense proportions; still, as I understand the rules by which they are to be governed, they are simple, and not difficult of application.

First, a contract for the sale of cotton, grain, or other commodity at a given price, to be delivered at a future time, is valid and binding, and each party is entitled to enforce the contract against the other; and, in case of failure, to recover damages for non-performance. When it is a purchase for resale, or the article can be immediately supplied by purchase in the market, then the damages consist in the difference between the sum contracted for and the market price of the commodity at the time for delivery. But if it is an article which the purchaser specially needs, and cannot supply without delay and additional expense, then such an amount as will "make him whole" is the measure of damages. If, according to the contract between the parties when made, either may demand a strict compliance when the time for performance arrives, then the contract is valid, even though one of the parties may secretly intend at the time not to comply, if such non-performance is not agreed to by the other contracting party at the time of the contract. In other words, to render the contract invalid, there must, at the time of its creation, be a mutual understanding between the parties that no delivery is to be made, but only the difference in prices paid.

Respectable authorities hold that when the contract is in writing, and such understanding is not expressed, that parol testimony is inadmissible to establish it. Such are the contracts proven in this case; that is, there was no agreement for non-delivery; and, if this rule is applied, it will cut off this defense.

There is, however, no sufficient proof in this case, written or verbal, to show that no delivery was to be made, but only differences paid. To sustain the positions above stated, reference is made to *Lehman v. Strassberger*, 2 Woods, 554; *Clarke v. Foss*, 7 Biss. 540; *Porter v. Viets*, 1 Biss. 177; *Kingsbury v. Kirwan*, 77 N. Y. 612.

The notes were not given in payment for balances upon these cotton contracts, but for money advanced by plaintiffs to pay the differences on contracts made by them upon the orders of J. D. Jewell & Bro., and for commissions as brokers in making said contracts; consequently the same rules do not apply as those between the contracting parties,—the plaintiffs being only agents and brokers advancing the money, and having no interest in the contracts themselves. The notes were given after the money was paid and the services performed; consequently there is no public policy to be subserved by denying the plaintiffs the money they have advanced and compensation for the services performed. This position is sustained by the case of *Lehman v. Strassberger*, which is similar in its facts to the present case. I am satisfied that plaintiffs are entitled to judgment

against defendant for the amount of the notes sued upon and interest. Judgment accordingly.

See *Melchert v. American Union Telegraph Co.* 11 FED. REP. 193, and note, 201; *Union Nat. Bank of Chicago v. Carr*, 15 FED. REP. 438; *Cobb v. Prell*, Id. 774; *Jackson v. Foot*, 12 FED. REP. 37; *Bryant v. Western Union Telegraph Co.* 17 FED. REP. 826; *Irwin v. Williar*, 4 Sup. Ct. Rep. 160.—[Ed.]

HARDMAN and others v. FIREMEN'S INS. CO.¹

Circuit Court, E. D. Louisiana. April 28, 1884.

1. FIRE INSURANCE—DOUBLE OCCUPANCY—SUPPRESSION—INCREASE OF RISK.

If the occupancy by two tenants rather than by one increased the risk, and there had been a failure to disclose that material fact, the policy was void; but if the fact of the additional occupancy did not increase the risk, there was no suppression which was material, and the policy was valid. The test of materiality is whether the disclosure of the fact would have influenced the rate of premium. This question was one of fact and not of law, and was properly left to the jury.

2. WEIGHT OF EVIDENCE.

Where the question to be dealt with by the jury is one for practical judgment, and one witness was sworn upon one side, and seven equally competent upon the other, and the finding of the jury is sustained by the majority of the witnesses, the verdict will not be disturbed, even where the evidence of the single witness opposed to the majority seems more correct to the court.

At Law. On motion for new trial.

E. D. White, for plaintiffs.

Geo. H. Braughn, Chas. F. Buck, and Max. Dinklespeil, for defendant.

BILLINGS, J. This cause is submitted on a motion for a new trial. The action is on a policy of insurance. The defense was that there had been a suppression of, or a failure to disclose, a material fact. The fact insisted on as material was that one story of the large building in which plaintiffs' insured stock was situated, was occupied by the manufacturers of washing-machines, the insurance being on plaintiffs' stock and materials as manufacturers of pianos, and the answer of the plaintiffs to defendant's questions failing to disclose that there was any tenant in the building occupied by them other than themselves. The evidence established that the business of manufacturing "washing-machines" was certainly no more hazardous than that of the manufacturing of pianos. The point urged by the defense was that the fact that two tenants occupied different portions of a building created an increased risk for goods or property situated in the building, as compared with the risk for the same goods when the building was occupied by the owner of the goods. The court charged

¹ Reported by Joseph P. Hornor, Esq., of the New Orleans bar.

the jury that if the occupation by two tenants rather than by one increased the risk, then there had been a failure to disclose a material fact, and the policy was void; but that if, on the other hand, the fact of the additional occupation did not increase the risk, there was no suppression which was material, and the policy was valid; and that the test of materiality was whether the disclosure of the fact would have influenced the rate of premium.

The two points urged by the defendant's counsel are (1) that the question was one of law and not of fact; and (2) that the weight of evidence was so great in favor of the materiality of the fact in question, that, even if the question was properly left to the jury, their verdict should be set aside.

1. I think the question here presented was one of fact, and not for legal inference, and the question was properly left to the jury. *Ang. Fire & Life Ins. Co. § 135; M'Lanahan v. Universal Ins. Co. 1 Pet. 170, 188.*

2. As to the weight of the evidence, the defendants called I. N. Marks, Esq., again, who testified most clearly and positively, as an expert, that the twofold tenancy increased the risk and rate of premium. If, as had been my impression up to the argument of this motion, Mr. Mark's testimony stood alone on this question, or if it had been met by merely one witness, I should have granted this motion and directed a new trial, as it seems to me that the reasons given by Mr. Marks are well founded. But the record contains the testimony of seven other witnesses, all of them experts, who testify under commissioner as follows: *Question H.* "As an expert, what is your opinion as to the effect produced on the risk, on a piano manufacturing establishment, by the occupancy and use of one story or a portion of the building by a washing-machine factory?" (1) To this question John L. Douglass answers: "The risk would be lessened rather than increased." (2) Edgar A. Holley answers: "None whatever." (3) David S. Ketchum answers: "None; it would not increase the hazard." (4) Vincent Tilgon answers: "None; it would not increase the risk." (5) Thomas Rowland answers: "It would not affect it at all." (6) John Edgar Phillips answers: "No effect, except that we always prefer one tenant." And (7) Benjamin Durham answers: "Does not add to the risk; has no effect on it."

The question dealt with by the jury is one for practical judgment, to be decided in part upon inferences from knowledge of human experience, and is also in part properly to be testified about by witnesses who are specially conversant about the matter of taking risks. An examination of the testimony shows that seven witnesses testified as to this matter in the negative and one witness in the affirmative. The jury in their verdict followed the testimony of the seven witnesses, though the question submitted is one upon which any individual might form a satisfactory opinion, and upon which the opinion of Mr. Marks seems to me as more correct than that of the seven

who differed from him. Nevertheless, it is a question as to the rate which insurers would charge, and upon which the jury could also for themselves form a satisfactory opinion, and since their finding is sustained by such a majority of the witnesses interrogated on the subject, I am of opinion that the verdict should not be disturbed.

The motion is denied.

GOUCHER v. NORTHWESTERN TRAVELING MEN'S ASS'N.

(Circuit Court, E. D. Wisconsin. March 21, 1884.)

1. INSURANCE—REPRESENTATIONS—GOOD HEALTH.

A representation by an applicant for insurance that he is in possession of good health, means that he is free from apparent sensible disease, and unconscious of any derangement of important organic functions.

2. SAME—SEVERE ILLNESS.

"Severe illness" means such as has, or ordinarily does have, a permanent, detrimental effect upon the physical system.

3. SAME—MISREPRESENTATION—INTENTION.

A false answer, made without qualification, to an inquiry as to a matter of fact, annuls the contract of insurance, whether the reply is designedly untrue or not.

At Law.

Mr. Hanson and D. S. Wegg, for plaintiff.

Jenkins, Winkler & Smith, for defendant.

DYER, J., (*charging jury*.) The defendant is a corporation, created for the purpose of paying a fund to and protecting the families of those of its members who may be removed by death. It is provided by the constitution of the association, which is in evidence, that any man of good moral character and in good general health, and not over 40 years of age, who at the time of his application is, and for one year immediately prior thereto has been, engaged as a traveling salesman, traveling buyer, or traveling agent for any wholesale house, company, or corporation, is eligible to membership in the association. All applications for membership are referred to the board of directors of the association, who may require such proof as to them may seem proper, as to the applicant's qualifications and eligibility. All applicants are required to furnish a medical certificate, and by one of the rules it is required that applicants shall pass a medical examination. Admission to membership involves the payment of an initiation fee of five dollars, and also the further sum of two dollars for first assessment. The constitution also provides that it shall be the duty of the board of directors to take a general supervision of the business of the association, to decide on all applications for membership and on all proofs of death, and order assessments to pay death losses. Upon suitable proof of the death of any member

of the association, the board of directors are required to pay, of the amount collected by assessment of \$2 upon each member, a sum not to exceed \$5,000 to the person previously designated by the deceased, upon his application for membership, upon the books of the association, or by his last will and testament. Thus, as is apparent, the benefit of a species of life insurance is secured to the members of the association.

On the thirtieth day of December, 1881, M. C. Goucher, since deceased, made application for membership in this association. He certified in his application that he was a traveling man; that he would comply with all the requirements of the constitution and by-laws of the association; that he had answered all of the questions accompanying his application honestly and truthfully; and he thereby agreed that any misstatement or concealment of any fact that would impair the interests of the association, by him, should annul all claims that he or his heirs or assigns might have to any benefit arising from his connection with the association. Accompanying his application were certain questions addressed to the applicant, and answered by him, among which were the following: *Question 10.* "Are you now in good health, and do you usually enjoy good health?" To which his answer was, "Yes." *Q. 22.* "Is there any fact relating to your physical condition, personal or family history or habits, which has not been stated in the answers to the foregoing questions, and with which the association ought to be made acquainted?" To which he answered, "No." In his application the deceased named, as the person to whom he desired his death loss paid, his wife, Florette A. Goucher, the plaintiff in this suit. As part of the application, two persons, members of the association, certified among other things that they were well acquainted with Mr. Goucher, and that he was then in good health. It appears further that when the deceased made his application for membership he submitted to a medical examination by Dr. Thorndike, medical examiner for the association in Milwaukee, and certain questions pertaining to such examination were answered by Dr. Thorndike, among which are the following: *Question 7.* "Has he now or has he had any disease of the stomach, liver, spleen, kidneys, intestinal canal, or urinary organs?" To which the doctor answered, "No." *Q. 11.* "Has the party ever had any severe injury or illness?" To which the answer was, "Typhoid fever in 1866." Further, as part of question 11: "If so, has it had any perceptible effect on his constitution?" Answer, "No." The testimony of Dr. Thorndike tends to show that he made these answers upon personal examination of the applicant, and upon information then furnished him by the applicant. The application of the deceased, and the certificates, questions, answers, and report of medical examination, are in evidence. It appears that the application of Mr. Goucher was approved by the board of directors of the association, and he was admitted to membership on the seventh day of January, 1882. On the twelfth day of September, 1882, he

died, and thereafter proofs of death were delivered to the defendant. Payment of the insurance not being made, this suit was brought by the plaintiff, as the beneficiary designated in the application for membership, to recover the amount of the death loss, which is alleged to be \$5,000. The question is, is she entitled to recover? and that depends upon whether the several questions which I have enumerated were truthfully answered. This is conceded by the plaintiff, it being expressly admitted by her counsel that these questions and answers relate to facts material to the risk which the defendant was asked to incur.

Some testimony has been offered by the plaintiff in support of the contention that by applying for additional proofs of the health of the insured after the original proofs of death were made, and by accepting from the plaintiff the amount of a death loss assessment after the death of the insured, the defendant is now estopped to set up the defenses to this action which it has interposed; but this claim is not insisted upon, and by waiver of the same the sole issue in the case for you to determine is, were the answers to the questions referred to true or untrue? And it is further agreed by counsel for the plaintiff that the answers to questions 7 and 11 in the medical examination shall be regarded and treated as the personal answers of the insured, M. C. Goucher.

The first question answered by the applicant, in his application for membership, to be considered by you, relates to the health of the deceased on the thirtieth day of December, 1881. He was asked: "Are you now in good health, and do you usually enjoy good health?" He answered, "Yes." It is contended by the defendant that this was not a truthful answer; that he was not then in good health, but, on the contrary, was at that time suffering from disease of the liver, and that his system was then weakened and depleted by physical disorder. The plaintiff insists that the deceased was not then afflicted by disease; that he was in good health, and usually enjoyed good health. The term "good health," as here used, does not import a perfect physical condition. It would not be reasonable to interpret it as meaning absolute exemption from all bodily infirmities, or from all tendencies to disease. It cannot mean that a man has not in him the seeds of some disorder. As has been well remarked by some of the law writers, "such an interpretation would exclude from the list of insurable lives a large proportion of mankind." The term "good health," as here used, is to be considered in its ordinary sense, and means that "the applicant was free from any apparent sensible disease, or symptoms of disease, and that he was unconscious of any derangement of the functions by which health could be tested." *Conver v. Phoenix Ins. Co.* 8 Dill. 226. Slight, unfrequent, transient disturbances, not usually ending in serious consequences, may be consistent with the possession of good health as that term was here employed. "The term must be interpreted with reference to the subject-matter and

the business to which it relates. * * * It means apparent good health, without any ostensible or known or felt symptom of disorder, and does not exclude the existence of latent unknown defects; * * * but a predisposition to" or manifestation of "a disease or disorder of such a character and to such a degree as to seriously or obviously affect the health, and to produce bodily infirmity, is incompatible with a representation of good health." May, Ins. § 295. With this understanding of the expression "good health," and in the light of the evidence, you will say whether the answer which the deceased made to this question was true or untrue; that is, was he or not, on the thirtieth day of December, 1881, in good health, and did he or not usually enjoy good health?

That part of the next question answered by the deceased, and necessary to be considered by you in connection with the answer thereto, is this: "Is there any fact relating to your physical condition * * * which has not been stated in the answers to the foregoing questions, and with which the association ought to be made acquainted?" *Answer.* "No." In answering this question, the deceased was bound to state any fact, not before stated, relating to his physical condition which he knew or considered, or which, in the exercise of a sound judgment on the subject, he should have known or considered, would be material for the defendant to know in passing upon his application for membership. He had no right to conceal or withhold any such fact, if it existed. "Concealment is the designed and intentional withholding of any fact material to the risk which the assured in honesty and good faith ought to communicate to the insurer; and every such fact wrongfully suppressed must be regarded as material, the knowledge or ignorance of which would naturally influence the judgment of the insurer in making the contract at all, or in estimating the degree or character of the risk." *Daniels v. Ins. Co.* 12 Cush. 425. It is charged that Mr. Goucher, in answering this question, concealed facts relating to his physical condition which should have been communicated. This involves intent,—knowledge on his part of such facts, and an intentional withholding of them. His answer to the question must be considered as only a representation to the extent of his knowledge or reasonable belief. If he knew of no fact relating to his physical condition with which the association ought to be made acquainted, other than what he had previously stated, then there could be no concealment. The testimony has disclosed what had been the health and physical condition of the deceased prior to his application for membership; and you will say whether there was any fact relating thereto with which the association ought to have been made acquainted, concealed by him in answering this question, in the sense in which I have defined concealment.

The next question is No. 7 in the medical examination: "Has he now or has he had any disease of the stomach, liver," etc.? *Answer.* "No." It is contended by the defendant that at that time he had dis-

ease of the liver, and that, therefore, the question was untruthfully answered. This claim is vigorously contested by the plaintiff, so the question for you to decide is, did the deceased at that time have, or had he previously had, disease of the liver? In speaking to you upon this question I cannot do better than to use substantially the language of the court in a case cited on the argument: In construing such a contract as this, words must have the sense in which the parties used them; and to understand them as the parties understood them, the nature of the contract, the objects to be attained, and all the circumstances must be considered. By this question, as by other questions inserted in this application, the defendant was seeking for information bearing upon the risk which it was to take,—the probable duration of the life to be insured. It was not seeking for information as to merely temporary disorders or functional disturbances, having no bearing upon general health or continuance of life. Many persons have at times some affection of the liver, causing slight functional derangement and temporary illness, and yet, in the contemplation of parties entering into contracts of life insurance, and having regard to general health and the continuance of life, it may safely be said there was no disease of the liver. In construing a contract like this, it must be generally true that before any temporary ailment can be called a disease, it must be such as to indicate a vice in the constitution, or so serious as to have some bearing upon general health and the continuance of life, or such as according to common understanding would be called a disease. *Cushman v. U. S. Life Ins. Co.* Ins. Law J. Aug. 1877, p. 601. A man may have predisposition to disease of the liver; he may have premonitory symptoms of its threatened approach, and still at the time not have the disease; and the question here is, if the deceased had any disorder, was it at the time he made his application, disease of the liver, or had he ever had that disease? If he then had, or had before that time had, the disease, then the question was not truthfully answered; and whether his answer was intentionally untrue is immaterial, if in fact it was untrue. He answered the question unqualifiedly in the negative, and he was bound by the answer whether it was designedly untrue or not, if it was untrue. So, gentlemen, considering all the evidence, you must decide whether on the thirty-first day of December, 1881, or at any time previously, the deceased had or had not disease of the liver.

It is claimed by the defendant that at various times previous to the application the deceased had certain illnesses; that at the time of his application he was not in good health; that his alleged ill-health was caused by a diseased liver; that external developments of that disease appeared in January and February, 1882, soon after he became a member of this association; that in March he was operated upon, and an abscess in his liver was opened; that he died September 12, 1882, of hemorrhage of the stomach, and that the remote cause of death was abscess of the liver. Upon these and other alleged facts

and circumstances in the case, it is insisted that when the deceased made his application for membership he had disease of the liver. Generally, it is claimed by the plaintiff that the attacks of illness which the deceased had before his application were slight, rare, and temporary, and had no relation to any disorder of the liver; that he was in good health, and had no disease of the liver when he applied for membership; that the disorder of the liver began after that time, and at a time sufficiently remote from the date of the application to enable the disease to have its origin subsequent to the application. Upon this point you have heard the opinions of physicians, the value of which, of course, depends, as those opinions apply to either side of the case, upon the correctness of the facts assumed to be true in the hypotheses upon which their opinions were based. From all the testimony in the case, as I have already said, and in the light of the instructions given you by the court, you must determine whether at the time the application was made the deceased had, or had previously had, disease of the liver, and so whether or not the question in relation thereto was truthfully answered.

The last question to be considered is No. 11 in the medical examination, in which the applicant was asked whether he had ever had any severe injury or illness, and if so, whether it had had any perceptible effect on his constitution. To the first part of the question he answered, "Typhoid fever in 1866;" to the last part, "No." It is contended by the defendant that Mr. Goucher had previously had several attacks of severe illness, beginning in November, 1878, which ought to have been named in his answer to this question, and therefore that his answer was untrue. This is controverted by the plaintiff, who insists that those attacks were slight, temporary, and brief, not affecting his general health, and not entitled to be regarded as in any sense severe. You will remember the testimony of witnesses on the subject, and I shall not enter upon any review of it. You will notice that the question does not ask whether the applicant had ever had any illness, but whether he had ever had any severe illness; that is, (in the ordinary acceptance of the word,) serious or extreme. Clearly the term "severe" or "serious" illness does not mean slight, temporary physical disturbances or ailments, speedily and entirely recovered from, not interfering materially with the pursuit of one's avocation, producing no permanent effect on the constitution, and not rendering the insurance risk more than usually hazardous; and, in determining whether Mr. Goucher had previously had any severe illness, the jury will consider, under the evidence, whether the illnesses which he had, produced any ultimate effect on his health, longevity, or strength, and other similar considerations.

In this case the term "severe illness" was used by the parties in its common, ordinary sense. In the language of the court in *Ins. Co. v. Cheever*, Ins. Law J. April, 1882, p. 264, the object of the question was to elicit information which would be useful in determining whether it

would be prudent to take the risk of insuring his life. He was therefore asked by the question to disclose, and was bound to disclose, whether he had ever had, not such merely slight or temporary disorders or functional disturbances as had and ordinarily can have no effect upon his general health or the continuance of his life, but such severe illness as either may have had in fact, or ordinarily does have, such effect. The latter only would come within the meaning of the term "severe illness" as used in this case. * * * This is the meaning which you must attach to those words in deciding whether or not the applicant answered truthfully when he said, as he impliedly did, that he had not had any severe illness except typhoid fever in 1866. That meaning, however, includes not only such ailments and disorders as are calculated or tend directly to impair the general health or constitution, or produce death unless arrested, but also such as indicate, by their presence, history, or development, a vice in the constitution,—such, in other words, as are signs or warnings of danger to life or health, rather than direct causes of danger. That meaning does not include such slight temporary ailments as are calculated neither to affect nor threaten the general health or constitution, or such as do not ordinarily indicate the seeds in the system of serious disorder. *Ins. Co. v. Cheever, supra.* So, gentlemen, if any illness which Mr. Goucher had prior to his application for membership in this association, other than typhoid fever in 1866, was merely temporary, and if its effects were temporary, and had entirely passed away before he made the application, and if it did not affect his health or shorten his life, then it was not a severe illness within the meaning of the question asked. The answer to the question in such case was substantially true, and the non-disclosure of such illness is no defense to the action. On the other hand, if the effects of any previous illness, other than typhoid fever, were not temporary, and remained when the application was made, or if such sickness affected the general health of Mr. Goucher, or was so serious that it might affect his health or shorten life, then it was such a severe illness as ought to have been mentioned, and its non-disclosure would defeat recovery, although the failure to mention it was not intentional or fraudulent.

Now, gentlemen, you will take this case, and, not deciding it upon conjecture or speculation, but weighing and considering all the testimony, and applying to the facts the principles which I have stated for your guidance, you will determine upon the evidence whether the questions referred to in the application of the deceased for membership in the association were truthfully answered by him. The burden of proof is upon the defendant to establish its defense, and to entitle it to your verdict it must satisfy you by a fair preponderance of the evidence that its defense is made out. If you are satisfied from the evidence, when considered in connection with the instructions given you, either that Mr. Goucher intentionally concealed any fact relating to his physical condition not stated in answers to other questions,

and with which the association ought to have been made acquainted, or that at the time of his application he had disease of the liver, or was not then in good health, or did not usually enjoy good health, or that he had previously had a severe illness other than typhoid fever, then your verdict should be for the defendant. On the other hand, if you find that there was not any such intentional concealment, and that when he made his application for membership he did not have disease of the liver, and was then in good health, and usually enjoyed good health, and had not previously had any severe illness other than typhoid fever, then your verdict should be for the plaintiff.

If you find the plaintiff entitled to recover, your verdict will be for the sum of \$5,000, with interest at 7 per cent. from December 21, 1882.

Verdict for plaintiff.

The particular case brings up the question, what is meant by representations contained in applications for insurance, that the applicant is in the possession of good health? We may accept it as an established or recognized principle of the law that "good health" does not import a perfect physical condition. It is said that the epithet "good" is comparative, and does not ordinarily mean that the applicant is free from infirmities. "Such an interpretation would exclude from the list of insurable lives a large proportion of mankind. The term must be interpreted with reference to the subject-matter, and the business to which it relates. Slight troubles, not usually ending in serious consequences, and so unfrequently that the possibility of such result is usually disregarded by insurance companies, may be regarded as included in the term 'good health.'"¹ A standard authority says: "The statement that the person is in good health, does not mean that he is in absolutely perfect health, but only that he is in a reasonably good state of health. It does not mean that he has not the seeds of disorder about him, nor even that he is not subject to any infirmity, so long as it is not an infirmity likely to produce death."²

The question was raised at an early day, and Lord MANSFIELD told the jury the only question is whether he was in a reasonably good state of health, and such a life as ought to be insured upon common terms.³ And in a later case the same learned judge said: "The imperfection of language is such that we have not words for every different idea, and the real intention of the parties must be found out by the subject-matter. By the present policy, the life is warranted to some of the underwriters *in health*; to others, *in good health*. And yet there is no difference in point of fact. Such a warranty can never mean that a man has not in him the seeds of some disorder. We are all born with the seeds of mortality in us. A man subject to the gout is a life capable of being insured, if he has no sickness at the time to make it an unequal contract."⁴

In *Peacock v. New York Life Ins. Co.*⁵ the New York court of appeals said: "The word 'health,' as ordinarily used, is a relative term. It has reference

¹ May, Ins. § 295; citing *Peacock v. N. Y. Life Ins. Co.* 20 N. Y. 293, affirming S. C. 1 Bosw. (N. Y.) 338.

² Bliss, Life Ins. § 102.

³ *Ross v. Bradshaw*, 1 Bl. 312; S. C.

Marsh. Ins. 770; *Park, Ins.* 933; *Bliss, Ins.* 144.

⁴ *Willis v. Poole*, 2 *Park, Ins.* 650; S. C. *May, Ins.* 386.

⁵ 20 N. Y. 293.

to the condition of the body. Thus, it is frequently characterized as perfect, as good, as indifferent, and as bad. The epithet 'good' is comparative. It does not require absolute perfection. When, therefore, one is described as being in good health, that does not necessarily or ordinarily mean that he is absolutely free from all and every ill which flesh is heir to."

In *Morrison v. Wisconsin Odd Fellows' Mut. Life Ins. Co.*¹ the supreme court of Wisconsin declares that an affirmation of "sound health" does not imply absolute freedom from bodily infirmity or tendency to disease. In his application the party insured stated: "I am, so far as I know, in sound health." It appeared in evidence that he had consulted a physician several times professionally, and complained of indigestion, flatulence, pain in the stomach after meals, and that the physician informed him that he had a touch of dyspepsia coming on. The court declared that this testimony failed entirely to show any misrepresentation as to the applicant's health. "It would be most unreasonable to interpret the term 'in sound health,' as used in contracts for life insurance, to mean that the insured is absolutely free from all bodily infirmities, or from all tendencies to disease. If that were its meaning, we apprehend but few persons of middle age could truthfully say they were in sound health."

In *Holloman v. Life Ins. Co.*² the court passed on the meaning of the question whether the applicant had had "any severe sickness or disease;" and, in so doing, it said: "This does not include the ordinary diseases of the country, which yield readily to medical treatment, and when ended leave no permanent injury to the physical system, but refers to those severe attacks which often leave a permanent injury and tend to shorten life. * * * The question is whether it was such a disease as often impairs the constitution and tends to shorten life, and which, if known, would have deterred the insurer from taking the risk without further examination and information." It appeared that the applicant had had chronic diarrhea or affection of the bowels, which trouble continued for two or more months. This was some two or three years before she made her application for insurance, and in her application she did not state this fact. It was held not to invalidate the policy.

In *Masons' Benevolent Society v. Winthrop*,³ the court construed the matter as follows: "Again, what is to be understood by 'serious illness?' If any sickness which may terminate in death, then it must embrace almost every distemper in the entire catalogue of diseases. To give such an interpretation to this expression would, we have no doubt, defeat a recovery in a large majority of the certificates issued by the society. The true construction of the language must be that the applicant has never been so seriously ill as to permanently impair his constitution, and render the risk unusually hazardous. It seems to us that this is the only reasonable construction that can be given to the language. It is reasonable, and is fair to both parties, and works no hardship or injustice to any one, whether the answers are warranted to be true, or only as a fair statement of facts honestly and truly given as understood by the applicant."

In *Boos v. World Mut. Life Ins. Co.*,⁴ the applicant, in answer to the question whether he had had "any severe sickness or disease," answered, "No." The evidence showed that he had had an attack of pneumonia, which lasted 10 days, and that he had had a sunstroke. It was held that the court was not bound to decide, as matter of law, that either pneumonia or a sunstroke was a severe sickness or disease, within the meaning of the question, and that the question of a breach of the warranty was one of fact for the jury.

In *Fitch v. American Popular Life Ins. Co.*⁵ the application contained an

¹ 18 N. W. Rep. 13.

² 85 Ill. 537.

³ 59 N. Y. 571.

⁴ 1 Wood, C. C. 674.

⁵ 64 N. Y. 236.

inquiry whether the deceased "had ever had any illness, local disease, or injury in any organ," and he answered, "No." The evidence showed an omission on his part to mention a temporary injury to the eye, by sand having been thrown into it, which had produced an inflammation six years before the policy was applied for, and which was then cured. The court held that this fact was not conclusive evidence of fraud, or of breach of the warranty, sufficient to avoid the policy, and said that, if the omission was of any import whatever, it was, at most, evidence of fraud to go to the jury.

In *Price v. Phoenix Mut. Life Ins. Co.*¹ the following question was required to be answered by the applicant: "Has the party had, during the last seven years, any severe sickness or disease?" and the applicant had answered, "No." The insurance company, in its answer to the plaintiff's complaint, claimed that the life insured had had, within the seven years referred to, "chronic gastritis." And evidence was introduced which tended to show that such life had had gastritis. This was held not to meet the case. "Unless chronic gastritis and gastritis are synonymous," said the court, "as to which there is no judicial presumption nor testimony, the evidence was not within the issues, so that the false representation charged was not proved. In addition to this consideration, we are not free from doubt as to whether gastritis was shown to be 'a severe sickness or disease.' We can take no judicial cognizance of its character."

In the same Minnesota case it appeared that one of the questions which the applicant was required to answer was whether he "had ever had any of the following diseases," naming several, and, among others, that of rheumatism. He answered, "Never." The evidence in the case tended to show that he had had subacute rheumatism. And there was also evidence in the case tending to show that subacute rheumatism was not the disease of rheumatism in the ordinary understanding of that term; but there was also evidence tending to show that, technically and in medical parlance, subacute rheumatism was the disease of rheumatism. In commenting on this part of the case the court said: "The rheumatism referred to in the question is the disease of rheumatism. Any rheumatic affection not amounting to the *disease* of rheumatism is not comprehended in its terms, any more than the spitting of blood occasioned by a wound of the tongue or the extracting of a tooth is the *disease* of 'spitting blood,' mentioned in the same question. The life insured had the right to answer the question upon the basis that its terms were used in their ordinary signification. If there was any ambiguity in the question, so that its language was capable of being construed in an ordinary as well as in a technical sense, the defendant can take no advantage from such ambiguity."

In *Powers v. Northeastern Mut. Life Ass'n*² it appeared that among the questions asked was whether the applicant has now or has ever had disease of the heart, and that he answered, "No." By the terms of the policy and application the parties agreed that the truthfulness of the applicant's answers to the questions propounded should be the basis upon which the validity of the policy was to stand. At the trial the jury brought in a special verdict, finding that the applicant had disease of the heart at the time of his application, and also that he did not and would not reasonably have been expected to know that he had that disease. The court held the policy void. It said: "It is wholly immaterial whether the applicant knew of the existence of the disease, because he agreed absolutely that it did not exist. Nor is it any answer to say that the question is a scientific one, and a layman might easily be deceived into a false answer. Scientific or simple, the applicant took the risk of the answer. If he had answered that he had no knowledge that the disease existed, the finding of the jury might affect the result."

In *Singleton v. St. Louis Ins. Co.*³ it appeared that one of the questions

¹17 Minn. 497, 518.

²50 Vt. 630.

³66 Mo. 63; S. C. 27 Amer. Rep. 321.

asked was, "Has the party had, since childhood, consumption, bronchitis, spitting of blood, * * * and, if so, which?" To which question the applicant answered, "No." The court held that no error was committed in permitting physicians to testify that "spitting of blood" was a medical term, meaning spitting of blood from the lungs exclusively. "Without any evidence of the meaning of that term, the court might properly have instructed the jury that spitting of blood, in consequence of a drawn tooth or a cut on the gums, was not meant by that term; and yet, if Anderson had spit blood from such trivial causes, literally, his answer to the question would have been false. There was, therefore, a propriety in the admission of evidence of the meaning of the term. There is something ambiguous in the term 'spitting of blood.' There is room for interpretation. Literally, the meaning is spitting blood, whether from the teeth, gums, or lungs; but it would be absurd to hold that it was used in that sense in the application." The question and answer may relate, not to the applicant's own health, but to the health of a third person. Such an inquiry and answer must necessarily be understood in a general and not in a strict sense. An applicant, in answering such inquiries, can, ordinarily, only answer from physical appearances and indications. "One who is not a doctor, and speaks not of himself, but of a third person, necessarily gives rather an opinion founded on observed facts, than an absolute and accurate fact, when he describes the health of such person as good. He means, and is understood to mean, that the individual inquired about has indicated, in his action and appearance, no symptoms or traces of disease, and to the observation of an ordinary friend or relative is, in truth, well."¹ In this case the court sustained an instruction charging the jury that if, from all the appearances, the person was in good health, so that everybody would so pronounce him, and there was nothing to indicate to any person that he was not in good health, that the warranty was not broken, although, in fact, the germs of a lurking and hidden disease might exist.

In *Hartford Life & Annuity Ins. Co. v. Gray*² the insured answered "No" to the question whether either of his parents, brothers, or sisters ever had pulmonary, scrofulous, or other constitutional or hereditary taint. It was held that his answer assumed his knowledge of the fact, and would preclude the plaintiff, in an action on the policy, from alleging a want of knowledge on the part of the insured as an excuse for not answering correctly.

In *Ins. Co. v. Gridley*,³ the applicant, in reply to a question whether certain of his relatives had any hereditary disease, answered, "No hereditary taint of any kind in family, on either side of house, to my knowledge." The company proved that an uncle had died in an insane asylum more than 20 years before the date of the application. The supreme court of the United States held the policy good, and that, to have avoided it, it was necessary that the company should have shown that the applicant knew of the insanity of his uncle, and also that he knew that insanity was hereditary.

In *Grattan v. Metropolitan Life Insurance Co.*⁴ the facts were as follows: The sister of the applicant died of consumption before he made the application. The fact was known to the insured, but in the examiner's report it was stated that he did not know the cause of her death. Appended to this report was the certificate of the insured, signed by him, in these words: "I hereby declare that I have given true answers to all questions put to me by the medical examiner; that they agree exactly with the foregoing; and that I am the same person described in the accompanying application, and whose signature is appended to declaration and warrant herewith." The insured contended that he answered truthfully, and that the medical examiner wrote down the falsehood. It did not appear that the applicant signed in blank.

¹ *Grattan v. Metropolitan Life Ins. Co.* 92 N. Y. 280.

² 91 Ill. 159.

³ 100 U. S. 614.

⁴ 92 N. Y. 282.

But the evidence tends to show that the examiner received a true answer, and either inadvertently or fraudulently wrote down a false one; that the applicant did not read the answers as written, neither were they read over to him by the examiner; that the applicant signed the examiner's report without reading it and through natural confidence and trust in the examiner. Upon such facts the company would be estopped by the fraud of its agent.

For other cases in which it has been held that the applicant is not to be prejudiced by the fraud or mistake of the agent in writing out the application, reference may be had to the cases cited below.¹

We note in this connection a principle often laid down, that to avoid a policy of life insurance upon the ground of misrepresentation, the misrepresentation must, in the absence of fraud, be in respect to some circumstance or fact material to the contract; but that, on the other hand, a warranty must be literally true, whether the fact warranted be material or not.² In *Campbell v. New England Mut. Life Ins. Co.*³ it is laid down by the supreme court of Massachusetts that the application is in itself collateral merely to the contract of insurance. "Its statements, whether of facts or agreements, belong to the class of representations. They are to be so construed, unless converted into warranties by force of a reference to them in the policy, and a clear purpose, manifest in the papers thus connected, that the whole shall form one entire contract." But in *Knecht v. Mutual Life Ins. Co.*,⁴ recently decided in Pennsylvania, the supreme court of that state says that the authorities are by no means uniform on the question whether the declarations of the insured as to existing facts in his application constitute a warranty; and it is laid down that knowledge of the agent of the falsity of a warranty cannot relieve the insured or his representatives from the consequences of the breach.⁵

HENRY WADE ROGERS.

¹ *McCall v. Phoenix Mut. Life Ins. Co.* 9 W. Va. 237; S. C. 27 Amer. Rep. 558. In *Lueders v. Hartford L. & A. Ins. Co.* 12 Fed. Rep. 465, it was held that where an authorized agent of an insurance company has examined an application, and has undertaken to fill in the applicant's answers, the applicant has a right to presume that his answers have been written down as given; and that if he has answered all questions truly, and signed the application under the impression that his answers have been correctly reduced to writing, a policy issued on the faith of the application will not be invalidated by false answers inserted in the application by the company's agent without the knowledge of the applicant. In *Fletcher v. N. Y. Life Ins. Co.* 11 Fed. Rep. 377, it appears that, to have this effect, the applicant must sign under the impression that it contains his answers as given. See *Ryan v. World Mut. Life Ins. Co.* 41 Conn. 168, where the agent wrote false answers, and

applicant signed without reading, and policy held void.

² See *Bartean v. Phoenix Mut. Life Ins. Co.* 67 N. Y. 595; *Higbie v. Guardian Mut. Life Ins. Co.* 53 N. Y. 603; *Foot v. Aetna Life Ins. Co.* 61 N. Y. 576; *Fitch v. A. P. L. Ins. Co.* 59 N. Y. 557; *Archibald v. Mut. Life Ins. Co.* 38 Wis. 542; *Carpenter v. American Ins. Co.* 1 Story, 62; *Alston v. Mechanics' Mut. Ins. Co.* 4 Hill, (N. Y.) 334; *Miller v. Mutual Benefit Life Ins. Co.* 31 Iowa, 226; *Daniels v. Hudson River Fire Ins. Co.* 12 Cush. (Mass.) 416; *Campbell v. New England Mutual Life Ins. Co.* 98 Mass. 389; *Illinois Masons' Benevolent Society v. Winthrop*, 85 Ill. 537.

³ 98 Mass. 389, 391.

⁴ 90 Pa. St. 118, 121.

⁵ *Bartean v. Phoenix Mut. Life Ins. Co.* 67 N. Y. 595; *Chase v. Hamilton*, 20 N. Y. 52; *Ripley v. Aetna Ins. Co.* 30 N. Y. 136; *Brown v. Cattaraugus Mut. Ins. Co.* 18 N. Y. 387; *Foot v. Aetna Life Ins. Co.* 61 N. Y. 576.

LETOUFORD v. CONVILLON and another.¹

(Circuit Court, E. D. Louisiana. May, 1884.)

STATE INSOLVENT LAWS—ALIEN RESIDENT.

An alien living and doing business in Louisiana, with actual and constructive notice, is bound by insolvency proceedings under the laws of Louisiana. *Mississippi Mills Co. v. Ranlett*, 19 FED. REP. 191, distinguished.

At Law.

Thomas Gilmore & Sons, for plaintiff.

Henry B. Kelly, for defendants.

PARDEE, J. The plaintiff, an alien residing and doing business in the state of Louisiana for the last 20 years, brings suit on notes and accounts against the defendants, citizens of Louisiana. The defense is a discharge under the insolvency laws of Louisiana. A jury has been waived, and the cause submitted to the court. There is no dispute about the facts. The defendant contracted the debt sued for, and the plaintiff is entitled to judgment, as claimed, unless the insolvency proceedings, and the discharge granted therein, operate a legal discharge from the obligation. The insolvency proceedings are in the main regular. The only objections pointed out are that the judge did not set the day for the meeting of creditors, but left the notary to set it, (see section 1789, Rev. St. La., and article 3087, Rev. Civil Code,) and that Robert S. Perry, attorney of insolvents, also acted as attorney in fact of several creditors, thus representing inconsistent and contradictory interests. Neither of these irregularities can avoid the proceedings nor be the subject of inquiry collaterally. The record shows the notice to plaintiff as provided by law, and the evidence here shows actual notice. The debt sued for was contracted since the insolvency laws were in force. The question for decision, then, is whether an alien, living and doing business in Louisiana, with actual and constructive notice, is bound by insolvency proceedings under the laws of Louisiana. It is difficult to assign any reason, in justice and equity, why such an alien creditor should not be bound and affected the same as any citizen of the state. It certainly cannot be claimed as a right, that an alien can come here, live among us, carry on business under our laws, and all the time occupy a better position as a creditor, on debts created under our laws, than any citizen can have. An alien, residing in Louisiana, has privileges, balanced by disabilities, resulting from his alienage, but he has no just claim to be a privileged creditor.

The effect and scope of discharges under state insolvent laws have been considered by the supreme court in many cases, but I do not find that this precise case has ever been presented.

Ogden v. Saunders, 12 Wheat. 213, though not the first case, is the

¹ Reported by Joseph P. Hornor, Esq., of the New Orleans bar.

leading case on the subject. It was there held, as announced by Justice JOHNSON, (1) that the power given to the United States to pass bankrupt laws is not exclusive; (2) that the fair and ordinary exercise of that power by the states does not necessarily involve a violation of contracts, *multo fortiori* of posterior contracts; (3) but when, in the exercise of that power, the states *pass beyond their own limits*, and the rights of their own citizens, and act upon the rights of citizens of other states, there arises a conflict of sovereign power and a collision with the judicial powers granted to the United States which renders the exercise of such a power incompatible with rights of other states, and with the constitution of the United States.

Following came the decisions in *Boyle v. Zacharie*, 6 Pet. 635, and *Suydam v. Broadnax*, 14 Pet. 67, from all of which Mr. Justice STORY announced the following propositions as the result: (1) That state insolvent laws may apply to all contracts within the state between citizens of the state; (2) that they do not apply to contracts made within the state between a citizen of the state and a citizen of another state; (3) that they do not apply to contracts not made within the state. See 2 Story, Const. § 1390; Story, Confl. Laws, § 341.

In *Baldwin v. Hale*, 1 Wall. 223, the authorities are again reviewed. The court, through Mr. Justice CLIFFORD, reiterates the conclusions in *Ogden v. Saunders*, and the propositions of Judge STORY quoted above, and adds:

"Insolvent laws of one state cannot discharge the contracts of citizens of other states, because they have no extraterritorial operation, and, consequently, the tribunal sitting under them, unless in cases where a citizen of such other state voluntarily becomes a party to the proceedings, has no legal jurisdiction in the case. Legal notice cannot be given, and consequently there can be no obligation to appear, and of course there can be no legal default."

Baldwin v. Hale is followed and indorsed in *Gilman v. Lockwood*, 4 Wall. 409. In these two cases the reasons for the rule are plainly laid down: (1) Because insolvent laws can have no extraterritorial effect; (2) because the tribunal sitting under them has no jurisdiction of the person of the excepted creditor.

In the case of *Crapo v. Kelly*, 16 Wall. 610, which decided that an assignment under a state insolvency law passed the title to a ship of the insolvent, though at the time on the high seas. Mr. Justice BRADLEY, in dissenting from the judgment giving insolvent laws such alleged extraterritorial effect, clearly states three fundamental rules or axioms, as laid down by Huber in his *Prælectiones*, which, in my opinion, throw light on the question in the present case, to-wit: (1) That the laws of every empire have force only within the limits of its own government, and bind all who are subjects thereof, but not beyond those limits; (2) that all persons who are found within the limits of a government, whether their residence is permanent or temporary, are to be deemed subjects thereof; (3) that the rules of every

empire, from comity, admit that the laws of every people, in force within its own limits, ought to have the same force everywhere, so far as they do not prejudice the powers or rights of other governments or of their citizens.

All the cases in relation to the force and effect of state insolvent laws decided by the supreme court, so far as cited either here or in briefs, have been cases between citizens of the United States, and in no one has the question or effect of residence, as distinct from citizenship, been raised or considered. In fact, as to citizens of the United States, residence in a state, other than temporary, draws to it citizenship of that state, so that it is incompatible to be a real resident of one state of the Union and at the same time a citizen of another. With aliens the case is different; for an alien may be a permanent resident of one of the states of the Union without ever becoming or intending to become a citizen. The duties and obligations of such resident aliens are well defined in the text-books. They are bound to the society by their residence, and they are subject to the laws of the state while they reside in it. Vattel, 102. They are bound to obey all general laws and are amenable in disputes with each other or with our citizens to the ordinary tribunals of the country. See 2 Kent, Comm. 64, and Wheat. Int. Law, (2d Ed.,) by Lawrence, 172 *et seq.*, where, in note 59, in relation to foreigners generally, it is said: "Foreigners who, by an acquired domicile, participate in the commercial privileges of citizens or subjects of a country, must also share the inconveniences to which the latter are subject." *Case of Laurent*, Convention of 1853, p. 158.

There is a distinction between domiciled aliens and visitors in or passengers through a foreign country, and it affects the rights and obligations of the parties under the local law. See Phill. Int. Law, (2d Ed.) 6. The present case is that of an alien domiciled in Louisiana, who is bound by its laws, is amenable to its tribunals, and who participates in the commercial privileges of its citizens; a contract made in Louisiana, under its laws, with its citizens, and to be executed in its territory; and insolvency proceedings, with legal and actual notice, wholly within proper territorial limits, and in violation of no constitutional rights.

The supreme court of the United States has never, apparently, had such a case before it, and that court has never decided that in such a case the insolvent laws of a state would not be binding and effective. None of the principles declared in the many cases decided, and as formulated in the different cases *supra*, would justify holding the insolvency proceedings in this case not binding; but, rather, they seem to justify the contrary ruling. Mr. Justice CLIFFORD's reasons in *Baldwin v. Hale*, and Mr. Justice BRADLEY's propositions in *Crapo v. Kelly*, certainly point to the validity of the insolvency proceedings as against the plaintiff here. And to the same purport are the distinguished jurists to whose works reference has been made. And I

find in Wharton's Conf. Laws, § 523, this doctrine: "The discharge under a state insolvent law of a debt arising on a contract made and to be performed in that state between parties residing there is good everywhere." And to this state of circumstances, sufficient for Mr. Wharton, we find that the tribunal sitting under the insolvent law has territorial jurisdiction over the creditor, and through legal notice the creditor is made a party and the jurisdiction made complete, it would seem there should be no question as to the universal efficacy of the discharge.

The case of *Von Glahn v. Varrenne*, decided in the Eighth circuit, is a case on all fours with this, and therein Judge DILLON, Judge NELSON concurring, and Mr. Justice MILLER agreeing, held that state insolvent laws were as valid and binding on resident aliens as upon native-born citizens residing in the state. 1 Dill. 515. No circuit court case nor other case has been cited to the contrary.

The case of *Mississippi Mills v. Ranlett*, lately decided in this court, (19 FED. REP. 191,) does not touch the questions involved in this case.

I conclude, therefore, that in the present case the finding should be that the insolvency proceedings in the state court, in the case of *S. Convillon & Son v. Their Creditors*, wherein the plaintiff was made a party, and had notice, and wherein the said Convillon & Son were discharged from their debts, were valid and binding against the plaintiff, and operated to discharge the obligations herein sued on.

Judgments will be entered for the defendants.

RICE and others v. BROOK.

(Circuit Court, E. D. Wisconsin. April 18, 1884.)

1. FACTOR—CONSIGNMENT FOR SALE—RIGHT TO CONTROL SALE.

Where a consignment is made to a factor for sale, the consignor has a right, generally, to control the sale thereof, according to his own pleasure, from time to time, if no advances have been made or liabilities incurred on account of the consignment, and the factor is bound to obey his orders.

2. SAME—ADVANCES BY FACTOR—DISCRETION—USAGES OF TRADE.

But when the factor has made large advances or incurred expenses on account of the consignment, the principal cannot, by any subsequent orders, control his right to sell at such time as, in the exercise of a sound discretion, and in accordance with the usage of trade, he may deem best to secure indemnity to himself and to promote the interests of the consignor.

3. SAME—ADVANCES ON CONSIGNMENTS—RESPECTIVE DUTIES AND INTERESTS.

A factor who advances money on a consignment is still the agent of the consignor, and must act in good faith, so as to promote the latter's interest, as well as to indemnify himself.

4. SAME—DUTY OF FACTOR IN RESPONDING TO WISHES OF CONSIGNOR.

If a factor, after making an advance on a consignment and delaying sale of the goods, receives a letter from consignor directing him to sell, he ought to sell as soon as the goods can be made to realize sufficient to reimburse him.

5. SAME—INFERENCE OF CONSENT TO PAST ACTS TO BE DRAWN FROM DISCRETIONARY AUTHORITY.

After a long delay in the sale of wool consigned to a factor, if the consignor, with full knowledge of the facts, and uninfluenced by concealment or fraud on his factor's part, authorizes the latter to sell at his discretion, he thereby ratifies the action of the factor in not having sold before.

At Law.

Robert F. Pettibone, for plaintiffs.

J. V. Quarles, for defendant.

DYER, J., (*charging jury*.) On or about the thirtieth day of September, 1875, the defendant shipped to the plaintiffs, who were wool commission merchants in Boston, 29 sacks of wool, containing in all about 5,730 pounds. The wool was consigned to the plaintiffs, and was to be sold by them for the account of the defendant. At the same time the defendant drew his draft on the plaintiffs for \$1,000 on account of the shipment, which draft was paid on presentation, and the amount of which was to be repaid from the proceeds of the sale of the wool. Soon thereafter the defendant drew on the plaintiffs for the further sum of \$1,000, and this draft was also paid. The consignment appears to have been made generally, and without any specific orders as to the time or mode of sale of the wool; and no orders as to the time of sale were given by the defendant to the plaintiffs prior to the eleventh day of February, 1876. On that day, and long after the plaintiffs had made the advances amounting to \$2,000 on account of the consignment, the defendant wrote the plaintiffs as follows:

"BURLINGTON, February 11, 1876.

"*Denny, Rice & Co.*—DEAR SIRS: You will please do me the favor of sorting and selling my wool as soon as you can conveniently, and oblige,

"Yours respectfully, EDWARD BROOK."

To this time the plaintiffs, according to their account of sales in evidence, had only made sales of the wool to the amount of \$31.48. Between that date and March 16, 1877, it appears from their statement of sales that they made other sales amounting to \$457.54, and, on the last-named day, they sold out the balance of the wool, realizing therefor \$1,419.69; so that the total proceeds of all sales amounted to \$1,958.71. The plaintiffs charged a commission of 5 per cent. for making the sales, amounting to \$97.93. They claim to have paid for insurance, labor, and storage, \$19.59, and for freight and cartage, \$97.03. With interest on their advances, and on the amount paid for freight and cartage, to March 5, 1877, they make the deficiency remaining, after accounting for the total sales of the wool, \$461.21, and this suit is brought to recover that amount, with interest, from the defendant. Payment of this demand is resisted by him on the ground that the plaintiffs disregarded his instructions to sell the wool, contained in his letter of February 11th, and he claims that if the wool had been sold during that month more than enough would have been realized to reimburse the plaintiffs the amount of their advances and

other demands before enumerated. Considerable testimony has been introduced concerning the quality and character of the wool, and the state of the Boston market between February, 1876, and March, 1877, and numerous letters which passed between the parties have been read in evidence. In one or more of the letters the plaintiffs called on the defendant, because of the state of the market and of their alleged inability to sell the wool for a satisfactory price, to return to them \$500 of the advances they had originally made on the consignment, and on the sixteenth day of May, 1876, the defendant wrote the plaintiffs complaining of their failure to sell the wool as requested in his letter of February 11th. This letter was followed by one from the plaintiffs explanatory of the reasons why the wool had not been sold, and in reply thereto the defendant, on the fifth of June, 1876, wrote the plaintiffs, and authorized them to exercise their discretion with reference to the time when the wool should thereafter be sold.

The plaintiffs, in the transactions in question, stood towards the defendant in the relation of factors. Where a consignment is made to a factor for sale, the consignor has a right, generally, to control the sale thereof according to his own pleasure, from time to time, if no advances have been made or liabilities incurred on account of the consignment, and the factor is bound to obey his orders. This arises from the ordinary relation of principal and agent. But when the factor has made large advances or incurred expenses on account of the consignment, the principal cannot, by any subsequent orders, control his right to sell at such a time as, in the exercise of a sound discretion, and in accordance with the usage of trade, he may deem best, to secure indemnity to himself and to promote the interests of the consignor. *Feild v. Farrington*, 10 Wall. 149.

The rule on this subject has been laid down by the supreme court in the case of *Brown v. McGran*, 14 Pet. 479, as follows:

"Where the consignment is made generally, without any specific orders as to the time or mode of sale, and the factor makes advances or incurs liabilities on the footing of such consignment, there the legal presumption is that the factor is intended to be clothed with the ordinary rights of factors to sell, in the exercise of a sound discretion, at such time and in such mode as the usage of trade and his general duty require, and to reimburse himself for his advances and liabilities out of the proceeds of the sale; and the consignor has no right, by any subsequent orders, given after advances have been made or liabilities incurred by the factor, to suspend or control this right of sale, except so far as respects the surplus of the consignment not necessary for the reimbursement of such advances or liabilities."

By making the advances of \$2,000 to the defendant, the plaintiffs acquired a special interest or property in the wool, and therefore they held it for their own indemnity as well as for the benefit of the defendant. The consignment of wool, it is undisputed, was made without any specific orders in the first instance as to the time of sale, and it is not denied that the advances were made on account of such

consignment and before the order contained in the defendant's letter of February 11, 1876. This being so, and applying to the case the rule of law I have stated, the defendant could not, after those advances were made, control absolutely, by any specific order, the plaintiff's right to sell at such a time as, in the exercise of proper discretion and in accordance with the usage of trade, they might deem it best to sell, for the purpose of indemnifying themselves and at the same time promoting the interests of the defendant. So, gentlemen, it being undisputed that the wool was shipped by the defendant to the plaintiffs to be sold by them, without any specific orders in the first instance, as to the time or manner of sale, and that before any such orders were given the plaintiffs made advances and incurred expenses on account of the consignment, I instruct you that if the plaintiffs could not sell the wool within a reasonable time after receiving the letter of February 11th, for enough to fully reimburse them for their advances and expenditures, and if they exercised a sound discretion, and acted in good faith, and with reasonable care and diligence, in selling the wool, having in view their own indemnity and the interests of the defendant, and if the proceeds of the sales so made did not amount to a sufficient sum to reimburse the plaintiffs for their advances, with interest, and their proper charges for services and necessary disbursements for freight, insurance, storage, and labor,—then the plaintiffs are entitled to recover. Although the plaintiffs had made advances to the defendant, they were still his factors, and under the obligations of factors. They were still his agents to sell the wool, and they were bound to act in good faith towards him, and so as to promote his interests as far as possible, as well as to secure indemnity to themselves. If, therefore, within a convenient time after receiving the letter of February 11, 1876, the plaintiffs, in the exercise of reasonable discretion, and according to the usage of trade, could have sold the wool for more than enough to have fully reimbursed them for their advances and expenditures, then I think they were bound to make the sale; but not unless they could thereby fully secure reimbursement to themselves. With reference to the order contained in the letter of February 11th, I ought to say, further, that if the defendant wrote the letter of June 5, 1876, with full knowledge of all the facts, and without any fraud or concealment of facts on the part of the plaintiffs, then he must be held to have ratified the action of the plaintiffs in not selling immediately under the specific order of February 11th. The plaintiffs had no right to delay the sale of the wool by the want of reasonable skill and efforts on their part; and if the loss which they here ask the defendant to make good to them was occasioned by their own want of good faith, or by their failure to exercise reasonable care, discretion, and diligence in selling the wool, then they should themselves bear that loss, and in that event they are not entitled to recover. Reasonable care and diligence in such case means such care and diligence as an ordinarily

prudent and diligent man would exercise in the circumstances in which the plaintiffs were placed, with reference to his own property, taking into consideration the usage of trade, the state of the market, and the situation of the property. Failure to find a purchaser of the wool would not of itself constitute neglect of duty, provided such failure was not attributable to any want of reasonable care and diligence on the part of the plaintiffs.

* * * * *

If you find for the plaintiffs, you will assess their damages at such sum as will repay them the difference between the proceeds of the sales of the wool and the aggregate amount of their advances, commissions, and disbursements for freight, cartage, labor, insurance, and storage, with an allowance of interest at 6 per cent., the legal rate in Massachusetts.

TAYLOR v. IRWIN.

(Circuit Court, N. D. Iowa, C. D. June Term, 1894.)

1. **BANKRUPTCY—LIMITATIONS—BANKRUPT'S LAND.**

According to the bankrupt act, assignee should bring suit for property withheld from him within two years from the time when the cause of action accrued. If he does not his right of action is barred, except in cases where the relief sought is against fraud.

2. **SAME—BANKRUPT'S LAND—ASSIGNEE'S DISCRETION AS TO IT.**

It is for the assignee to determine whether or not, in a given case, he will assert title to property; he may elect not to charge the estate with the burden of looking after property.

3. **SAME—FAILURE TO RECORD ASSIGNMENT.**

The failure of assignee to record the assignment in a county in which land of the bankrupt is situate is evidence of a disposition not to assert title to the land.

4. **SAME—INFORMAL CONVEYANCE—DELAY OF ASSIGNEE.**

A man's handing to his wife his patent for a certain piece of land, with the intention that she shall take title thereby, is not a conveyance in law, and the land can, after the bankruptcy of husband, be taken by his assignee. But if assignee does not assert title to it within the time limited by the bankruptcy act the wife can hold.

5. **DELAY OF ASSIGNEE TO ASSUME LAND—ESTOPPED.**

The failure by assignee to assume charge of land of bankrupt for such length of time as would imply a disposition not to assume at all, estops him from asserting right thereto after bankrupt in possession has sold to an innocent purchaser for value.

At Law. Action in ejectment.

Taylor & Pollard and *M. D. O'Connell*, for plaintiff.

C. A. Irwin and *Robinson & Milchrist*, for defendant.

SHIBAS, J. In this action plaintiff sues in ejectment for the purpose of determining the right to the possession of the N. E. $\frac{1}{4}$ of sec-

tion 26, township 88, range 33, situated in Calhoun county, Iowa. The parties waived a jury trial, submitting the cause to the court upon an agreed statement of facts and other testimony.

The land in question was entered by one Joseph Cain, to whom the patent from the United States issued in 1860. On the twenty-third of December, 1876, the firm of B. & J. F. Slevin & Co., of which firm Joseph Cain was a member, filed their petition in bankruptcy in the United States district court for the Eastern division of Missouri, and the firm and its members were duly adjudged to be bankrupts, and on the seventeenth of January, 1877, Preston Player was appointed assignee of the bankrupts' estate, and on the eighteenth of January, 1877, the register executed to such assignee a deed of the property of said bankrupts. This deed has never been recorded in Calhoun county, Iowa. The land in controversy was not included in the schedules filed by Cain in the bankruptcy proceedings, and the assignee did not have actual knowledge of the fact that the title to this land stood in the name of Joseph Cain until January, 1883, when his attention was called to the fact by a creditor of the firm. Joseph Cain claims that he had given this realty to his wife in March, 1876. No transfer of the title was made, nor was there any written evidence of such gift executed. On the eighth of April, 1881, Joseph Cain and wife sold the premises in question to Harvey E. Buck, executing a warranty deed therefor, which deed was duly recorded in Calhoun county, Iowa, on the sixteenth day of May, 1881, and on the eighth of October, 1881, said Buck and wife sold and conveyed, by warranty deed, the said premises to W. W. Irwin, the defendant, for the sum of \$1,650. At the time of the purchase by defendant he had no actual notice or knowledge of the fact that Joseph Cain had been adjudged a bankrupt, and he entered upon the property under that purchase, and is now in possession thereof. On the tenth day of January, 1883, the fourth meeting of the creditors of B. & J. F. Slevin & Co. was held, and a list of the other uncollected and outstanding assets of the firm was exhibited and sold at auction. The realty in question was not included in this list as thus exhibited, but the attention of the assignee having been called to the matter by a creditor, he put up the realty for sale and sold it at public auction to plaintiff, who bid therefor the sum of \$10. This sale, therefore, was made without any order having been obtained from the court for making same, without any notice whatever being given, or any effort made to realize for the estate the value of the property. The report of the assignee of his acts in the premises, including the sale of the realty to plaintiff, was approved by the court in bankruptcy, and a quitclaim deed was executed by the assignee and delivered to plaintiff, who caused the same to be recorded in Calhoun county, Iowa, on the fifteenth day of March, 1883, and on the twenty-eighth of the same month plaintiff filed his petition in ejectment against defendant for the recovery of possession of the land. Thus it appears that both

parties claim title under Joseph Cain,—the plaintiff under the deed of the assignee in bankruptcy, and the defendant under the deed from Cain and wife to Buck, and the deed from Buck and wife to defendant.

On part of the plaintiff it is claimed that the title of the assignee reverts back to the date of the filing of the petition in bankruptcy, and includes all property which in fact belongs to the bankrupt, whether scheduled or not, and that from that time no act done or conveyance made by the bankrupt can in any way affect the title of the assignee, and that the pendency of the proceeding in bankruptcy is notice to all the world, and, further, that the assignee is not required, in order to protect his rights, to record the deed of assignment in the several counties wherein the bankrupt may have owned property; the provision found in section 5054 of the bankrupt act, requiring the assignee, within six months, to cause the assignment to be recorded in every registry of deeds or other office within the United States where a conveyance of any lands owned by the bankrupt ought by law to be recorded, being intended only as a means of furnishing proof of title to persons purchasing property of the assignee.

In support of these propositions plaintiff cites *Bump*, Bankr. 139; *Phillips v. Helmbold*, 26 N. J. Eq. 208; *In re Lake*, 6 N. B. R. 542; *In re Gregg*, 3 N. B. R. 529; *Ex parte Vogel*, 2 N. B. R. 427; *In re Wynne*, 4 N. B. R. 23; *Davis v. Anderson*, 6 N. B. R. 154; *Ex parte Foster*, 2 Story, 158; *Johnson v. Geisritter*, 26 Ark. 46; *Barron v. Newbury*, 1 Biss. 149; *Mays v. Manuf'rs' Nat. Bank*, 64 Pa. St. 74; *In re Neale*, 3 N. B. R. 178; *Hall v. Whiston*, 5 Allen, 127; *Butler v. Mullen*, 100 Mass. 455; *Stevens v. Mechanics*, etc., 101 Mass. 110; *Zantzing v. Ribble*, 36 Md. 33; *Conner v. Long*, 104 U. S. 239; *Bank v. Sherman*, 101 U. S. 406.

On the part of the defendant it is claimed (1) that the realty at the date of proceedings in bankruptcy belonged in fact to the wife of Joseph Cain, and that he held the title in trust for her, and hence the same did not pass to the assignee; (2) that the assignee, having failed to take possession of the property, or assert any right thereto, for over six years after the adjudication in bankruptcy, is barred of any right or title therein by the provision of the bankrupt act, which enacts that "no suit at law or in equity shall be maintainable in any court, between an assignee in bankruptcy and a person claiming an adverse interest, touching any property or rights of property transferable to or vested in such assignee, unless brought within two years from the time when the cause of action accrued for or against such assignee;" (3) that if not barred as a matter of law by the limitation just cited, nevertheless the assignee and his grantee are estopped from asserting any right or title to the premises in question, for the reason that the assignee allowed the bankrupt to remain in possession of the premises, did not assert any right thereto, and permitted the bankrupt to sell the property to defendant, who bought the same in good

faith, paying full value therefor, and that the assignee has never in fact asserted a claim to the property for the benefit of the estate.

All the evidence adduced to show that the realty in dispute belonged to Mrs. Cain at the time the petition in bankruptcy was filed, is found in the testimony of Joseph Cain, who testifies that shortly after his marriage he made a gift of the property to his wife. He did not execute a conveyance of the property to her, but simply handed her the patent, saying that he had bought the land with his first earnings, and wished her to have it. While, as between the husband and wife, this gift may have taken effect so that the husband held the property as her trustee, yet, as it appears that the husband was then in debt, such a transaction cannot be held valid as against creditors of the husband. In other words, the assignee, as the representative of the creditors, could, had he so chosen to do, have held the property under the deed of assignment for the benefit of the creditors. If, however, the creditors, through the assignee, did not assert their right to the property within the time limited by the terms of the bankrupt act, then it may be that Mrs. Cain can assert her title or right to the property. The evidence shows that she joined in the granting clause of the deed to Harvey E. Buck, under whom the defendant claims, and therefore all her title and right, whatever it may be, has passed to the defendant.

By the express provisions of the bankrupt act, it was made the duty of the assignee to bring suit for the recovery of property belonging to the estate and not in his possession within two years after the cause of action accrued to him. A failure on his part to do so would bar his right to maintain an action at law or in equity, except in cases where the relief sought is against a fraud practiced by the opposing party. *Bailey v. Glover*, 21 Wall. 342.

In the case at bar it appears that the assignee did not take possession of the property in question, or assert any right thereto, or do any act affecting the property, for more than six years after the adjudication in bankruptcy. This delay would bar his right, or that of one in priority with him, unless such delay was caused by fraud or deceit on part of defendant or those under whom he holds title. The only fact tending to sustain the charge of fraud is the failure on part of Joseph Cain to schedule this land as part of his assets in the bankruptcy proceedings. Cain, however, claimed that the property in fact belonged to his wife, and hence did not pass to the assignee. The title to the land stood in the name of Joseph Cain, upon the records of the county in which it is situated, for more than four years after the assignee was appointed. It does not appear that the assignee ever examined the bankrupt touching his property, or that either the bankrupt or his wife ever made any false statement to the assignee about the property. While the assignee may not have known that the property could be subjected to the debts due creditors, yet it does not appear that the bankrupt or his wife took

any steps to conceal the property, or deceive the assignee in regard to the same. Certainly nothing is proven affecting the good faith of the defendant. When actual knowledge of the fact that the title of this land stood in the name of the bankrupt was brought home to the assignee, he took no steps to assert any right thereto.

It is shown in the testimony of Joseph Cain that, shortly after the sale of the property to Buck, the assignee had a conversation with him in regard to the property. It was fully within the power of the assignee to have examined both the bankrupt and his wife touching their rights to this property, yet he did not do so, but permitted the sale to Buck to stand without objection. It is true that it is agreed in the stipulation signed by the parties that the assignee did not have actual knowledge or notice of the fact that Cain owned or held the title to the land until in January, 1883, yet it would appear that he had notice of facts sufficient to make it his duty to inquire into the condition of the property. What inquiry he did in fact make does not appear. The assignee died in December, 1883, and we have not the benefit of his testimony, but it does appear that he took no action looking towards the assertion of any right on his part to the land.

In January, 1883, the final schedule of assets left unsold was prepared for submission to a meeting of the creditors, but this land was not included therein. At the meeting of the creditors, when the matter was called up, he did not add it to his schedule as property belonging to the estate. At the request of a creditor he did put up for sale whatever interest he might have in the property, but it is clear that he did not claim the property as belonging to the estate, or else he was derelict in his duty as assignee. The property in question was worth sixteen hundred dollars. It was then occupied by an adverse claimant, and it was his duty, if he wished to sell it, to procure an order from court for that purpose, after notice given to the adverse party. No order for sale was procured, nor was any notice given that it would be sold. It was ostensibly put up for sale at auction, without notice, and knocked down to plaintiff for the sum of \$10. When the assignee came to execute a deed to plaintiff he was careful to avoid asserting that he had ever claimed any right to the land. Thus, in the recitals of the deed, as prepared for his signature, it was recited that "whereas, on the date last aforesaid, the said bankrupts, or some one or other of them, were possessed of or entitled to an interest in the real estate hereinafter described;" but the assignee interlined between the words "were possessed" the following, "as it is said and alleged;" and in the recitals of what was offered for sale, he interlined the words "such interest as he might have as assignee as aforesaid,"—thus clearly showing that he did not intend to assert a claim to the title of the land. In fact, it cannot be believed that the assignee would have sold the premises in question for the

merely nominal sum of \$10 had he believed that the property belonged to the estate. The facts show that the assignee did not regard the estate as really having any interest in the premises, and for this reason he asserted no right thereto. Under these circumstances he would not only be barred by the statute of limitations, but would also be estopped from asserting a right to the premises against a *bona fide* purchaser for value.

It is for the assignee to determine whether or not, in a given case, he will assert his right to property. He may elect not to charge the estate with the burden of looking after property. This election he must exercise within a reasonable time. A failure to do so may, as against third parties, be construed as an election not to claim the property. *Amory v. Lawrence*, 3 Cliff. 523; *Smith v. Gordon*, 6 Law Rep. 313; *Oakey v. Gardiner*, 2 La. Ann. 1005.

If an assignee neglects or refuses to take charge of a given piece of property for such a length of time as would indicate that he did not intend to assert a right thereto, and the bankrupt being left in possession thereof sells it to a third party, who buys in good faith, the assignee may be estopped from afterwards asserting his right thereto. In the case at bar, the title of the realty in question was in the name of the bankrupt, and it so remained for over four years after the appointment of the assignee. The bankrupt act makes it the duty of the assignee to record the deed of assignment within six months in every registry of deeds or other office within the United States where a conveyance of any lands owned by the bankrupt ought by law to be recorded. While it may be true that a failure to record the deed does not necessarily defeat the title of the assignee, yet it is a fact tending to show that the assignee does not assert a right to any land within a given county, because if he does assert such right, then he should record the deed.

In the case at bar the title to the realty in question was in the name of the bankrupt, and so remained upon the records of the county for over four years after the appointment of the assignee, yet he did not take possession of the property, or record the deed of assignment. In April, 1881, the property was sold to Harvey E. Buck by the bankrupt, and the deed put upon the record; and in October of the same year the defendant bought the property, paying \$1,650 therefor. In January, 1883, when the attention of the assignee was directly called to the property, he did not take the steps necessary to assert his right to the property, nor did he seek to give the estate the benefit of the property. So far as his own action is concerned, he clearly indicated that he did not intend to assert any claim to the property. The fact that when asked to do so he put up the property for sale at auction, without giving any notice thereof, or taking any steps to realize upon the property, and knocked the same down at the nominal sum of \$10, does not show that he really, and in good faith, deemed

the property to be part of the assets of the estate. Under these circumstances the assignee should now be estopped from asserting any right or title to the property against the defendant.

The plaintiff stands in no better position than the assignee. He holds under a quitclaim deed, and cannot therefore be heard to assert that he is an innocent purchaser. He takes just the right and title his grantor had, subject to all the equities existing and available against the assignee. *Oliver v. Piatt*, 3 How. 363; *May v. Le Claire*, 11 Wall. 217.

Moreover, when the quitclaim deed was executed to plaintiff, the defendant was in possession of the land, holding under deeds of warranty duly recorded. The plaintiff, therefore, can assert no greater or better right than could the assignee, and unless the latter could recover possession of the land, his grantee cannot.

Judgment for defendant.

UNITED STATES v. TURBAUD. (Several Cases.

(Circuit Court, E. D. Louisiana. May 23, 1884.

1. CRIMINAL LAW—INFORMATIONS.

Informations must be based upon affidavits which show probable cause arising from facts within the knowledge of the parties making them; the mere belief of the affiant is insufficient.

2. SAME—AMENDMENT OF INFORMATIONS.

Amendments of affidavits made as part of criminal informations cannot be allowed.

Motions to Quash Informations on the ground of insufficiency of affidavits.

A. H. Freeman, Asst. Atty. Gen., A. H. Leonard, and Francis T. Nichols, U. S. Atty., for plaintiff.

John D. Rouse, William Grant, and Joseph P. Hornor, for defendant.

BILLINGS, J. The question presented arises in prosecutions for the lowest grade of misdemeanors, but the determination affects the proceedings in all mere misdemeanors or offenses lower than felonies. I asked, therefore, a fuller argument, in order that I might have all the aid possible in the consideration of the matter, so that, on the one hand, there might be no groundless restriction upon the executive department in its efforts to enforce criminal law, and, on the other hand, that no protection which the constitution had thrown around the citizen might be disregarded.

¹ Reported by Joseph P. Hornor, Esq., of the New Orleans bar.

The affidavits, the sufficiency of which are to be determined, are identical, and are as follows:

"Geo. A. Dice, being duly sworn, says: All the statements and averments in the foregoing information are true, as he verily believes.

"GEO. A. DICE.

"Sworn to and subscribed before me this twentieth day of May, 1884.

"E. R. HUNT, U. S. Commissioner."

The point, and the sole point, to be passed upon is whether this affidavit furnishes such a "probable cause," and is supported by such an oath, as is required by the fourth amendment to the constitution. It is true, it is an affidavit subjoined to and made the basis of an information. It is also true that under the usages of the government of Great Britain this information belongs to the class of formal accusations which could be made by the king in his courts without any evidence, and against all evidence. But the adoption of the fourth amendment affected all kinds and modes of prosecution for crimes or offenses; for there can be no legal pursuit of accused persons without apprehension. All prosecutions require warrants. An information, a suggestion of a criminal charge to a court, is a vain thing, unless it is followed by a *capias*. The procedure by information, therefore, after it was acted upon by this amendment lost its prerogative function or quality. It could not thereafter be the vehicle of preferring any arbitrary accusation—not by the king, because we have in the department of criminal law no successor to him, so far as he represented a right to institute, if it pleased him, unsupported incriminations; nor by the district attorney, nor by any other officer of the United States; for the constitution has said, in effect, that in no way nor manner shall magistrates or courts issue warrants, except upon proofs, which are to be upon oath and make probable excuse. See *State v. Mitchell*, 1 Bay, 267, and 1 Op. Attys. Gen. 229, where Mr. Attorney General WIRT holds that even the president is controlled by this amendment. All arbitrary informations, all informations which spring into existence simply because the king and his attorney elected to present them, indeed all informations, except those supported by proof upon oath, which constitute probable cause, by this constitutional provision were expunged from permissible procedures, and the learning about informations was left valuable only as showing what proofs were considered adequate in cases where proofs had to be presented in order to have them acted upon by the judicial discretion or mind.

The master of the crown, whose duties with regard to informations to be sustained by proofs corresponded with the district attorneys' of the United States in the courts of the Union, was required to produce to the court "such legal evidence of the offense having been committed by the defendant as would warrant a grand jury in finding a true bill against the defendant, otherwise he will be left to his ordinary remedy by action or indictment." Cole, Crim. Inf. marginal

aging 15, 54 vol. Law Library. This is the measure of proof which is held to be requisite by the courts of the United States under the fourth amendment. See *Ex parte Burford*, 1 Cranch, C. C. 276. CRANCH, J., whose dissenting opinion was adopted by the supreme court, said: "It [the warrant] ought to have stated the names of the persons on whose testimony it was granted, and *the nature of the testimony*, so that this court may know what kind of ill-fame it was, and whether the justices have exercised their discretion properly." When the case reached the supreme court, (3 Cranch, 453,) "the judges of that court were unanimously of opinion that the warrant of commitment was illegal for want of stating some *good cause certain, supported by affidavit*."

The rule which must govern this court, and all magistrates who authorize arrests under the constitution of the United States, as to the foundation for the issuance of warrants, is uniform, and is thus stated by Mr. Justice BRADLEY in the matter of a rule of court upon the subject, (3 Woods, 502:)

"After an examination of the subject, we have come to the conclusion that such an affidavit does not meet the requirements of the constitution, which, by the fourth article of the amendments, declares that the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and that no warrants shall issue but upon probable cause, supported by oath or affirmation describing the place to be searched and the persons to be seized. It is plain from this fundamental enunciation, as well as from the books of authority on criminal matters in the common law, that the probable cause referred to, and which must be supported by oath or affirmation, *must be submitted to the committing magistrate himself, and not merely to an official accuser*, so that he, the magistrate, may exercise his own judgment on the sufficiency of the ground for believing the accused person guilty; and this ground must amount to a probable cause of belief or suspicion of the party's guilt. In other words, the magistrate ought to have before him the oath of the real accuser, presented either in the form of an affidavit or taken down by himself on a personal examination, exhibiting the facts on which the charge is based, and on which the belief or suspicion of guilt is founded."

The rule which was established was that the warrant should issue "only upon probable cause, supported by oath or affirmation of the person making the charge, in which should be stated *the facts within his own knowledge* constituting the grounds of such belief or suspicion."

In New York the statute required the warrant to contain, in the very words of the fourth amendment, a recital of "probable cause, supported by oath or affirmation." In *Blythe v. Tompkins*, 2 Abb. Pr. 468; Abb. N. Y. Dig. *verbo*, "Arrest," § 324, the warrant recited a complaint on oath by A. and B. that on or about a certain day, D., "as the said witnesses had good reason to believe and do believe," committed the offense. The court held the warrant on its face void, and that "the mere belief of witnesses was insufficient."

In *Vannatta v. State*, 31 Ind. 210, it was held that an information in which the district attorney charges the offense, "as he verily be-

lies," is bad on a motion to quash. In this last case the court, in effect, say that a verdict of guilty would not establish probable cause, for they say, (p. 211:) "A verdict that the defendant is guilty as charged would amount to nothing. *It would only show that the district attorney BELIEVED that the offense had been committed.*"

The "probable cause supported by oath or affirmation," prescribed by the fundamental law of the United States, is, then, the oaths or affidavits of those persons who, of their own knowledge, depose to the facts which constitute the offense.

It does not appear, from the affidavit upon which these procedures are based, that the affiant has any knowledge whatever of the truth of the matters contained in the informations; but simply that "all the statements and averments are true *as he verily believes,*" i. e., that he believes them all to be true, without any showing as to the grounds of his belief. Nothing was submitted by this affidavit upon which the "grand jury could have found a bill," nor "upon which the court could exercise its own judgment as to the sufficiency of the ground for believing the accused guilty." The constitutional provision must be utterly disregarded, or else it must be held that there is here no probable cause supported by the necessary proof.

The law of this state was correctly stated by the counsel of the government, and the attorney general of the state may file informations without offering any proofs. No more doubt is there that the section 1014 of the Revised Statutes of the United States authorizes the usages of the state to be followed as to the mode of process against offenders. But this, if, indeed, it refers to anything more than the form of the warrant, could not, by any possibility, include any usage which is expressly prohibited by the constitution of the United States.

An offer was made by the assistant attorney general to file another affidavit in case the court should find the one now on file defective. After consulting the authorities, I find that even when the hearing was on a rule to show cause why an information should not be filed, amendments of affidavits were not allowed. *Rex v. Inhab. of Barton*, 9 Dowl. 1021. See the numerous authorities cited in *Cole*, Crim. Inf. marginal paging 51, in support of the doctrine that if a party makes application on insufficient materials he cannot afterwards be allowed to supply the deficiency, and even though the deficit may be in the jurat. But where, as here, the probable cause has been acted on, and the warrant issued, the information must be adjudged either good or bad upon the record, and the proofs made by affidavit cannot be supplemented any more than upon a hearing under a writ of *habeas corpus*.

The motions to quash the informations must therefore be allowed.

THE "LOUISIANA LOTTERY CASES."

UNITED STATES *v.* DAUPHIN. (Several Cases.)¹

(Circuit Court, E. D. Louisiana. May 12, 1884.)

1. CRIMINAL LAW—REV. ST. § 3894.

The "sending" of letters and circulars concerning lotteries, denounced in section 3894 of the Revised Statutes, means the knowingly forwarding or causing to be forwarded through the mail, as matter to be conveyed by mail, *i. e.*, as mail matter, after the prohibited article has been deposited in the mail, and does not include the naked sending towards or to the post-office.

2. SAME.

After the voluntary termination of the custody of a letter by the post-office or its agents, the rights of the proprietor are under the protection of the local law, and not that of the United States, (*U. S. v. Parsons*, 2 Blatchf. 107,) and there is no difference in the dominion of the postal laws over a letter before that custody has commenced and after it has ended.

3. CONSTRUCTION OF STATUTES.

In the matter of construction of a revised statute the authority of the original statute is unquestioned.

On Demurrers to Informations.

A. H. Freeman, Asst. Atty. Gen., *Albert H. Leonard*, U. S. Atty., and *Francis T. Nichols*, for plaintiff.

Thos. J. Semmes, *Georgé H. Braughn*, and *Joseph P. Hornor*, for defendant.

BILLINGS, J. The informations in the four cases are identical, each containing three counts, charging a violation of section 3894 of the Revised Statutes. The offense charged in each count is the sending, with more or less particularity of circumstance, a circular concerning a lottery. The sending in each count is charged as follows: In the first count, simply that the defendant "unlawfully and knowingly did send to the post-office, at the said city of New Orleans, to be conveyed by the mail;" and in the second and third counts that the defendant did unlawfully and "knowingly send by another person to the post-office in said city, to be conveyed by and in the mail, which said circular letters, at the time the same were so as aforesaid by the said M. A. Dauphin sent to and were deposited in the post-office at said city of New Orleans." The offense charged in each of the counts is either a naked sending to the post-office by another with the proscribed intent, or a sending to the post-office with the same intent and a subsequent deposit in the post-office, but with no averment that the deposit was otherwise by the procurement of the defendant. Section 3894 is as follows: "No letter or circular concerning lotteries shall be carried in the mail. Any person who shall knowingly deposit or send anything to be conveyed by mail in violation of this section shall be punishable," etc.

¹ Reported by *Joseph P. Hornor, Esq.*, of the New Orleans bar.

The validity of the information turns upon the meaning of the word "send;" or, rather, whether the transmission which the statute visits with the penalty is before or after the depositing. If either reading is adopted there is a necessity of supplying an ellipsis, for when the word "send" is used in connection with the mails, the sending may either be "towards" or "to," signifying "into" or "in" the mails. If the meaning is that the sending precedes the deposit, it would follow—indeed it was so admitted in the argument—that sending outside of the mail, the intent being that the thing should ultimately be conveyed by mail, was an offense whether it reached the mail or not. There may be constitutional authority vested in congress, under the grant "to establish post-offices" and post-roads, to create such an offense, though, with reference to the force of a postal criminal statute, extending after letters had left the actual possession of the postal officers, in *U. S. v. Parsons* Judge Betts says: "Legislation of such scope and extent would clearly not be in furtherance of the functions and duties of the post-office department." And again, 2 Bl. 107: "After the voluntary termination of the custody of a letter by the post-office or its agents the rights of the proprietor are under the protection of the local law and not that of the United States." And it is difficult to see any difference in the dominion of the postal laws over a letter before that custody has commenced and after it is ended.

The debates in the United States senate in the years 1835 and 1836 upon the bill to prevent incendiary publications from being transmitted in the mails, which were participated in by Mr. Calhoun, Mr. Webster, Mr. Clayton, Mr. Buchanan, and to which Mr. Davis, of Massachusetts, so essentially contributed, and the bill itself, are most instructive as to the real nature and proper definition of the term "post-office," as used in the constitution, and the extent of the power given to congress over the subject. While there was great conflict of views as to the degree to which the other constitutional guaranties and exemptions qualified the right of government seizure and inspection of papers, it does not appear that any of the senators claimed that the power could be exercised to any degree outside of the physical limits set up in the bill itself, viz., upon mail matter while being received, transmitted, or delivered by the postmasters and mail carriers. See Congressional Debates, (Gale & Seaton's Reg.) vol. 12, pts. 1 and 2. I do not make this reference to show that the law would necessarily be unconstitutional, even if it had the construction that the legislation means a sending which would leave the act unconnected with the mails, but as bearing upon the question of the intention of congress in the use of this word; for, had it here created and punished such an offense, it would be one of the few instances, if not the only instance, in which congress has attempted to regulate the transmission of mail matter on account of what is written or printed, except while in or while physically connected with the

custody of the postal officers, *i. e.*, except while physically in or being deposited or being delivered.

True, the informations have been framed as if this part of the statute had made the offense to be "to send for deposit, followed by a depositing;" but this form of declaring cannot change the statute. If it should be held by the courts that the "sending" intended by the statute preceded or might precede any deposit in the mail, it would leave an attempted but unaccomplished sending—*i. e.*, a sending "towards" or "to," in the sense of "towards," the mail with the intent to have a conveyance by the mail—as unmistakable an offense as sending *into* the mail. But I think the meaning of this enactment is that the sending should follow the deposit, and should be "through" or "in" the mail. It makes the essential ingredients of the sending to be three: (1) Knowledge of the character of the circular; (2) a causing to move forward as matter to be conveyed by mail; and (3) *a violation of this section*. Circulars concerning lotteries, so far as federal law is concerned, may be lawfully sent anywhere, from any point to any point, with any intent, provided it be not *in violation of this section*. "In violation of this section" means in violation of the general and sole prohibition upon which it all rests, and in aid of which its penalties were established. That general prohibition is, "shall not be carried in the mail." No sending could conflict with this inhibition which was not effected in the mail.

It has been urged that these words, "in violation of this section," qualify only the word "anything," and were intended merely to indicate the thing prohibited; *i. e.*, circulars concerning lotteries, etc. But merely dealing with the prohibited thing is not the act constituted a crime. It is dealing with the prohibited thing in the prohibited manner. The prohibited thing must be sent. It can never be questioned that sending, to be made an act cognizable by criminal laws, must be bounded by words which define it, not alone in intent, but which characterize it as necessarily involving motion. There could then be no definite or punishable sending unless it be in violation of this section; that is, the thing sent must be carried or sent in the mail.

In the case of *The Paulina v. U. S.* 7 Cranch, 52, the court had to determine the effect of just this qualification upon the meaning of a penal clause. The thing prohibited was the putting on board of goods from one vessel to another. The qualification was "contrary to the provisions of this act, or of the act to which this act is a supplement." The court says, (p. 65:)

"Most apparently, then, both the letter and spirit of the law must be disregarded, or it must be admitted that the putting on board that is rendered culpable must be such a putting on board as is 'contrary to the provisions' of the original or supplementary act."

Though the prohibited thing had been confessedly done, since it had not been done contrary to the provisions of the act, the thing was

held not to be within the statute. The rule which should govern courts in determining in such case the limit of the act declared punishable is thus stated by Chief Justice MARSHALL, (p. 61:)

"But should the court conjecture that some other act not expressly forbidden, and which is in itself the mere exercise of that power over property which all men possess, *might also be a preliminary step to a violation of the law*, and ought, therefore, to be punished for the purpose of effecting the legislative intention, it would certainly transcend its own duties and powers, and would *create a rule*, instead of applying one already made. It is the province of the legislature to declare *in explicit* terms how far the citizen shall be restrained in the exercise of that power over property which ownership gives; and it is the province of the court to apply the rule to *the case thus explicitly described*,—not to some other case which judges may conjecture to be equally dangerous."

It is to be observed that throughout the title, "The Postal Service," the verb, "send," and its past participle, "sent," have an established meaning, and uniformly signify forwarded in the mail through the officers of the government. See Rev. St. §§ 3851, 3909, 3912, 3932, 3937, and 3993. Whereas, the intentional procurement of the conveying of a letter into the mail is described as causing to be deposited. See sections 3887 and 3893. Those who revised the statutes had, therefore, this last form of expression, which they had used in the preceding section, and which they could have used in connection with the word "attempted," instead of the word "send," had they intended to include the act set forth.

The meaning of the section under consideration is equally evident if we consult the statute from which it is derived in the Revision. It was compiled from the act to revise, consolidate, and amend the statutes relating to the post-office department, (section 149, vol. 17, p. 302,) which provides that "it shall not be lawful *to convey by mail*, nor to deposit to be sent by mail, any letters," etc., and that "a penalty is hereby imposed of, etc., upon conviction in any federal court of the violation of this section." The meaning of this original statute could hardly be more fully expressed, or be freer from ambiguity. It creates two offenses,—"*the conveying by mail*" and "*the depositing in a post-office to be sent by mail*." Neither of these offenses could include the *sending* towards or to the mail. The sending is the conveying by mail, and that alone. The whole structure and the parts in detail of section 3894 show that this section 149 of the act of 1872 was the portion of the law which was therein brought into the Revision or Compilation. In the matter of construction of a revised statute the authority of the original statute is unquestioned.

In *Dominick v. Michael*, 4 Sandf. 409, the court say:

"For nearly half a century it has been a cardinal and controlling maxim that in the construction of a revised act a mere change in the language shall not be regarded 'as evidence of an intention to vary the construction, unless the change is such as to render that intention manifest and certain.' See, also, *Taylor v. Delancy*, 2 Caine, Cas. 151, and Chancellor KENT, in *Goodell v. Jackson*, 20 Johns. 722. In this last case Chancellor KENT assents to the

doctrine that 'when the law *antecedently to the revision* was settled by clear expression, the mere change of phraseology shall not be deemed a change of the law unless the phraseology *evidently purports* an intention in the legislature to work a change,' and that 'if any doubts are entertained the court is authorized to look at the law as it was before the revision.'

The original act declared that "to convey by mail," and "to deposit in, to be sent by mail," were prohibited, and that the crime should consist in "the violation of this section." The revised act declared that the specified articles "should not be carried in the mail," and that the crime should consist "in depositing or sending them," as matter "to be conveyed by mail," "in violation of this section." Is it not manifest that while there is a change in the order of words, and, in one or two instances, the substitution of one word for another, and a change in the dependence of sentences, that there is not such "change in the language" as should be "regarded as evidence of intention to vary the statute?"

Both the original and Revised Statutes include letters and circulars. A sealed circular is, for all purposes affecting the postal offices, a letter. But circulars were for the most part unsealed, and their character could, therefore, be ascertained. The much lower postage made their use much more frequent for purposes of advertisement, as distinguished from correspondence, and therefore they stood as the chief means of scattering alluring notices. The prohibition against carrying or forwarding would have little application to letters, but, enforced by vigilant post-offices, would have great efficacy with reference to circulars, which would probably be the great means for diffusing the information sought to be suppressed. The importance of the prohibition against "carrying" would, therefore, be manifest to all who were legislating to secure the object of excluding from the mails circulars belonging to the specified class.

It must not be forgotten that the exclusion of this class of matter from the mail first appeared in the form of a postal regulation, unattended by any imposition or penalty, (Act of 1868, 15 St. p. 196, § 13;) that, subsequently, congress emphasized this regulation by punishing those who deposited and those who conveyed, (17 St. p. 302, § 149;) that no good reason can be assigned why the punishment of those who convey circulars of the prohibited class should be withdrawn; that, on the other hand, a wide void would be made in the system of legislation on this subject unless such punishment be maintained; and that it has been altogether withdrawn from the statute in the Revision, unless the word "sending" means after the depositing has been affected, and through the officers who have custody of the mail.

There are difficulties and doubtless omissions of preventive measures if we adopt any of the proposed constructions; but, considering the greater difficulties which any other construction opposes, I am of the opinion that the proper conclusion is that by the section 3894 the

congress meant to re-enact the then existing law upon the subject, at least without any omission of the chief means of enforcing the entire prohibition, and that the sending denounced and punished is knowingly forwarding or causing to be forwarded through the mail, as matter to be conveyed by mail, i. e., as mail matter, after the prohibited article has been deposited in the mail, and could not include the naked sending to the post-office, which is alone charged in the informations.

Let there be judgment sustaining the demurrers.

UNITED STATES *v.* WASHINGTON and others.

(Circuit Court, W. D. Texas. February Term, 1883.)

CONSTITUTIONAL LAW—CIVIL RIGHTS ACT.

The act of congress of March 1, 1875, entitled "an act to protect all citizens in their civil and legal rights," is unconstitutional.

Motion to Quash Information.

George Goldthwaite and Pendexter & Wooten, for the motion.

A. J. Evans, U. S. Atty., contra.

TURNER, J. On the thirteenth day of June, 1883, the district attorney of Texas filed in this court an information against one John H. Washington and others. The information was based upon an affidavit made by one White, stating the facts embraced in the information. The information charges, in substance, that on the fifth day of August, 1882, one Laura Evans, a resident citizen of the state of Texas, desired to go from Austin, Texas, to the city of Houston, Texas, and that, in pursuance of such desire, purchased a first-class ticket of the Houston & Texas Central Railroad Company from Austin to Houston; that said railroad company is a corporation which owned and operated their railroad from Austin, Texas, to points south and south-east of said city of Austin, to Houston and other points in Texas, etc.; that the defendants, acting as agents of the said railroad company, refused the said Laura Evans admittance to the coach or car of said company used for the conveyance of persons of her sex, and required her to enter the car known as the smoking car, where she would be subjected to indignities and inconveniences not met with in the car usually occupied by females; and that she was thus discriminated against solely on account of her race and color, she being of African descent, etc. The information is filed upon the idea that the acts complained of render the defendants liable to a prosecution under the act of congress of March 1, 1875, and to recover the penalty therein announced against persons violating the provisions of that act.

While the information does not state in terms that the Texas Central Railroad Company was chartered by the state of Texas, such is the import of the words, and such is the fact. Therefore the railroad company is, for all legal purposes, a person and resident and citizen of Texas, as well as their agents, the defendants. A motion is made to dismiss the case for want of jurisdiction of this court, the point being that the act of congress, so far as it undertakes to regulate and control the conduct of the private citizens of the same state, is without constitutional authority, and therefore of no effect. The authority for the act of congress referred to must be found, if found at all, in the fourteenth amendment of the constitution of the United States. It is universally conceded that the United States government is one of limited powers; that congress can only legislate upon such matters as it is authorized by the constitution of the United States, or such as arise by necessary implication from those actually and specifically conferred. The fourteenth amendment is as follows:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No *state* shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any *state* deprive any person of life, liberty or property without due process of law, nor deny to any person without its jurisdiction the equal protection of the laws."

Then follows the provision which gives congress the power to enforce by appropriate legislation this provision. The act of congress invoked reads:

"That all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances, on land or water, theaters and other places of public amusement, subject to the condition and limitations established by law, and applicable alike to citizens of every race and color, regardless of any conditions of servitude."

There is no allegation in the information that there is any law of the state which makes, or undertakes to make, any discriminations against persons of African descent, nor is it believed that any such law exists in this state. The defendants are all citizens of this state, and the ticket purchased was from one point in the state to another point in the state. The fourteenth amendment is a limitation upon the powers of the state and an enlargement of the powers of congress. If the state has not by its laws or officers overstepped these limitations, no case arises for the exercise of the power conferred on the federal congress. The first clause of the amendment simply declares who are citizens of the United States and of the state where they reside, and it does nothing more. The balance of the article is directed against state action. If it had been intended to confer upon congress the power to legislate with reference to the infraction of the rights of one citizen of the state against another

citizen of the same state, it would have said so. I do not think the power was conferred by this section to declare that the federal court should have exclusive and concurrent jurisdiction with the state courts to protect the rights of national and state citizenship; if so, then the inhibition against the state action is superfluous. I am of opinion, therefore, that the act of congress under which this action is prosecuted is without the sanction of the constitution. The party injured has her redress in the state court. How long our railroad companies will continue in their employ men possessed of the spirit which actuated the defendants in this case I do not know. That the party complaining was entitled to accommodations equal in all things to other passengers who rode upon the train there can be no doubt. It is no credit to the railroad companies that they retain in their employ agents such as these defendants, from the allegations in the information, seem to be. The question before me, however, is one of jurisdiction. It is not pretended that there is any unfriendly legislation against the colored man in this state, and it cannot be said that the act complained of is in any way connected with the instrumentalities used by the state in the administration of its government, either legislative, executive, or judicial. In short, the state is in no manner connected with or implicated in the acts complained of, and it does not come within the inhibitions mentioned in the fourteenth amendment to the constitution, and consequently the authority for the act in question is wanting, and this court has no jurisdiction of this cause. I am not without authority in this view of the case. See the following cases: *In re Tiburcio Parrott*, 1 FED. REP. 481; *The Slaughter-house Cases*, 16 Wall. 36; *U. S. v. Cruikshank*, 92 U. S. 542; *U. S. v. Harris*, 106 U. S. 629; S. C. 1 Sup. Ct. Rep. 601.

These cases must be held to be conclusive upon the point, and the motion to quash must prevail.

The first and second sections of the civil rights act, passed March 1, 1875, are unconstitutional enactments as applied to the several states, not being authorized either by the thirteenth or fourteenth amendments of the constitution. The fourteenth amendment is prohibitory upon the states only, and the legislation authorized to be adopted by congress for enforcing it is not *direct* legislation on the matters respecting which the states are prohibited from making or enforcing certain laws, or doing certain acts, but is *corrective* legislation, such as may be necessary or proper for counteracting and redressing the effect of such laws or acts. The thirteenth amendment relates only to slavery and involuntary servitude, (which it abolishes;) and although, by its reflex action, it establishes universal freedom in the United States, and congress may probably pass laws directly enforcing its provisions, yet such legislative power extends only to the subject of slavery and its incidents; and the denial of equal accommodations in inns, public conveyances, and places of public amusement, (which is forbidden by the sections in question,) imposes no badge of slavery or involuntary servitude upon the party, but, at most, infringes rights which are protected from state aggression by the fourteenth

amendment. Whether the accommodations and privileges sought to be protected by the first and second sections of the civil rights act, are or are not rights constitutionally demandable, and if they are, in what form they are to be protected, is not now decided. Nor is it decided whether the law, as it stands, is operative in the territories and District of Columbia; the decision only relating to its validity as applied to the states. Nor is it decided whether congress, under the commercial power, may or may not pass a law securing to all persons equal accommodations on lines of public conveyance between two or more states. *The Civil Rights Cases*, 3 Sup. Ct. Rep. 18. See, also, *U. S. v. Buntin*, 10 FED. REP. 730, and note, 736.—[Ed.]

ALBANY STEAM TRAP CO. v. FELTHOUSEN and others.

(Circuit Court, N. D. New York. May 31, 1884.)

PATENT—STEAM-HEATER—PRIOR INVENTOR—INFRINGEMENT.

Action for infringement of patent for steam-heaters with apparatus for returning condensed steam to boiler. Infringement proved, and defendant, not being able to substantiate his claim of being the prior inventor, judgment pronounced against him, without costs.

Argument on Final Hearing before WALLACE and COXE, JJ.

Dickerson & Dickerson, for complainant.

George B. Goodwin and J. D. F. Stone, for defendant.

WALLACE, J. The first of the four patents in controversy was granted to Helem Merrill, April 30, 1867, and the specific improvement in steam-heating apparatus which it describes consists in the devices for returning the water of condensation back into the boiler. The main contention of the parties is respecting the construction which should be placed upon the claims, especially upon the first and third claims of the patent, it being conceded by the experts for the defendant that the claims have not been anticipated by any of the earlier patents introduced in evidence by the defendant, if the claims are limited so as to restrict the patent to the specific devices of the description. The description of the patent is as follows:

"My improvement consists in the manner of returning the water of condensation back into the steam-boiler or generator when the heaters, evaporators, or condensers are above or below the water level in the boiler, thus keeping the coils and return pipes free from water. The steam, being dry, imparts more heat for the purposes required, thereby causing a great economy in fuel.

"To enable others skilled in the art to make and use my invention I will proceed to describe its construction. Figure 1 is a front view of a steam boiler with a receiving and discharging cylinder; also a heater above, and one below the water level in the boiler, together with the necessary pipes and valves. Figure 2 is an enlarged vertical section of one of the cylinders and float as attached to the steam or water-cock. Figure 3 is a cross-section of a cylinder, float, and arm. Figure 4 is a vertical section of one of the check valves. The letters of reference show corresponding parts in the different figures represented in the accompanying drawings. Steam is generated in

boiler, A, figure 1. The air cocks, *g, g*, figure 1, receiving cylinder, G, and discharging cylinder, H, figure 1, are opened. The steam is let into the main pipe, C, through the stop-valve, B, and into the coil, D, which is above the water level, as indicated by red line, *i*, and also into coil, E, which is below the water line, through the cocks, *h, h*, all in figure 1. As the steam is condensed in the coils by the process of heating or evaporating, the water of condensation passes down into and through the condensing pipe, F, into cylinder, G, figure 1. When all the air is exhausted through cock, *g*, it is closed, and the water rises, carrying up the float, *a'*, figure 2, until it strikes the arm, *o'*, figure 2, and carries it up with the rod and arm, *b*, figures 2 and 3, which are connected together through a stuffing-box on the outer side of cylinder. The connecting-rod, *c'*, is attached by a loose joint to the arm, *b*, figure 2. The other end of the rod, *c'*, has a slot that moves on a pin on the side of the ball-arm, P. When the float raises, the arm, *b*, figure 1, brings the end of the slot in contact with the pin, and throws the ball, P, past the center, when it falls by its own weight, being loose on the pin which projects from the head of the key of the cock, N, figure 1. The quadrant, which is attached firmly to the key of the cock, has two points projecting outward, against which the shaft holding the ball strikes in its fall, and carries the quadrant round, thereby opening the water-cock, N, figure 1, allowing the water to flow from cylinder, G, through pipe, J, and check-valve, I, and pipe, K, into discharging cylinder, H, figure 1. The air-cock, *g*, in cylinder, H, being still open, there is no pressure on the top of the water, which rises, carrying the float and arms, as before described in figure 2, until it is near the top, when the air-cock, *g*, is closed, and the float, having raised the inner end of the arm, *b*, figure 1, it carries the outer end down by the shaft in the stuffing-box, being the axis, until it has drawn the ball-arm, P, down by means of the connecting rod, *c'*, figure 1, thus throwing the ball past the center, it falls and operates as before described for receiving cylinder, G, figure 1. The ball, P, in falling, moves the quadrant attached to the key of the cock, O, admits the steam from the boiler, A, through pipe, K, into the cylinder, H, on top of the water, which, being above the level, and by the pressure of the steam on its surface, causes it to flow downward by its own gravity through pipe, K, up through valve, L, pipe, M, and cock, *e*, into the boiler, A, figure 1. When the water is nearly all out of cylinder, H, the float having fallen, closes the steam-cock, O, by means of the lever, connecting rod, and ball-arm. By reversing the ball it stops the steam from entering the cylinder, H, figure 1. The cylinder, G, having discharged its water into the cylinder, H, the float has fallen and closed the cock, N, in the same manner as described for the steam-cock, O. While the water is again filling the cylinder, G, the steam is being condensed in the cylinder, H, thus reducing the pressure, so that when the water again rises sufficiently to open the cock, N, it rushes up, as before described, to fill the vacuum caused by the steam being condensed in the cylinder, H. The pressure on the top of the water in the cylinder, G, also forces it up, thereby making the operation sure, the cylinders receiving and discharging alternately, as described. The cock, *f*, figure 1, at the bottom of the cylinder, G, is for drawing off the water when the whole apparatus is not in operation. The float, *a'*, figure 2, has a tube through its center, and is air tight. The rod which holds the float in the center of the cylinder passes through the tube, the float thereby being independent of the levers, until they come in contact by the rising or falling of the water. One or more coils or heaters may be used at the same time. If the motive power is required from the same boiler a separate pipe should be used for that purpose."

The claims are as follows:

"(1) The retaining of the water in the receiving and discharging cylinders until at required height it exerts a power sufficient to perform the operations,

substantially as described and set forth; (2) the independent float, as connected and combined with the stop-cocks, making the whole apparatus self-acting, for the purposes as substantially set forth and described; (3) I claim the method of returning the water of condensation to the boiler, substantially as described."

Upon the face of the claims grave doubt is entertained whether the first and third claims are not nugatory, because they do not particularly specify and point out the part, improvement, or combination which the inventor claims as his invention. The first claim is so vague and nebulous that it does not convey any definite meaning. The third is so general, that it is, in effect, the mere statement of the inventor that he claims what he has described in his specification. The first is a claim for the functions of some part of the apparatus described, whereby the water is retained and enabled to perform certain operations by reason of being retained in the receiving and discharging cylinders; but what these operations are, and what devices co-operate thereto, is left open to conflicting theories. Both of these claims must be construed as claims for the apparatus which performs the functions mentioned in the first claim, and which is the means for effecting the method specified in the third claim; otherwise both claims are void as being for a function, or abstract effect, instead of the means by which it is produced. If the claims were for some of the specific devices employed, either separately or in combination, or if the description distinguished what was new from what was old in the state of the art, the scope and limits of the invention might be intelligibly ascertained.

Referring to the prior state of the art to ascertain what Merrill really invented, it appears that he was not the first to effect a return of the water of condensation to the boiler when the heating surfaces in a steam-heating system were located above or below, or above and below, the water level of the boiler. The English patent of July 8, 1857, to Bonsfield, and the United States patent of March 2, 1858, to Dennison and Sealy, show all the features of the closed pressure steam-heating system of Merrill, except the receiving chamber and the automatic valve-operating mechanism in that chamber, and in the discharge chamber. The United States patent to Barnes, of September 6, 1859, shows a closed pressure steam-heating system, in which the heating surfaces are located both above and below the level of the water. This system contains a receiving chamber located below the level of the boiler to receive the water of condensation, and a discharge chamber located above the level of the boiler. The chambers are connected, and the receiving chamber empties the water into the discharge chamber, and the discharge chamber empties it into the boiler. The pipe by which steam passes from the boiler into the discharge chamber, and the pipe by which the water flows back from that chamber into the boiler, are provided with a stop-cock or valve to close or open the passage, which is operated by hand. The sys-

tem contains all the features of Merrill's, except the automatic-valve mechanism, the valves in this system being operated by hand.

The automatic valve devices of Merrill were old in principle. An automatic steam-boiler feeder, consisting of a vessel interposed between the boiler and a water reservoir, and fitted with valves and a float so applied as to cause the said vessel to be alternately filled from the reservoir and discharged into the boiler, is disclaimed as old in the patent to James Hoover, of August 6, 1861. That patent describes automatic valve devices in the feeding vessel, which operate upon the same principle as Merrill's, to do the same work. The English patents to Routledge, of June 25, 1860, and Auld, of April 21, 1859, also describe a float and tumblebob devices for actuating equalizing valves in steam-boiler feeding apparatus..

What Merrill did was to introduce the automatic valve devices shown in these patents, with modifications, into the receiving and discharging chambers of the Barnes patent. By doing this, he effected an automatic return of the water to the boiler, a new result, and a valuable one, in a steam-heating system of the kind to which his invention relates. If he had claimed a method of returning the water by means of his new combination, pointing out the co-operative members, there would be nothing to impeach his claim. The difficulty of the complainant's case is to give any construction to the claims of the patent that will save the invention.

For present purposes, it is only necessary to construe the patent so far as to decide the precise point of difference between the experts as to the proper construction of the claims. As to the first and third claims the question is whether they must be confined to a combination of devices of which the valve-operating mechanism of the lower cylinder or receiving chamber is a constituent. If they are to be limited to such a construction the defendant does not infringe, as he employs merely an ordinary trap for his receiving vessel, without any automatic valve mechanism. It is insisted for the complainant that the only function of the receiving chamber is to receive and store the water for delivery into the discharging chamber, and therefore that this valve mechanism in the receiving chamber is not an essential element in the system. Undoubtedly the automatic return of the water of condensation can be effected successfully if the receiving chamber is merely a trap located below the level of the lowest heating surface. But how can this be ascertained from the claims and description of the patent? Not only does the description locate the automatic valve mechanism in the receiving chamber, but its operations there are pointed out with particularity. According to the theory of the specification, the automatic mechanism in that chamber regulates the supply of the discharge chamber by emptying the water at intervals, determined by the action of the float. The water is to be retained in the receiving chamber until it is full, and there is a fixed point which it must reach before

it can actuate the valve mechanism and escape into the discharge chamber. It seems very plain that the automatic valve mechanism in the receiving chamber cannot be eliminated from the invention described, and must be regarded as of the substance of the invention claimed.

The second claim of the patent must also be limited to such a float in general detail of construction, as is described in the specification, or the claim is anticipated by the independent float shown in the patent of Hoover, and the other references cited. The defendant does not employ such a float.

As to all the claims of this patent, the conclusion is therefore reached that the defendant does not infringe.

COXE, J. This is an equity action founded upon four patents for improvements in steam-heating and steam-traps. The first was issued to Helem Merrill April 30, 1867. The other three, known as the Blessing patents, were issued as follows: The first, February 13, 1872, reissued August 26, 1873; the second, September 2, 1873, reissued June 18, 1878; the third, August 27, 1878. The Blessing patents alone remain to be considered, it having been determined, for reasons stated in the opinion of the circuit judge, that the defendant does not infringe the claims of the Merrill patent. The object of the inventor in each of these patents was, as in the Merrill patent, to return the waters of condensation automatically to the boiler, to accomplish the same result upon similar principles but by different and improved mechanism. In view of the prior state of the art and of the construction given the Merrill, or foundation patent, it may be said at the outset that the claims now to be examined should be confined within exceedingly narrow limits. Each inventor must be restricted to the specific improvement and the particular device described and claimed by him.

Regarding the first Blessing patent, the controversy is limited to the first and fifth claims. They are as follows:

"(1) A receiving and discharging vessel, C, communicating with a steam-boiler by means of a steam-pipe, G', and inlet-check valve, X, and with the same boiler by means of an out-let pipe, J, and a valve, 2, and so arranged between or in respect to the two valves that the water is received and allowed to fall to the bottom of the vessel, and the steam following is not compelled to pass through the water, all for the purposes of automatically returning water of condensation to the said boiler from steam-heaters, substantially as described. (5) A receiving vessel, C, for the purpose of insuring the return of the water of condensation to the boiler which rises and falls on occasions, combined with a steam-heater and a steam-boiler, substantially as set forth."

As to the first claim, the conclusion is reached that nothing valuable is there described which was not known before, and as to the fifth that the defendant does not infringe.

The points of difference suggested by complainant between the apparatuses in this and the Merrill patents are these: In the latter

the inlet and outlet passages to and from the trap are combined in one. In the former the inlet is at the top and the outlet at the bottom. In the former, too, the weight of the water is used to operate the equalizing steam-valve, the receiving vessel being counterbalanced by a weight combined with a lever. In the Merrill patent an airtight float rises and falls with the water in each cylinder. With these exceptions the principles of the two patents are substantially identical. Regarding the first claim it is unnecessary to repeat what is so well stated by Judge WALLACE, or to refer in detail to the numerous references which have been so extensively commented upon by the experts and by counsel. It suffices to say, that the patentee has, in view of what was before known in the art, done nothing to entitle him to a monopoly. It is, perhaps, true that the precise apparatus is not described in any prior patent, but every separate element was known and the mechanical change necessary to transform several of the devices referred to into the receiving and discharging vessel communicating with a steam-boiler, as described in the claim, would hardly amount to invention. The fifth claim refers to a receiving vessel, counterbalanced by a weight in such a manner that the vessel will rise when the water is withdrawn and sink when it is filled again. In the defendant's device the trap is stationary and the float is caused to rise by what is termed "a water counterbalance;" that is, the water is introduced into the trap and the float, being empty, rises until the water, overflowing into it, causes it to sink. It is contended that this is the mechanical equivalent for the metal weight described. We cannot accede to this view. Indeed, the inquiry is suggested, why did the inventor, if he considered the one an equivalent for the other, describe and claim the equivalent so carefully in the second patent? To use the language of the complainant's brief, the second patent shows, "Mr. Blessing's first modification of the invention described in Exhibit first, Blessing patent, and it consists simply in the substitution for the weight, W, of a water counterbalance." The method of operation in the defendant's and complainant's apparatuses is in practice, entirely dissimilar, and where the field of invention is so thoroughly occupied as we find it here, each patentee must be contented with the mechanism described by him.

The second Blessing patent contains the following claims:

"(1) A steam-trap, provided with a rising and falling bucket contained within a shell, into which the return-water is delivered, and from which it is discharged by a siphon-pipe which passes nearly to the bottom of said bucket, substantially as described. (2) A steam-trap provided with a rising and a falling bucket, contained within a shell, into which the water is delivered, and from which it is discharged by a siphon-pipe passing nearly to the bottom of the apparatus, the said bucket being attached to an apparatus operating the steam-valve, which apparatus does not open or close the steam-valve at the commencement of the fall or rise of the bucket, but allows an interval of time to elapse between the movement of the bucket and its action on the

steam-valve, whereby the bucket is entirely filled and discharged, substantially as described. (3) An improved steam-trap, provided with a rising and falling bucket, through the top of which the water is delivered and discharged by means of a delivery and discharge-pipe, each provided with a check-valve substantially as described. (4) An improved steam-trap provided with a rising and falling floating bucket, into which the water is delivered, and through which it is discharged by means of a siphon-pipe reaching nearly to its bottom, and provided with an air-cock, by means of which the accumulated air may be discharged from the apparatus, substantially as described. (5) The inlet and outlet passages, *b b*, provided with check-valves, and combined with a water-receiver, containing a vertically movable bucket, *T*, into which the water enters and from which it is discharged, substantially as and for the purposes described."

They all relate to an open-top float contained within a shell constructed with a siphon-pipe, so that the water is discharged from the top, instead of the bottom of the float. The water from the coils is by means of a pipe forced directly into the float which, when a sufficient quantity has been introduced, is thus caused to sink. In the defendant's trap the water is showered down from the perforated diaphragm to the bottom of the containing shell. As the water flows into the trap it causes the float, which is empty, to rise until it comes in contact with a plate at the top of the trap where it remains until the circumjacent water flows over its edge, and when the trap and float are filled the latter sinks to the bottom of the former. It is insisted that this difference is immaterial, though the complainant's expert admits that "perhaps it is an improvement to deliver the water outside of the bucket." It certainly is an improvement and one to which the defendant would be entitled, provided he first made the discovery. Step by step has the advance in steam-traps been made, each inventor adding something, until, at the present time perfection has been nearly reached. The progress made by Blessing, as shown in this patent, since the several devices which preceded it, is surely no more beneficial and important than that made since the patent, as illustrated by the defendant's trap and the third Blessing trap.

The claims of the third Blessing patent are as follows:

"(1) An automatic steam-trap for the purpose of returning water to the boiler, having an open-top float, into which water enters and whence it is delivered to the boiler, thereby causing said open-top float to rise and fall, when the said open-top float is connected to an equalizing steam-valve by a connecting apparatus which does not connect a steam-space and the atmosphere, nor two steam-spaces of different pressures, and when the opening and closing of the steam-valves is not effected gradually, but suddenly and surely, by reason of the fact that there is a certain amount of lost motion between the movement of the open-top float and its action on the valve. (2) An automatic steam-trap consisting of a containing vessel and a rising and falling open-top float, when the water which enters said trap first fills the space between the open-top float and the containing vessel, and when the equalizing steam-valve is not immediately actuated by the movement by the open-top float, but the open-top float is connected to said steam-valve by means of apparatus allowing a certain amount of lost motion, substantially as described. (3) An automatic steam-trap which consists of an inclosing-vessel, *A*, and a rising and

falling open-top float, B, when the inclosing-vessel is provided with a tank communicating with its upper portion, substantially as described. (4) An automatic steam-trap having a vessel, A, provided with a tank, T, connecting with its upper portion, which tank communicates with the vessel by means of two or more small openings, thereby delaying the escape of the water in the tank into the inclosed-vessel, substantially as described. (5) An automatic steam-trap for returning water to the boiler provided with a rising and a falling vessel and with apparatus as substantially described, independent of the mere inflow of water from the supply, whereby the water-level between the rising and falling vessel and the containing-casing is maintained, and raised after the vessel begins to ascend. (6) The combination of the vessel, A, open-top float, B, and rod, *p*, provided with collars, *g* and *f*, operating the steam-valve, *t*, when the collars *g* and *f*, are separated for the purpose of allowing a certain amount of lost motion before opening or closing the valve, substantially as described. (7) In an automatic steam-trap for returning water to the boiler the combination of the shell, A, with a siphon, C and C, provided with the air-cock, *x*, for the purpose of filling said siphon, substantially as described. (8) An automatic steam-trap provided with the tank, T, connecting with the upper part of said trap by means of apertures, *m*, *n*, and operating the steam-valve by means of apparatus substantially as described, whereby a certain amount of lost motion is allowed between the rising and falling open-float and the equalizing steam-valve, substantially as described."

It will be observed that the trap here described is almost the exact counterpart of the defendant's. In principle and operation the two are substantially alike, and we have no hesitancy in saying that the defendant infringes. The main controversy, therefore, has reference to the alleged anticipation by the defendant who asserts that he is the prior inventor. Upon this issue the burden is upon him, and he has failed to prove to our satisfaction the allegations of the answer in this behalf. The evidence relied on to establish prior use is vague, shadowy, and uncertain. No part of the trap which, as is alleged, anticipated complainant's invention is produced, and there is nothing definite as to the manner of its construction. Opposed to the defendant's testimony is the positive statement of Blessing that he conceived his invention in the spring of 1874, though it was not perfected till the spring of 1875. In corroboration of this statement the patterns are produced and the pattern maker identified them as having been made by him in the months of February, March, and April, 1874. Our conviction is that the defendant has not succeeded in proving a defense.

There should, therefore, be a decree for the complainant upon the third Blessing patent, but as the complainant has been defeated upon three of the four patents in suit, the decree will not allow costs.

PATTERSON and another v. DUFF.

(Circuit Court, W. D. Pennsylvania. May 24, 1884.)

1. PATENTS FOR INVENTIONS—PRESUMPTION OF PATENTABILITY—RATCHETS FOR COUPLING BARGES.

The presumption of patentability, authorized by the grant of a patent, is not repelled where it is proved that no such device as a ratchet for coupling barges was in existence or use before the issue of the patent.

2. CONFLICTING EVIDENCE—BURDEN OF PROOF ON DEFENDANT—DOUBT RESOLVED IN FAVOR OF COMPLAINANT.

Where evidence of a fact is conflicting, but the burden of proof is on a defendant, a doubt will be resolved in favor of a complainant.

In Equity.

J. J. Johnston, W. P. Potter, and D. F. Patterson, for complainants.

R. A. Balf, for respondent.

Before BRADLEY and McKENNAN, JJ.

PER CURIAM. This is a suit upon a patent granted to the complainants February 7, 1871, No. 111,564, for an improvement in ratchet couplings for barges. Two grounds of defense are set up: (1) That the device or combination claimed in the patent does not involve invention, and is therefore not patentable. In view of the fact that no such device was in existence or use before, although there was a wide necessity for its employment and of its obvious utility, we are of opinion that the presumption of patentability authorized by the grant of the patent is not repelled, and that the objection is not well founded. (2) It is alleged that Thomas Duffy first conceived the idea of the invention, and that he described it to one of the complainants, and that thus they derived the idea from him. The burden of proving this allegation is upon the defendant, and hence it must be borne by the exhibition of preponderating and satisfactory evidence. The proofs are conflicting; and while we are of opinion that the scales incline in favor of the complainants, it can, at least, be said with confidence that the defense is not clearly sustained. That is enough to resolve the case in favor of the complainants.

If the validity of the patent is sustained, it is admitted that the defendant is an infringer. Hence the complainants are entitled to the relief prayed for.

v.20,no.9—41

THE C. ACCAME.

(Circuit Court, N. D. Florida. April, 1884.)

ADMIRALTY JURISDICTION.

Where a damage done is done wholly on land, the fact that the cause of the damage originated on water, subject to the admiralty jurisdiction, does not make the case one for the admiralty. *The Plymouth*, 3 Wall 20.

Admiralty Appeal.

S. R. Mallory, E. A. Perry, I. E. Yonge, and John C. Avery, for libellant.

I. P. Jones, Wm. Fisher, and R. L. Campbell, for claimants.

PARDEE, J. The original libel, among other things, charges:

"That on the ninth day of September, inst., while the said barkentine was lying at libellant's said wharf *without libellant's permission, and against his express direction*, there came a violent storm of rain and wind, and said barkentine, by the negligence, want of proper care and diligence, on the part of the said barkentine and those in charge of her, ran into said wharf of libellant, completely breaking down a large portion of it, and greatly injuring and damaging the same, rendering necessary, by such negligence and want of care on the part of the said barkentine and those having her in charge, great repairs to be made on said wharf, at great cost and expense, by libellant, besides being deprived of the use and profit of said wharf for the period of three months, all of which is greatly to the injury and damage of libellant."

Thereafter an amended libel was filed, charging as follows:

"That on the ninth day of September the said barkentine C. Accame was lying at said wharf, under a *contract with libellant for the discharge of ballast at said wharf*; that when said barkentine, by the master thereof, applied for a berth at said wharf, he was informed that the wharf at that time was undergoing repairs, and that portions of said structure were not in a safe and proper condition, but that said barkentine could be accommodated with a suitable and safe berth at a certain point, which was pointed out and assigned to said barkentine, and accepted by the master thereof, where she was accordingly placed and moored for the purposes of said contract, under which, and the rules and customs of wharves at this port, she was entitled to remain until she had taken in sufficient cargo for stiffening, without extra wharfage, but if she remained, occupying the wharf after such stiffening had been taken in, she was required to pay one cent per ton for each and every day so consumed; that afterwards, notwithstanding the information first given touching the unsafe condition of said portion of the wharf, and *in disregard of frequent subsequent warnings* given by libellant, the master, after said barkentine had taken in sufficient stiffening cargo, moved her from the berth so assigned to the point where she lay moored on the ninth day of September, 1882, which was a portion of the wharf which had, as above stated, been pointed out to the master as unsafe; that on the said ninth day of September, 1882, while said barkentine was lying at that portion of the said wharf to which she had been removed by the master, as set forth in the second article, there came on a violent storm of rain and wind, and, said barkentine being moored to said wharf, by the *negligence, want of proper care and diligence*, on the part of said barkentine, and the master thereof, and in violation of his duty under the said contract last above set forth, pulled and completely broke down a large portion of libellant's said wharf, and thereby greatly in-

¹Reported by Joseph P. Hornor, Esq. of the New Orleans bar.

jured and damaged the same, rendering it necessary, by said acts, negligence, want of proper care and skill, and by such violation of said contract on the part of said barkentine, the master, and those in charge of her, to make great repairs upon said wharf, at great cost and expense to the libellant."

It seems to be conceded that the claim for damages *ex delicto*, by reason of the matters alleged, is without the jurisdiction of the admiralty court, by reason of the locality of the thing injured. At all events, the authorities are that way. *The Plymouth*, 3 Wall. 20; *The Maud Webster*, 8 Ben. 547; *The Neil Cochran*, 1 Brown, 162; *The Ottawa*, Id. 356. It must have been with this view of the law that the amended libel was filed, and the attempt made to claim that the damages arose *ex contractu*. But, taking the amended libel as a whole, I am unable to see that any better or different case is made therein than in the original libel. While in the amendment, in direct contradiction of the original and sworn libel, it is first stated that the barkentine was lying at the wharf under a contract with libellant for the discharge of ballast, in the same article it is alleged "that afterwards, notwithstanding the information first given touching the unsafe condition of said portion of the wharf, and in disregard of frequent subsequent warnings, the master removed the ship to the unsafe portion of the wharf." And in the next article it is alleged that while lying at that portion of the wharf to which she had been removed, as set forth, (*i. e.*, without authority and against warnings,) there came on a violent storm, and by the negligence, want of proper care and diligence, on the part of said barkentine and her master, the damage complained of was committed, etc. From such a state of facts I cannot see how it can be claimed that the alleged damages are the result of any breach of contract. If it is conceded that a ship using a wharf, and while lying at the same impliedly contracts to take good care of it and not damage it, as a tenant of a house may be said to contract, the case is not helped by such concession, for by the very terms of the libel the barkentine, in this case, without authority and against warnings, moved to an unsafe and forbidden portion of the wharf, and hence the damage by reason of the storm, etc., followed.

Taking the most favorable view of this case possible under the pleadings, I am unable to distinguish it from the case of *The Plymouth*, *supra*. In that case a vessel anchored at a wharf, and, owing to the negligence of those in charge, the vessel took fire, and the flames, spreading to the wharf, burned it. Here the ship ties up at a wharf without authority, and, owing to the negligence, want of proper care and diligence, of those in charge, batters the wharf down. There was as much of an implied contract in the one case as the other. If any difference can be made, the present case shows the plainer case of trespass and tort.

The judgment of the district court, dismissing the libel and amended libel, was clearly right, and the same judgment will be entered in this court.

COBURN *v.* FACTORS & TRADERS INS. CO. and others.¹

(Circuit Court, E. D. Louisiana. April, 1884.)

1. ADMIRALTY—STALE CLAIM.

The libelant sued for his share of salvage money that had been received by respondents more than nine years previously, during which time libelant had made no claim, nor pretended any, and in the mean time the rights and position of the respondents had materially changed, and they had been condemned to pay and had paid to others more than the salvage money that they had received. *Held*, that the claim of the libelant was stale, and could not, therefore, be enforced in admiralty.

2. SAME—CHANGE OF CIRCUMSTANCES.

In other cases where this court has allowed similar claims, notwithstanding the lapse of time, it was a potent factor that the delay had not been injurious to the respondent; the circumstances had not changed,—the party defendant still held the money.

3. SAME—LAPSE OF TIME.

Whether a claim will be held stale in admiralty does not depend so much upon lapse of time as upon change of circumstances affecting the rights and conditions of parties.

Admiralty Appeal.

From 1871 to 1876 the libelant was master of the tug Tyler, owned by the Harbor Protection Company, a body claiming to be incorporated by a number of the insurance companies of New Orleans, the act being signed by their respective presidents, and the stock owned by the various companies. The tug was employed as a fire-boat in the harbor of New Orleans, extinguishing fires on ships, etc., throwing water over the levees for the use of the fire-engines, and did some towing also. During this period she had earned salvage by putting out fires on ships, steam-boats, etc., in the harbor, amounting to \$74,723.48. In 1873 there was a division of a portion of the salvage earned to that date, but none afterwards. In 1875, 1876, 1877, and 1878, all the crew except libelant brought libels against the Harbor Protection Company, and the various insurance companies, alleging that the Harbor Protection Company was not a corporation, and that the companies were bound to them for their share of the salvage. After protracted and bitter litigation the district and circuit courts held that it was not a corporation, and that the companies were bound. The libelant, Colburn, was a witness in nearly all the cases for the company, and did his utmost to defeat the crew in their claims. Subsequently, in 1876, another company was formed, called the New Harbor Protection Company, and a new boat was built and employed as the tug Tyler. The libelant, in a case of salvage earned by the new boat, released to the new company all his right, title, and claim to any salvage which had been earned by the tug Tyler. He filed his libel for his share of the salvage as master, March 6, 1883, claiming \$1,238.62 from the Factors' & Traders' Insurance Company,

¹ Reported by Joseph P. Hornor, Esq., of the New Orleans bar.

and \$771.60 from the Home Insurance Company. The defenses set up by both companies are (1) that the libelant contemplated this service when he was hired as master, and that, not being a seaman, within the meaning of sections 4535, 4536, Rev. St., and having released his claim, if any he had, he had no standing in court; (2) stale claim, without any excuse shown for delay. And the Home set up the further defense that the corporation of the Harbor Protection Company was *ultra vires*; that it (the Home) was a new corporation; that the old company, the Home Mutual, could not be bound beyond the portion of the salvage it had received; that the new company had paid to the crew more than the old Home Insurance Company had ever received.

Richard De Gray, for libelant.

Charles B. Singleton, Richard H. Browne, B. F. Choate, F. T. Nichols, and Chas. Carroll, for respondents.

PARDEE, J. After much deliberation in this case I have concluded that it makes very little, if any, difference whether the respondent companies were stockholders, incorporators, or copartners in the Harbor Protection Company. In either case they were beyond their rights and powers under the scope and effect of their charters as insurance companies, and what they have done has been *ultra vires*. But the view I take of the case renders it unnecessary to determine the responsibilities devolving on them by reason of their connection with the Harbor Protection Company, but for the case concede them to be as claimed by libelant. Nor is it necessary to consider as to the legal force and effect of the employment of libelant by the Harbor Protection Company, and the several agreements by and between libelant and the same company. Neither the Harbor Protection Company nor the respondents owe the libelant by reason of any salvage services rendered to or for them. The case is that the Protection Company, in the first instance, and the respondent in the second, had received moneys for salvage services, which, in law and in fact, belonged to the officers and crew of the tug-boat on which libelant was employed, and a share of which money belonged to him. It may be assumed, and perhaps correctly assumed, that libelant, as master of the tug-boat earning the salvage collected by the Harbor Protection Company owners, was entitled to his share of the same, as claimed in the libel, and that he never has legally waived or abandoned his right to sue for and collect the same. As the respondents did not owe libelant this money, they cannot be held liable for it beyond the responsibility devolving on them as copartners or stockholders in the Harbor Protection Company, and that which they incurred when they received the money, or part of it, from the Harbor Protection Company. In short, the demand libelant has in this is one for money had and received, either by the Protection Company, for which respondents may be said to be liable, or by the respondents themselves. The case shows that the Harbor Protection Company, owners of the

salving tugs, from December, 1871, to March, 1876, received large amounts, say \$74,723.48, of salvage, a portion of which belonged to the libelant as master; that whatever was done with the said salvage money by the Protection Company, only the sum of \$2,144 thereof was turned over to the Home Insurance Company, and only the sum of \$3,863.20 thereof was turned over to the Factors' & Traders' Insurance Company. The case further shows that these sums were turned over in December, 1873, since which time libelant's claims have been exigible; and that while libelant has stood by, pretending no claim, rather renouncing any claim, other persons having claims against these funds on the same account of salvage, have, by suits instituted in the admiralty court from time to time, recovered from respondents as salvage moneys more than the original amounts received by respondents, to-wit, from Home Insurance Company the sum of \$2,253.42, and from Factors' & Traders' Insurance Company the sum of \$3,939.50.

And this brings me to what I consider as certainly a meritorious defense to the libelant's demand, i. e., staleness of demand. The sum claimed by libelant was earned nearly all prior to December, 1873, only a small portion having been earned thereafter to March, 1876. In December, 1873, the respondents received the salvage money that furnishes ground for liability in this case. This suit was instituted March 6, 1883, so that for over nine years the libelant made no claim, nor pretended any. In fact, the evidence in the case shows that during nearly all of the nine years, both by actions and words, libelant repudiated and renounced any and all claims. His justification for his silence and for his conduct is that if he had spoken he would have lost his employment. As against his employers this is a very strong excuse; and I believe that heretofore in this court it has been held sufficient, but only in cases against employers, and where the substantial rights of the parties had undergone no change. *Sonderberg Tow-boat Co.* by Justice BRADLEY, 3 Woods, 146; *Averill v. Yorke*, by Judge PARDEE, (not reported;) Cohen, Adm. 164. Here the case is entirely different. Even conceding that the respondents stood to the libelant in the relation of employers, and still the rights and position of respondents has been materially changed, while the libelant has stood idly by, making no claim.

In the *Sonderberg Case*, *supra*, Justice BRADLEY said:

"I do not see that an action *in personam*, such as this is, against those who have received and *still hold* moneys fairly belonging to the libelants, can be said to be a stale demand, in the admiralty sense, by means of any lapse of time (two years) which has taken place in this case."

And in the case of *Averill v. Yorke*, *supra*, it was said:

"And where the salvage money was withheld by the owners, and certain of the salving crew remained in the employ of the ship-owners without making claim to their share of the salving money for fear of discharge and loss of employment, such an apprehension was a sufficient reason for not prosecuting their claim sooner; and where under such circumstances the claim is not pros-

ecuted for over a period of nine years, a plea of staleness of demand constitutes no defense."

In these cases I think that this court has gone to the verge of reason and equity in relieving parties who have slept upon their rights, but in each it will be observed that a potent factor was that the delay had not been injurious to the respondent. The circumstances had not changed. The party still held the money. Here the case is very different. The Harbor Protection Company deceased in 1876. Its assets were divided. Some of its partners or stockholders have become insolvent. One of the respondents here is liable, if at all, only as the purchaser and successor of one of the partners or stockholders. The respondents have paid out on similar claims to libelants more than they received of salvage money. Whether a claim will be held stale in admiralty does not depend so much upon lapse of time as upon change of circumstances affecting the rights and conditions of parties. Three months' time may render a claim stale, as where a lienholder has stood by and permitted a ship to pass into the hands of innocent purchasers, while perhaps three years would not be sufficient without change of ownership. Here both lapse of time and change of condition are factors, and I think it would be inequitable to hold the respondents liable, and this particularly in view of the fact that libellant has not simply remained silent as to his demands, but has openly, notoriously, and in writing renounced and denied his claims.

The assignment of May 5, 1879, may or not be valid as a transfer of libellant's claim for salvage in favor of the New Harbor Protection Company, but in favor of these respondents it should certainly have effect as an estoppel. And the same may be said as to the other acts and conduct of the libellant.

A decree will be entered dismissing the libel, with costs of both this and the district court.

THE GEORGE L. GARLICK.

THE WHITE FAWN.

(District Court, S. D. New York. February 12, 1884.)

1. COLLISION—ANSWERING SIGNALS.

A steam-tug, at rest in the stream preparing to land her tow, and in a place in the stream where she leaves room for other vessels to pass, being required by rule to answer signals from other vessels, is not required, in consequence of answering with two whistles a signal of two whistles given to her by another tug, to suspend the business in which she is engaged, and pull away to the left. Such response is only a signal of acquiescence with the other tug's signal, and an agreement that she will do nothing to embarrass the latter's passing to the left.

2. SAME—ACTS IN EXTREMIS.

Where a steam-tug put herself in the way between her tow and a schooner which was about to strike the tow, so as to fend off the schooner from the latter, and damage thereby resulted to the schooner, *held* justified as an act in *extremis*, to prevent a more injurious collision, for which the tug was not responsible.

In Admiralty.

Beebe & Wilcox, for libellant.

Owen & Gray, for the Garlick.

Goodrich, Deady & Platt, for the White Fawn.

BROWN, J. On the twelfth of May, 1881, the libellant's schooner *Telegraph*, in tow of the steam-tug *White Fawn*, upon a hawser of about 20 fathoms, came into collision near the middle of the East river, off about Fourteenth street, with the steam-tug *George L. Garlick*. The tide was flood, and the day clear. The *White Fawn*, with her tow, was proceeding nearly in the center of the river. The *Garlick* had previously been taking a bark of about 1,000 tons, not loaded, in tow, upon a hawser of about 50 fathoms, from Gowanus creek, bound for North Tenth street, Brooklyn. The *Garlick*, with her tow, had turned around, so as to be heading down river against the tide, and had slackened her hawser preparatory to taking it in, and going along-side the bark for the purpose of landing her, when a signal of two whistles was received from the *White Fawn*, then from an eighth to a quarter of a mile further down the river, to which the *Garlick* immediately replied with two whistles. The men who were at the time engaged in taking in the slack hawser of the *Garlick*, continued to do so until she was near the bows of the bark. At that time the *White Fawn* had crossed the bows of the *Garlick* to the westward, but the schooner in tow was not able to cross without a collision, and, in order to avoid a more injurious collision with the bark, the pilot of the *Garlick* started ahead to fend the schooner off from the bark, and thereby struck the starboard bow of the schooner with the port bow of the tug a considerable blow, from which some damage arose, to recover which this libel was filed against both tugs.

The evidence leaves no question in my mind that it was the duty of the *White Fawn* to keep out of the way of the *Garlick* and her tow. This duty rested upon her equally, whether the situation were regarded in reference to the heading of the two tugs, or in reference to their actual motion. In the former view it was the fifth situation, and the *Garlick* was on the starboard hand of the *White Fawn*. In reality, however, the *Garlick*, though headed down river, was taking in her hawser preparatory to going along-side of the bark in order to land her, and that was perceived and understood on the *White Fawn*; and while doing so, the *Garlick*, though headed down river, was drifting up river with the flood tide. Before turning around she had been going in the same direction as the *White Fawn*, and ahead of her. The *White Fawn* was the overtaking vessel, and might be so considered, after the *Garlick* had headed round, as before stated. The *Gar-*

lick first began to head round towards the Brooklyn shore, but she afterwards changed, and swung round to the westward. There was plenty of room for the White Fawn to have passed to the eastward of the Garlick, and nothing in the way of her doing so. Her pilot saw what the Garlick was doing, and understood it, and after the latter had headed round, and when the White Fawn's first signal of two whistles was given, there was still plenty of time and space for the White Fawn to have avoided her.

I do not discover in the evidence any legal fault on the part of the Garlick. At the time of the collision, and for some considerable time previous, she had been floating with the tide. After heading round against the tide she was taking in her hawser, preparing to go alongside the bark for the purpose of landing. This it was proper for her to do in the open river, where she occasioned no obstruction to other vessels; she was not navigating at the time, but drifting; and this was obvious to the pilot of the White Fawn. It is urged that her answer to the whistles given by the White Fawn obligated her to go to port under a starboard helm. I do not perceive the ground of any such obligation. She was required to answer the White Fawn's two whistles, and she did so. She was also bound "to keep her course," and her course was then simply drifting. All that her answer meant was that she assented to the White Fawn's passing to the left, and that she would do nothing to embarrass the White Fawn or her tow in passing on that side. The evidence shows that she did not do anything to embarrass her. The answer did not require her to tighten her hawser and pull off to the eastward, instead of remaining still and drifting as she was doing. The responsibility of undertaking to pass to the left rested wholly upon the White Fawn; and so long as the Garlick was not going ahead, and was in no way embarrassing the movements of the White Fawn or her tow, the fault in not keeping out of the way rested upon the latter.

The movement of the Garlick at the last moment, to prevent a more injurious collision between the schooner and the bark, was an act *in extremis*, rendered necessary by the previous fault of the White Fawn. I am satisfied that it did not increase the inevitable damage of the impending collision, and it is therefore no fault and no ground of damage against the Garlick.

The libel should therefore be dismissed as against the Garlick, with costs, and a decree entered against the White Fawn, with costs, with a reference to compute the amount of the damage.

THE WM. H. PAYNE.

THE VANDERBILT.

(District Court, S. D. New York. June 11, 1884.)

1. COLLISION—TUG AND TOW—EAST RIVER.

A steam-tug has a right to remain stationary in the East river, or nearly so, while making up a tow in the usual place, leaving room for vessels to pass on either side.

2. SAME—ANSWERING SIGNALS.

An assenting response of two whistles to a previous signal of two whistles from another tug imposes on the former no duty to move away to the left, and she is not liable for a collision, unless fault in her management be proved.

3. SAME—CROSSING BOWS.

Where the steam-tug V. was making up a tow of canal-boats opposite piers 4 to 8, East river, about one quarter of the distance across from the New York shore, heading against a strong flood-tide and remained nearly stationary by frequent turns of her engine, and the steam-tug W. H. P., with four canal-boats in tow, two lashed upon each side of her, came round the Battery from the North river, about 400 feet from the shore, and the tugs, when first seen by each other, exhibited each to the other her red light a little on the port bow, and the W. H. P., instead of keeping to the right, with the set of the tide, and towards the middle of the river, where she was required by statute to go, gave a signal of two whistles to the V., to which the V. replied with two, and the W. H. P. thereupon crossed the bows of the V. to go between her and the New York shore, and in so doing the port quarter of her starboard tow struck the bows of the V., the latter having backed in the mean time as far as safe towards her own tow, *held*, the collision was solely the fault of the W. H. P., in going to the left rather than to the right, caused by miscalculation of either the distance of the V. or of the sweep of the flood-tide.

In Admiralty.

Edwin G. Davis, for libellant.

Ludlow Ogden, for Orient Mut. Ins. Co.

Jas. K. Hill, *Wing & Shoudy*, for the Wm. H. Payne.

Owen & Gray, for the Vanderbilt.

Brown, J. The libel in this case was filed by the owner of the canal-boat Willis, in tow of the steam-tug Wm. H. Payne, to recover damages sustained by a collision with the steam-boat Vanderbilt, in the East river, on the evening of September 20, 1880. The Willis, with her cargo of 235 tons of coal, sank almost immediately after the collision, and the owners and insurers of the cargo have intervened for their interests.

The Vanderbilt, a powerful steamer about 300 feet long, was engaged in making up a tow of canal-boats in the East river, abreast of piers 4 to 8. Her witnesses describe her as lying about midway in the river; but I am satisfied from the evidence that she was not more than a quarter of the distance across from the New York shore. At the time of the collision there were about four or five tiers of canal-boats, four in each tier, already attached, and others still remained to be added. The tide was about half flood, and strong, running from two to three miles an hour. The Vanderbilt had a hawser about 100 feet long between her stern and the head tier of the tow. She had

been thus engaged from an hour to an hour and a half prior to the collision, and maintained her position, heading against the tide, without substantial change, by the frequent movement of her engines a few turns forward, followed by short stops.

The Payne left pier 4, North river, bound up the East river, with four canal-boats in tow, two lashed upon each side. The Willis was the outer boat on the starboard side. She proceeded around the Battery, within about 400 feet of the New York shore, and about the same distance from the barge-office beyond, when she perceived the Vanderbilt, which was, as I find, off about pier 4, and gave her a signal of two whistles, indicating that she would go between her and the New York shore. This signal was not answered by the Vanderbilt, being either not perceived, or misunderstood; for at the same time one of the Hamilton ferry-boats was approaching towards her slip on the New York shore, between the Vanderbilt and the Payne; and almost immediately after the Payne's signal the ferry-boat gave one whistle, indicating that she would go ahead of the Payne. The latter replied with one whistle, and immediately slowed her engines for three or four minutes, and allowed the ferry-boat to pass ahead into her slip. Immediately afterwards the Payne repeated her signal of two whistles to the Vanderbilt, whose two colored lights were then visible still a little on the Payne's port bow, and that signal was immediately answered by two from the latter. The Payne put her wheel hard a-starboard, to go between the Vanderbilt and the New York shore, but did not quite clear the Vanderbilt. The port quarter of the Willis, a few feet from her stern, struck a glancing blow against the Vanderbilt's bows, causing the former injuries, from which she sank a few minutes afterwards.

The libellant's witnesses contend that the Vanderbilt was moving forward at the time of the collision, and was in fault for not going to port, according to the mutual signals of two whistles. The weight of evidence, however, satisfies me that the Vanderbilt had not commenced her trip at the time of the collision. She had made no forward movements, except the occasional turns of her wheel necessary to maintain her position against the tide; and after the signal of two whistles she backed and came as near to the head of her own tow as was safe. The men on board the latter shouted that she would be into them; she then started up her engines sufficient to prevent a collision with her own tow, and the collision with the Willis happened at about the same moment, while the Vanderbilt was still close to her own tow. Upon these facts I cannot doubt that the prime cause of the collision was the Payne's undertaking to cross the bows of the Vanderbilt, and to go to the left, between her and the New York shore, instead of keeping to the right, towards the middle of the river, where there were no obstructions, but plenty of room, and where the state statute required her to go. As the Payne passed the barge-office only the red-colored light of the Vanderbilt was visible a little on her

port bow, and only the Payne's red light was at the same time visible to the pilot of the Vanderbilt a little on his port bow. The situation, therefore, plainly required the Payne to go to the right. Some witnesses from the latter testify that the Vanderbilt was headed towards the ferry slip. If this were so it would render going to the left still more imprudent. The witnesses from the Vanderbilt say she was headed towards Castle William. It is probable, however, that she was headed nearly against the tide, which would make her pointing somewhat to the westward of Castle William. The flood-tide from the barge office to pier 2 sets strongly towards the Wall-street ferry, on the Brooklyn shore, and in my judgment the collision was caused through the miscalculation of the pilot of the Payne, either as to the distance of the Vanderbilt, or the effect of the flood-tide in sweeping the Payne towards the Brooklyn shore, when he undertook to pass the Vanderbilt to the left. That he miscalculated somewhat the distance of the Vanderbilt seems probable from his testimony that when first seen he judged her off pier 8, whereas she was not far from pier 4.

The local inspectors' rules required the Payne to pass to the right, but permitted, for good reason, going to the left on proper signals. There was not in this case any good reason, so far as the evidence shows, for the Payne's going to the left. As I have said, each, when first seen, exhibited to the other her red-colored light only, and on the port bow of each. Three-fourths of the East river was available to the Payne on the right. The tide set to the right, and every consideration of prudence, as well as the statute, required her to pass that way. Her course to the left must, therefore, be held to have been at her own risk, unless it be shown that the collision arose through some fault of the Vanderbilt.

Careful examination of the evidence fails to satisfy me that any fault is shown in the management of the Vanderbilt. She was engaged in the legitimate business of making up her tow, in a place in the river where it was usual to make up such tows, and abreast of the docks specially devoted by statute to the use of canal-boats. She was sufficiently far from the New York shore to enable boats to pass inside of her that had any legitimate business there, or that needed to land at those docks. She was not in the middle of the river, where other steam-boats were, by statute, required to go, and hence offered no obstructions to their passage there. She was, therefore, in the most proper place for her work of making up her tow; and she was as nearly stationary by land as was practicable in heading a strong flood-tide. During all the time she was there her engine was worked by the engineer by hand. Her response of two whistles to the Payne's signal of two was a proper response; because there was no obstruction to the Payne's passing to the left, if she had any business which called her inside. The rules required the Vanderbilt to respond to the Payne's signal; and the response given meant only that she acquiesced in the Payne's proposed course, and would

do nothing to embarrass her. *The Garlick*, ante, 647. It did not mean that the Vanderbilt would leave her business and pull away to the left, in order to avoid the Payne. In acquiescing in the Payne's signal, the pilot of the Vanderbilt had the right to assume that the Payne had sufficient power and speed to pass to the left as proposed, if the former did nothing to embarrass her. Afterwards, when he saw the Payne's green light approaching rapidly with the sweep of the tide, he backed the Vanderbilt as far as possible; and the weight of evidence shows that the turn of the engines forward, made just before the collision, was only what was necessary to prevent a collision with the Vanderbilt's own tow. In that position, and under those circumstances, no mere change of the helm of the Vanderbilt, at the last moment, could have been of any avail in avoiding the collision. There was sufficient room to pass on the New York side, as is shown clearly by the fact that the Payne did afterwards pass inside, about 75 feet from the tow; so that the Vanderbilt was not called on either to give dissenting signals or any signals of danger. It must be inferred from the evidence that the pilot of the Payne either knew that the Vanderbilt was not under way, but only engaged in making up a tow, or else that she was very probably doing so; because the pilot of the Payne was familiar with the business of the Vanderbilt, and the making up of tows in that region, and, as he testifies, he noticed canal-boats moving about there.

I am obliged to hold, therefore, that the course of the Payne in going to the left was wholly at her own risk; that there was no fault in the Vanderbilt; and consequently that the libel against the latter must be dismissed, with costs, and a decree, with costs, directed against the Payne. A reference may be taken to compute the amount.

THE YEAGER.

(Circuit Court, D. Louisiana. April Term, 1880.)

COLLISION—DAMAGES—SATISFACTION OF LOSS BY INSURERS.

Damages caused by a collision may be recovered by the owners of the injured vessel in a proceeding against the vessel in fault, notwithstanding the fact that they have received satisfaction from the insurers for the damages sustained.

Appeal in Admiralty.

J. H. Kennard, W. W. Howe, and S. S. Prentiss, for libellant.

C. B. Singleton and R. H. Browne, for claimant.

WOODS, J. It is established by the decided weight of testimony that the damage sustained by the *Charles Morgan* was at least as great as the sum allowed by the district court. The question of

damage was twice referred to a commissioner in the district court, and his report, on which the decree of the district court was founded, appears to have been amply sustained by the evidence. The new evidence introduced in this court on the question of damages does not meet the evidence on which the commissioner based his report. I am of opinion that the damages sustained by the collision were correctly found by the district court. The defense that the insurance companies have paid Stein, the libelant, for the damages sustained by his steam-boat will not hold.

It was decided by the supreme court of the United States, in a case where a schooner was lost by a collision with a propeller, the latter being in fault, that the fact that the libelants had received satisfaction from the insurers for the schooner destroyed, furnished no ground of defense. *The Monticello v. Mollison*, 17 How. 152. See, also, *Althof v. Wolf*, 2 Hilt. 344, and cases there cited.

There must be a decree for libelant for the damages sustained by the collision, which are found to be \$2,087.27. To this must be added interest from the date of the decree in the district court, to-wit, March 20, 1879, and costs.

THE RICHARD VAUX, etc.

(District Court, S. D. New York. June 9, 1884.)

SEAMEN'S WAGES—SHIPPING ARTICLES—INTERLINEATIONS—REV. ST. § 4575.

Upon a dispute concerning the rate of a seaman's wages, where the shipping articles show alterations, a lesser rate being written over a larger, and the seaman testifies to the larger sum as the rate agreed on, and the evidence being evenly balanced, and the alteration not otherwise satisfactorily explained, *held*, the amount as first written should be allowed, in accordance with section 4575, as a salutary rule of practice, although that section is no longer in force as an express statute applicable to vessels engaged in the coasting trade

In Admiralty.

Hyland & Zabriskie, for libelant.

Alexander & Ash, for claimant.

BROWN, J. The libelant claims wages at the rate of \$22 per month; the claimant alleges that he shipped at the rate of \$15 a month. The crew consisted of the master, cook, and three seamen. The shipping articles show the libelant's signature, by his mark, and in the column containing the rate of wages the figures \$15 are written over the figures \$22, the latter being still very plainly distinguishable. Section 4575 of the Revised Statutes, sub. 4, provides that all such interlineations shall be deemed fraudulent alterations unless satisfactorily explained, etc. This provision was not in force as an express statute as respects the schooner in question, as she was in the

coastwise trade, and by the act of June 9, 1874, (18 St. at Large, p. 64, c. 260,) such vessels were excepted from the former provisions of that statute. I cannot doubt, however, that the principle of the statute is a salutary one, and should be followed as a sound rule where the evidence is conflicting. The libellant swears positively that he read the figures 22 when he signed his name to the articles; while it is claimed for the defense that the figures 22 were inadvertently written, and immediately corrected before the libellant put his mark to the articles. The appearance of the paper itself does not accord with the explanation given. It is evident the figures 22 were quite dry when the figures 15 were written over them. In the case of illiterate seamen, who are sought to be held by the shipping articles, it is but just that, in case of doubt and of alterations, every intendment should be made against those who write out the articles. If a line is filled out erroneously, a new line ought to be written which will be free from alteration and ambiguity.

In the utter contradiction which exists in this case, there is no important circumstance to support either side. It is simply one witness' testimony against the other. The object of requiring written articles was to avoid such disputes, and to protect the rights of seamen. This, I think, can only be done in such cases by adhering to the articles as they originally stand, unless the change, before signature, and the seaman's knowledge of it, are conclusively proved. That has not been done here.

Decree for the libellant for \$13.14, with costs.

THE WANDERER.

(Circuit Court, D. Louisiana. April Term, 1880.)

SEAMEN'S WAGES—LIEN—DISCHARGE OF PURSER.

A purser who is employed, by a vessel making regular trips between two ports, for a year has a lien for his wages for the entire year, and may enforce such lien against the vessel if discharged without cause before the end of the term for which he was employed.

Appeal in Admiralty.

Joseph P. Hornor and Francis W. Baker, for libellant.

J. W. Gurley, Jr., for claimant.

WOODS, J. The case made by the libel is an action by a seaman to recover his wages. The libellant had made a contract of service for one year. He performed part of the contract, and was ready and willing to perform the residue, but was prevented by the master of the vessel, who discharged him without cause. He sues to recover the balance due on his salary for the year. If he performed

his duty while in the service of the vessel, and was ready and willing to perform it for the residue of his engagement, and was discharged without due cause, and was unjustifiably prevented from completing his contract, his rights are the same as if he had completed it. He is entitled to his wages for the whole year, and was entitled to sue for them on his discharge. He has been paid a part of his wages, and sues for the balance.

In the case of a contract for an ordinary seaman's wages, the lien should not, perhaps, be extended beyond a single voyage, as that is the usual time for which his engagement is made. But the case of a purser stands somewhat on a different footing. His connection with the vessel is generally more permanent than that of a common seaman. He represents to some extent the owners, and his qualifications are of such a character that a competent purser cannot usually be employed for a single trip. We, therefore, do not think an engagement of a purser for a year an unreasonable one, and such an engagement, we think, would be binding on the boat.

The case of libelant, therefore, falls within the thirteenth admiralty rule, which declares that "in all suits for mariner's wages the libelant may proceed against the ship, freight, and master, or against the ship and freight, or against the owner or master alone *in personam*."

The cases cited by claimant are to the effect that a seaman discharged in a foreign port may sue for his three months' extra wages *in personam*; that a personal action for wages lies, immediately on the discharge of a seaman, against the master and owner, without waiting 10 days after the right of action has accrued, as required in an action *in rem*; that a stevedore has no maritime lien for his wages, and that an action *in rem* does not lie for refusal on the part of the master to perform a contract of charter-party. These cases do not meet the question. They may all be good law, yet they do not show, or tend to show, that the libelant has not a maritime lien for the demand set out in his libel. On the other hand, the case of *The Hudson*, Olc. 396, cited by libelant, is an authority directly in support of his right to proceed *in rem*.

We are of opinion, therefore, that the exception is not well taken, and must be overruled.

BRADLEY, Justice, concurred.

DRENNEN and others v. LONDON ASSURANCE CORP.

*(Circuit Court, D. Minnesota. June 26, 1884.)***FIRE INSURANCE—AVOIDANCE OF POLICY—INTRODUCTION OF NEW PARTNER INTO FIRM ASSURED.**

The sale or transmutation of the various interests between partners themselves, and nobody else having the control, and leaving the possession where it was, does not invalidate the policy; but the introduction of a new partner, with an investiture of an interest in him which he did not have before, *does* invalidate the policy.

On Motion to Find for Defendant.

L. J. C. Drennen and Rea, Kitchel & Shaw, for plaintiffs.

Cameron, Losey & Bunn and C. K. Davis, for defendant.

MILLER, Justice, This case was argued upon certain questions of law. It seems that the plaintiffs, who have brought the suit upon two policies of the London Assurance Corporation, were, at the time the policies were made, the owners of a stock of goods in Minneapolis, which was the subject of the insurance. The loss by fire is apparently admitted as stated, and the only issue raised by the defense grows out of two conditions of the policies, which are supposed to relate to the same subject. One of these conditions is that "if the property insured be sold or transferred, or any change takes place in the title except by succession, by reason of the death of the assured, whether by legal or judicial process, or voluntary transfer or conveyance, this policy shall be void." The other provision is that "if the interest of the assured in the property be any other than entire, unconditional, and sole ownership in the property, for the use and benefit of the assured; or if the building insured stands upon leased ground, or the property has been sold and delivered, or otherwise disposed of, so that all interest or liability on the part of the assured has ceased, this insurance upon all such property shall immediately terminate."

A point raised by the plaintiff in the construction of this policy is that the clause I have read last, in the fourth paragraph of this insurance policy, is a limitation and a qualification of the one I have first read. The first one is, "and if the property be sold or transferred, or any change takes place in the title or possession, then the policy is void." The last one is that "when the property has been sold and delivered, or otherwise disposed of, so that the liability of the assured has ceased, this insurance shall terminate." I do not think that they have anything to do with each other. They relate to distinct phases of what may be done by the owners of the property after the insurance policies are executed. The latter does but little more than explain and qualify the universal principle of law, that, when a man has insured property and ceases to be the owner, or have any interest in it, although it may be burned during the life of the

policy, he cannot recover anything, for the very obvious reason that he has nothing to recover; he has no interest in the property; he has sustained no loss, and therefore can recover nothing; that has been decided over and over again. It is also one of the conditions of these policies, in order to prevent their assignment without the consent of the insurance company, that, when a man sells and parts with his title and ownership of the property, he ceases to be insured, and has nothing to insure, and if the property is burned, it is somebody else's property. This provision in question has relation to that, and is intended to qualify, and, to some extent, perhaps, to limit, the common law, for if it is sold and not delivered, he probably could recover.

"When the property has been sold and delivered, or otherwise disposed of, so that all interest or liability on the part of the assured has ceased, this insurance on such property shall immediately terminate." This is rather for the benefit of the assured; a sale of part of the property does not forfeit his right to insurance on the balance. Possibly, a sale without a delivery, if delivery was essential, would not forfeit his insurance; but this relates simply to a sale of property in whole or in part, and is intended to qualify the rule of the law that would prevail without it.

The other relates to a different affair: "If the property be sold or transferred, or any change takes place in the title or possession." Many changes may take place in the title, and also in the possession, without a sale or transfer of the property to another party; for instance, a sale by one partner to another has been held by the courts not to be such a sale or transfer as is included in this policy, and for the very obvious reason that the possession does not change; it remains where it was,—the title remains, perhaps, in the firm, although one member of the firm may have gone out; but the question we have to solve is whether the introduction of a new partner into the partnership firm, whose goods are insured, is such a change as vests him with an interest which he did not have before, and vests another man with a right of control of the possession, and to have charge of the property, and will avoid this policy. Without going on to cite the authorities, we are both of the opinion that this is such a change as by that language was intended to avoid and forfeit the policy.

The sale or transmutation of the various interests between the partners themselves, and nobody else having the control, and leaving the possession where it was, does not invalidate the policy; but the introduction of a new partner, with an investiture of an interest in him which he did not have before, does avoid the policy.

There are two things with regard to which the insurers are always cautious, tenacious, and anxious: one of them is the character of the men with whom they make the contract, and the other is the character of the man who has possession of the property, especially if it be movable property that is insured; and it is easy to see why

this is so. They may very well know that the man or men with whom they deal when the contract is made, are cautious, prudent business men, honest, and for a long time successful in business; with those men they contract without hesitation. They have the right to know who those men are with whom they contract, and the character of the men with whom they contract with regard to the possession of the property. They make a contract with A., because they know him, or because they have heard of his character; because they understand that he is honest and fair; and they deal with him just as you would deal with one whom you know to be reliable; you will seek to deal with honest men only. Now, it is against all the principles of contracts to say that in dealing with one man or with two men, that those two can afterwards, acting without the consent of the other party, introduce another man into the contract, who has all the rights and all the control which those two had before, because that man may be a scoundrel, may be known to be a scoundrel by the insurance company; and if that rule prevails, the other parties have a right to introduce the veriest scum of the earth, and men who have half a dozen times been engaged in the destruction of property to get the insurance. So you may sell the goods insured, but you cannot sell the policy unless the company agrees to it. We are of the opinion that if Mr. Arndt was within the meaning of that policy, introduced into that partnership, and became a member of it before the loss, and acquired an interest in the goods, that the policy was forfeited.

The question whether he was so introduced, as presented to the jury and the court at this time, rests almost entirely upon the construction of a written contract, which defines the relation of these parties. There is some verbal testimony on this subject introduced by defendant before the policy itself was introduced by the plaintiffs. As regards that testimony, I am inclined to think that some of it would be pertinent, even after the introduction of the policy; and to that alone I will advert in what I have to say about the construction of this policy. I may as well state at the start, however, that the two opposing views which are taken of the contract are these: the one by the plaintiff is that it was simply an agreement, not for a partnership, but for the future organization of a joint-stock corporation, in which, when completed and organized, these goods shall constitute a part of the capital stock; but that, not having done so before the fire, no such change as the policy alludes to was made in the ownership of the property or its possession, but that the original partners were the sole owners at the time of the fire. This agreement, therefore, requires a somewhat critical examination. It says:

"This agreement, made and entered into this twenty-fourth day of May, 1883, by and between E. J. A. Drennen, F. W. Starr, and Edward Everett, who are members and constitute the firm of Drennen, Starr & Everett, all of Minneapolis, parties of the first part, and D. M. Arndt, of Sandusky, Ohio, party of the second part, witnesseth: Said parties of the first part agree to receive into their business said Arndt, on the following conditions: Said

Arndt is to pay into said firm for its use, on or before June 14, 1883, five thousand dollars, and said Arndt is to pay into said firm, for its use, on or before January 1, 1885, an additional sum of five thousand dollars," etc.

—The contract being signed by E. J. A. Drennen, F. W. Starr, and D. M. Arndt.

It is observed that Mr. Everett's name is not signed to this instrument; and if nothing more had been said about it, I should have said the instrument was void. But Mr. Drennen stated on the stand that Mr. Everett was away from home when the contract was signed, and that when he returned home he was informed of it and assented to it. Mr. Drennen and other witnesses testified that Mr. Arndt was in the office as book-keeper, and on this point there is no contradictory evidence. I say to the jury now, that I think they are authorized to assume that Mr. Everett was a party to this contract; so that question may be considered out of the way.

Considering this, then, to be the instrument of Drennen, Starr & Everett on the one hand, and of Mr. Arndt on the other, we are of the opinion that it takes Mr. Arndt into the partnership on the day he paid \$5,000 and gave his note for the other \$5,000. It provided for his having an interest in the whole firm, as I understand it, upon the payment of that money. The testimony is that his cash payment of \$5,000 was made on the fourteenth of June, and he made the note for \$5,000 a day or two afterwards, which was accepted by the plaintiffs. The language of this instrument is "to pay into the firm"—the firm then in existence—"for its use," on or before June 14, 1883. There was no firm that he could have paid it into except the firm of Drennen, Starr & Everett. He was to pay into that firm for their use \$5,000; and, that there may be no mistake about it, this is repeated: "Said Arndt is to pay the said firm for its use, on or before the first day of January, 1885, an additional sum of \$5,000." The books of the partnership and the book-keeper are introduced, and the payment of that money into the firm, as entered on their books, is found; the execution of the note and its credit is found on these books of the firm of Drennen, Starr & Everett. I cannot resist the conclusion that a primary object of this contract was, in its own language, that the said parties of the first part (that is, Drennen, Starr & Everett) were to receive into their business said Arndt, and that when he paid that money, as a condition of his being received into that business, he was paying it to said firm for its use, and not to the corporation to be formed; that it was to the firm of Drennen, Starr & Everett he was to pay \$5,000, "for its use," on or before June 14, 1883, which he did; and that he was to pay into such firm for its use, on or before January 1, 1885, an additional sum of \$5,000 by note, which he did, and which note they might have sold and discounted, (although it is testified that they have returned it to him;) and this was the formation of the partnership. He was received into their business,—not a future business; he paid the money into them,—the

firm,—and not the corporation to be formed. The basis of his interest is not calculated on what may have been the intention to put into the joint-stock corporation to be afterward formed, but it was based on the condition of the firm of Drennen, Starr & Everett, on the first of January, six months before, when they had taken stock, and an inventory of their debts, credits, and property, and they said: "We have now a surplus of \$65,000, and on that basis we take you into this firm. You have paid your money; you have been received into the firm." He acted as a member of the firm for two or three weeks before the fire. I must hold that by this contract he came into and became a member of the partnership of the old firm, with the same rights, in proportion to the amount of interest which he had, as the other three members of the firm. His money had been invested in the goods then there. He purchased an interest in the goods and in their debts, and incurred an obligation for debts owing on the first of January, 1883. That is our view of the case.

I shall simply say to the jury that if they believe this testimony of Miss Alice O'Brian, and the books that have been produced; and if they believe Mr. Drennen's testimony that Mr. Everett consented to this arrangement made by his two partners with Mr. Arndt, that that transaction constituted a partnership in which Mr. Arndt became interested in these goods, and in such a manner as to avoid the policy, their verdict should be for the defendant.

Jury found for defendant.

EDWARDS v. TRAVELERS' LIFE INS. CO.

Circuit Court, N. D. New York. June 27, 1884.)

1. LIFE INSURANCE—INVOLUNTARY SUICIDE.

A condition in a policy of insurance that it shall be void if the insured shall die by suicide, whether the act be voluntary or involuntary, has no application where the insured, a sane man, kills himself by accident.

2. SAME—SUICIDE—INTENTION OF INSURED IN THE ACT.

In case of death of insured by his own act there must be some proof, or at least, a presumption that such act was intentional on his part.

3. SAME—NEW TRIAL—EVIDENCE—OFFER OF A PAPER.

A new trial will never be granted because defendant offered in evidence a paper that plaintiff should have offered.

4. SAME—WAIVER BY COMPANY.

An insurance company may waive a strict performance of the contract. Receiving and acting on an oral notice is a waiver of written notice.

Motion for New Trial.

William N. Cogswell, for plaintiff.

Henry M. Field, for defendant.

COXE, J. This action is upon a policy of life insurance. At the January circuit the plaintiff had a verdict. The defendant now moves for a new trial. On the trial the principal contention had reference to the defense of suicide. The defendant succeeded in proving that the insured died in circumstances peculiar and suspicious in many of their aspects. The precise cause of death was left to conjecture. Stated as strongly for the defendant as the evidence warrants, the facts were, perhaps, sufficient, had the jury adopted the defendant's theory, to justify them in the presumption that the insured took his own life. They did not so find, and their verdict must be regarded as conclusive upon this issue.

It is insisted that the court should have charged, as requested, that the evidence was clear and positive that the insured committed suicide. I cannot adopt this view. The evidence was not clear and positive. The insured might have died from the effects of poison and he might have died from apoplexy produced by excessive heat. The defendants proved that 96 hours after death prussic acid was found in his stomach. Whether there was enough to produce death could only be presumed. No quantitative test was made. Assuming, however, that he died from prussic acid poisoning, there was no evidence as to how it was taken or that it was taken knowingly. But it is argued that whether taken ignorantly or designedly is wholly immaterial, and that the court fell into error in charging the jury that in order to reach a verdict for defendant they must find not only that there was poison sufficient to cause death but also that the insured took it knowingly and not by mistake. No authority is produced sustaining this position which seems wholly at variance with justice and common sense. Test it by an illustration. A sportsman is shot to death by the accidental discharge of his own fowling-piece; a woodman is killed by the premature fall of a tree which he himself has felled; an infectious cut from his own scalpel causes the death of an anatomist. Strictly speaking, each dies by his own hand, but can it be seriously maintained that a life policy providing that it shall be void if the insured "shall die by suicide, whether the act be voluntary or involuntary" would be avoided in such circumstances? No court has yet enunciated a doctrine so untenable, and it is believed none ever will. Life insurance is intended to cover just such risks; its chief benefits are found in cases of sudden death. But the precise question was determined by the court of appeals of this state in *Penfold v. Universal Life Ins. Co.* 85 N. Y. 317.

The plaintiff offered in evidence a receipt for the first annual premium, but, relying on certain admissions of the answer, did not produce the policy of insurance. Defendant objected to the receipt unless read in connection with the policy, and the refusal of the court to so rule is alleged as error. The answer is twofold: *First*, it was not incumbent on the plaintiff under the pleadings to produce the policy; and, *second*, the question at best relates only to the order of

proof, and as the policy was subsequently offered and the jury properly instructed as to the burden of proof the mistake was cured, assuming that there was a mistake. A new trial will hardly be granted because the defendant offered in evidence a paper which the plaintiff should have offered.

It is also argued that there was a fraudulent concealment of certain facts by the plaintiff and that the court should have so declared. Regarding this proposition it is sufficient to say that all the evidence there was upon this subject, and there was but little, was submitted to the jury with instructions as favorable to the defendant as it could fairly ask.

The other defenses are of a formal and technical character and relate to the alleged failure of the plaintiff to give immediate notice in writing of the death of the insured, and to furnish proofs of death in accordance with the strict letter of the contract. No attempt will be made to conceal the fact that such defenses do not commend themselves to the court. They in no way involve the merits, and it is not easy to see how the omissions referred to injured the defendant or impaired any of its rights. True, the parties entered understandingly into the agreement, and if the court is clearly satisfied that it has been violated, even in an apparently unimportant particular, it should so say. But where a life insurance company seeks to avoid the sacred obligation which it has assumed, because, for instance, a fact is communicated to it orally instead of in writing, the court should be very sure of the rectitude of such a defense before permitting it to succeed. These policies are prepared with great care by those in the companies' employ, they are surrounded by agreements and warranties innumerable—a labyrinth of conditions, where one heedless or uninformed may easily go astray. To construe them narrowly and illiberally is not the policy of the courts. A strict construction would often work injustice to both parties alike. To the insured, by permitting nonessentials to defeat an equitable claim; to the insurer, by shaking the confidence of the people in the system of life insurance.

The condition here alleged to have been violated is in these words:

"That in the event of the death of the person insured, then the party assured, or his or her legal representatives, shall give immediate notice, in writing, to the company, at Hartford, Connecticut, stating the time, place, and cause of death, and shall within seven months thereafter, by direct and reliable evidence, furnish the company with proofs of the same, giving full particulars, without fraud or concealment of any kind."

The facts are as follows:

The insured died June 19, 1882. A day or two afterwards E. M. Phillips, who is described in the receipt referred to, as "agent of this company at Southbridge, Massachusetts," met one of the family of the deceased on the street, informed him that he was going to Hartford and would give the company the requisite notice and procure the necessary blanks for the proofs of death. He did go to Hartford on or about the twenty-first of June, saw the secretary of the company, gave him notice of the death, stating all the

the particulars which he then knew and obtained the blank proofs. On his return he handed the blanks to one of the plaintiff's representatives saying at the time, "When you get them completed I want you to return them to me." They were filled out and delivered to him July 3, 1882. He retained them for several months and then returned them to a brother of the plaintiff saying that they were incomplete, and demanded additional information. On the twenty-ninth of January, 1883, they were again delivered to Phillips and by him sent to the company on or about the seventh of February. The company, in acknowledging the receipt of the proofs, made no objection that they were received too late and retained them in its possession: they were produced on the trial by the defendant's counsel.

It must be held that if the plaintiff has not followed the contract literally in these particulars it was because she was misled by the course of the defendant, and that the defendant is not now in a position to take advantage of the plaintiff's omissions, having waived a strict performance of the contract.

I have examined other exceptions argued, but do not think any of them well taken.

The motion for a new trial is denied.

MERCHANTS' NATIONAL BANK OF THE CITY OF NEW YORK v. SAMUEL and another.¹

(Circuit Court, E. D. Missouri. April 10, 1884.)

NEGOTIABLE INSTRUMENTS—PAYMENT BY CHECK—LIABILITY OF DRAWER.

Where the indorsee of a draft accepts the drawee's check in payment, instead of cash, and neglects to present it for payment or certification until the next day, and the check is dishonored in consequence of the delay, and the draft has to be protested for non-payment, the drawer cannot be held liable.

Instruction of Court on Motion to Nonsuit.

This was a suit by the plaintiff, as indorsee of a draft, against the defendants as drawers. The draft was payable at sight. It was received by the plaintiff on the eighteenth of June, 1883, and presented for payment on the same day. Instead of paying cash the drawers gave the plaintiff a check on their bank in New York, which was accepted without direction or authority, and the draft was delivered up to the payee. The check was not presented for payment until the next day, June 19th, and when presented was dishonored. Upon payment being refused, the plaintiff went to the drawees of said draft and returned the check and received the draft back again, and upon the same day had it protested for non-payment. Thereafter it instituted this suit.

The case was tried before a jury, and, the above facts appearing in

¹ Reported by Benj. F. Rex, Esq., of the St. Louis bar.

evidence, the defendants moved the court to enter a nonsuit. The court thereupon charged the jury as follows:

Finkelnburg & Rassieur, for plaintiff.

McKerghan & Jones, for defendants.

TREAT, J., (*charging jury*.) The draft in question having been sent forward to New York for acceptance and payment, if the same was accepted, being a sight draft, and a check received in payment, during bank hours, instead of cash, and the said check was retained in plaintiff's possession, instead of having the same collected or certified on the same day during bank hours; if said check could have been presented for payment, or certification had, during the banking hours of the same day; and if the said check had been presented on the same day, and would have been paid if presented; and if the said check was not presented until the following day, and in the intermediate time the funds of the drawer of the check had been exhausted, and consequently said check dishonored,—the verdict must be for the defendant. This instruction is based upon the proposition that when a loss is suffered under the circumstances stated, the loss must fall upon the party through whose negligence the same occurs.

The payment of the draft was to be in cash; and if anything except cash was received, and in consequence thereof the drawer of the draft was damaged, then the damages sustained he has a right to be indemnified for by the negligent party. In this case, the plaintiff bank having received the draft, and presented the same, and received a check for the amount thereof instead of cash, the drawee having had funds to meet his check, which would have been paid if presented that day, and before the said check passed through the clearing house on the next day the drawers, Parks & Co., whose check had been received, had failed, whereby the check was dishonored, the loss so caused must fall on the plaintiff, and not on the defendant. The draft should have been paid in cash; and if the plaintiff chose to receive, instead of cash, the drawee's check, it did so at its own risk, and, if any loss followed, the plaintiff must bear the same.

At the defendant's request, the court then charged the jury as follows: "The court instructs the jury to find for the defendants;" and they returned a verdict for the defendant accordingly.

A motion for a new trial has since been filed by the plaintiff, and, after being duly considered, has been overruled.

MORGAN and others v. EGGERS.

(Circuit Court, D. Indiana. June 24, 1884.)

1. EJECTMENT—FINDING AND JUDGMENT AS TO PART OF PREMISES.

In an action of ejectment tried by the court, the finding and judgment may be given (in one sentence) for the plaintiff for a *part* of the premises described in the complaint, and such finding will not be construed to be an unqualified finding for the plaintiff in respect to the entire premises.

2. SAME—USE OF THE WORD "FENCE."

It is competent for the court, under the issue in ejectment, to find to what extent the defendant is guilty, and if, under the evidence, it appears that a fence has become the boundary of the unlawful occupation, it is proper that such fact should be mentioned in the finding and judgment of the court.

Motion to Amend Judgment.

U. J. Hammond, for plaintiff.

A. C. Harris, for defendant.

WOODS, J. Morgan and Smith sued Eggers in ejectment for the recovery of real estate, described as follows: All of the north part of lot 2, in section 36, etc., which lies west of the track of the Lake Shore & Michigan Southern Railroad, and north of a line parallel with the north line of said lot 2, and 753 feet south therefrom. The defendant answered by a general denial; and, upon the issue so joined, a jury being waived and trial had by the court, a finding and judgment of the tenor following were entered:

"Come the parties, and, by agreement, this cause is submitted to the court for trial; and the court, having heard the evidence, and being fully advised, finds for the plaintiff, and orders and adjudges that they are entitled to, and shall have and recover of defendant, the possession of so much of said lot two (2) as lies south of the south line of lot one, (1,) as indicated by a fence constructed and maintained by the defendant as and on on said south line," etc.

The plaintiffs now insist that there is an unqualified general finding for the plaintiff, and that in conformity with this the judgment should have been for the recovery of the land as described in the complaint, and that so much of the description set forth in the judgment as refers to the fence constructed by the defendant should be expunged. It was competent for the court, under the issue, to find to what extent the defendant was guilty, or had held unlawful possession of the premises described, and if, under the evidence, it appeared that a fence had become or was the boundary of such occupation, it was proper that the fact should be stated in the finding and judgment of the court. The finding and judgment in this instance are not separate and distinct, as perhaps it would have been better to have had them. The meaning however is clear. It is as if the entry read in this way: "And the court having heard the evidence, etc., finds and orders and adjudges that the plaintiffs are entitled to and shall have and recover of the defendant," etc.

The motion for correction is therefore overruled.

BANKS v. CHAS. P. HARRIS MANUF'G CO.

(Circuit Court, D. Vermont. March 20, 1884.)

STATUTE OF FRAUDS—CONTRACT FOR SALE OF GOODS—MEMORANDUM.

The traveling agent of the defendant company addressed to his principals an order, "Send to C. W. S. Banks; terms, net 30 days; freight allowed," signed by him as agent and followed by a list of the merchandise desired, with prices and directions for shipping, signed by Banks, the plaintiff. *Held*, that the paper was upon its face merely an order, and not a memorandum of sale signed by the defendant or his agent, within the terms of the statute of frauds.

At Law.

Alduce F. Walker, for plaintiff.

Walter C. Dunton and Elenzer R. Hard, for defendant.

WHEELER, J. One Berry, representing the defendant, a manufacturer of chairs, either as salesman or as a solicitor of orders, bargained to the plaintiff, a dealer in chairs at Baltimore, Maryland, two lots of unfinished chairs at an agreed price, to be delivered there, amounting respectively to \$4,274 and \$2,458, and by manifold writing filled duplicates of blank orders for each, which were substantially alike, and when filled, read: "Messrs. C. P. Harris M'f'g Co., order No. —. Send to C. W. S. Banks, of 59 South St., Baltimore, Md.; terms, net 30 days; freight allowed. M. D. BERRY, Agent." Then followed a list of goods, with prices, and "to be shipped after two months from date of this order," and the orders were signed at the foot by the plaintiff. One of each he left with the plaintiff, the other he sent to the defendant, and a copy of the written parts he kept himself. The defendant received the orders, refused to send the goods because the prices were so low, and the plaintiff brings this suit for the non-delivery.

A principal question is whether this order is a sufficient memorandum in writing of the bargain to charge the defendant, within the statute of frauds (29 Car. 2, c. 3) still in force in Maryland. There is no real question but that these instruments sufficiently set forth the terms of the sale, if they show a sale, nor but that the name of the agent is sufficiently signed to the memorandum, if it is a memorandum of a bargain of sale and he had authority to bind the defendant to a contract of sale. *Drury v. Young*, 58 Md. 546. The memorandum must set forth on its face enough to gather a contract of sale from, as against the party to be charged with the consequences of such a contract in the action. *Egerton v. Mathews*, 6 East, 307; *Cooper v. Smith*, 15 East, 103; *Bailey v. Bogert*, 3 Johns. 399. This memorandum appears to be of an order, and not of a sale, and would, so far as it shows for itself, fail to make out a sale without acceptance of the order. Chit. Cont. 349. The acceptance of the order might be by a delivery or forwarding of the goods, according to its terms, so as to charge the purchaser with the price without ac-

ceptance by him; but here there is no delivery; the action is for want of that.

There is nothing from the defendant to help this memorandum out at all. There was a letter to the plaintiff after the order was received, but it treated the memorandum as an order, and did not in any way recognize a sale. *Cooper v. Smith, supra.* In *Drury v. Young*, the memorandum was, "sold W. H. H. Young," etc. No case has been shown or observed in which the writing did not show a sale, or that from which a sale could be gathered, where it is held sufficient. In this instrument the name of the defendant itself appears, put there by its agent, but as being requested to send the goods, not as selling them. The name of the agent appears, but only as to ordering the goods. If he joined as agent in the order, it would be as agent of the plaintiff, for that comes from him to the defendant, and does not proceed at all from the defendant. If he was authorized he could accept the order in writing, and thus the whole would show a bargain of sale. But the acceptance is lacking, and the memorandum is of only one side of a bargain. The agent has testified to the bargain, and that the writing delivered to the plaintiff was intended to show it. This would be well enough if the writing did show it. Parol evidence is admissible to show the meaning of trade expressions and to apply the writing to the circumstances, but not to contradict the writing, nor to supply any part required by the statute to be in writing. To hold that what is on its face an order may be shown to be intended as a sale, or that an acceptance of an order necessary to make a sale may be supplied by parol, would be to disregard the plain provisions of the statute. In any view of Berry's authority, the statute cuts off this action.

Judgment for defendant.

The language of section 17 of the statute of 29 Car. I. c. 3, is as follows: "And bee it further enacted by the authority aforesaid, that from and after the said fower and twentyeth day of June noe contract for the sale of any goods, wares, or merchandises for the price of ten pounds sterling or upwards shall be allowed to be good except the buyer shall accept part of the goods soe sold and actually receive the same, or give something in earnest to bind the bargain or in part of payment, or that some note or memorandum in writeing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized." The principal case raises the main question under this section of the act, what is a sufficient "note or memorandum in writing" to satisfy the statute? And its consideration may conveniently be divided into (I.) the form of the memorandum, (II.) the contents, and (III.) the signature.

I. THE FORM OF THE MEMORANDUM. Lord ELLENBOROUGH said that "anything under the hand of the party expressing that he had entered into the agreement set out therein" was sufficient.¹ And it was said in the supreme court of the United States, by CATRON, J., in construing the fourth section of the statute, the language of which is similar: "But as the statute

¹Shippey v. Derrison, 5 Esp. 191.

does not prescribe the form of a binding agreement, it is sufficient that the natural parts of it appear either expressed or clearly to be implied."¹

"The statute of frauds does not require the contract itself to be in writing, but a memorandum of it, and a memorandum properly signed of a by-gone contract is quite sufficient."²

It thus appears that the memorandum is not the contract, but only the evidence of it, and this is true as to both the fourth and seventeenth sections.³ Hence letters may be sufficient *memoranda* within the statute, and that, too, whether addressed to the plaintiff or to third parties, so long as they contain actually intelligible *memoranda* of the contract;⁴ and even a telegram properly identified is equivalent to a letter,⁵ and a receipt or a promissory note may be a sufficient memorandum to show the price, or part of the price, of land, if the contract is described in the writing.⁶ An account stated is a sufficient memorandum within the statute to justify a suit for a debt included therein,⁷ and it has more than once been held that a will may be a sufficient memorandum of an alleged gift or contract made *inter vivos*;⁸ and this, too, even though the original paper be lost after execution, or fall short of the statutory requirements of a will, and hence be invalid as such;⁹ but the paper or will, whichever it may be, must contain the whole contract.¹⁰ An insufficient deed may, like an invalid will, be good as a memorandum.¹¹ But if the deed does not show the real contract, it does not operate as a memorandum of that contract.¹² A bond of arbitration and a reference in partition are both sufficient *memoranda*.¹³ So, too, is an affidavit.¹⁴ It is important for litigants to remember that statements or admissions in equity pleadings may also make good defects in their contracts, under the statute, since a statement in a bill in equity to assume an incumbrance and an answer in equity have both been held to sufficiently comply with the statutory requirements;¹⁵ but, if the statute is set up at the same time that the verbal contract is admitted, the answer will not then be binding within the act.¹⁶ Not only is it immaterial what the form of the memorandum may be; it is equally unimportant that the memorandum should be all contained in a single paper. Several papers, if distinctly connected together by reference to each other, may form a sufficient memorandum.¹⁷

¹ Bell v. Bruen, 1 How. 169. See, also, Moore v. Hart, 1 Vern. 114; Boys v. Ayerst, 6 Madd. 323; Hurley v. Brown, 98 Mass. 546; McCarthy v. Kyle, 4 Cold. 354; Sheid v. Stamps, 2 Sneed, 172; Atwood v. Cobb, 16 Pick. 230; Cadwalader v. App, 81 Pa. St. 210; Wood v. Davis, 82 Ill. 312; McConnell v. Brillhart, 17 Ill. 360; Cushman v. Burritt, 14 N. Y. Wkly. Dig. 59, (S. C. N. Y.); Jenkins v. Harrison, 66 Ala. 355; Crockett v. Green, 3 Del. Ch. 471; Scarritt v. St. John's M. E. Ch. 7 Mo. App. 178-9; Patton v. Rucker, 29 Tex. 407; Martin v. Weyman, 26 Tex. 466; Cosack v. DeScondres, 1 McCord, 425; Shoofstall v. Adams, 2 Grant, (Pa.) 212; Sherburne v. Shaw, 1 N. H. 159; Parks v. Brinkerhoff, 2 Hill, 663.

² Pollock, C. B., Bluck v. Gompertz, 7 Exch. 867.

³ Larned v. Wannemacher, 9 Allen, 412; Mirzell v. Burnett, 4 Jones, Law, 252; Bradford v. Roulston, 8 Ir. C. L. R. 472.

⁴ Reed, St. Frauds, § 323.

⁵ McBlain v. Cross, 25 Law T. (N. S.) 804; Murphy v. Thompson, 28 U. C. C. P. 233; Conpland v. Arrowsmith, 18 Law T. (N. S.) 765; Dilworth v. Bostwick, 1 Sweeney,

588; Kinghorne v. Montreal Tel. Co. 18 U. C. Q. B. p. 66, and Reed, St. Frauds, § 339.

⁶ Reed, St. Frauds, §§ 323, 329.

⁷ Cocking v. Ward, 1 C. B. 867.

⁸ Hart v. Hart, 3 Del. 595; Argenbright v. Campbell, 3 Hen. & M. 159.

⁹ Wiley v. Mullins, 22 Ark. 394; Maddox v. Rowe, 23 Ga. 433; Hiatt v. Williams, 72 Mo. 215.

¹⁰ Archer v. Scott, 17 Grant, 249.

¹¹ Reed, St. Frauds, § 337.

¹² Frazer v. Buder, 3 Law & Eq. Rep. 622.

¹³ Cooth v. Jackson, 6 Ves. Jr. 12; Trice v. Pratt, 1 Dev. & B. Eq. 628.

¹⁴ Scott v. Avery, (Dom. Proc.) 20 Monthly Law Rep.; Fell, Guar. 61; Barkworth v. Young, 4 Drew, 9; 26 L. J. Ch. 153.

¹⁵ Ives v. Hazard, 4 R. I. 14; Ivory v. Murphy, 38 Mo. 530; Packard v. Putnam, 57 N. H. 50; Collins v. Decker, 70 Me. 23.

¹⁶ Jackson v. Oglander, 2 H. & M. 472.

¹⁷ Higginson v. Clowes, 15 Ves. 521; Sandlands v. Marsh, 2 Barn. & Ald. 680; Gaston v. Frankum, 2 De G. & S. 567; Horsey v. Graham, 18 Wkly. Reg. 141; God-

II. THE CONTENTS OF THE MEMORANDUM. The memorandum relied on "must contain such words as will enable the court, without danger of mistake, to declare the meaning of the parties. It must obviate the necessity of going to oral testimony, and relying on treacherous memory, as to what the contract itself was."¹ Another test is, that, if specific performance is sought, the terms of the contract must appear with sufficient certainty to enable the chancellor to make a definite decree.² The memorandum, whether it be found in a single paper or a series of papers, must show the whole contract; *i. e.*, the promise, the parties, the subject-matter, the consideration, and the conditions, if any.³ An illustration of the failure of the memorandum to come up to the requirements of the statute in this respect, is found in *McElroy v. Buck*,⁴ where the plaintiff and defendant had verbal negotiations for the sale of some hogs, and the terms were then and there agreed upon, subject to the defendant's right to go to Ohio first, and to telegraph his determination from there. This was done, and he sent the following telegram to plaintiffs: "I will take double-deck car hogs. William C. Bryant will close contract. [Signed] JAMES McELROY." The court said: "Standing by itself, the telegram contained none of the elements of a bargain except quantity, and it implied that there had been some communication previously in regard to terms which would have to be appealed to, to explain the substance of the bargain. Moreover, it did not purport to be a note or memorandum of an agreement at all, but only a simple notification of adhesion to an agreement which had been previously arranged theretofore, and the terms of which were assumed to be understood, and the facts show that the previous arrangement so referred to was one which rested wholly in parol." In *Lee v. Hills*,⁵ through the omission of the clerk who made out an intended bill of sale, the word "sold" was omitted, so that the paper of itself showed no contract, although the name of the vendee, and the quantity and prices of the articles, appeared. It was held that the memorandum was insufficient, since the omission could only be supplied by parol testimony. So it was not enough to say: "This is to certify that I have received from Robert Irving, —, the sum of £10. —, and have applied it to the sale of lot No. 9 in the fifth concession of West Oxford, and as soon as I get a bond I will give him one for the lot," since it contains neither the terms and conditions of the contract nor the price.⁶ But a written offer of sale, which merely requires acceptance by the other party, is good if the acceptance can be proved even by parol.

In *Sandborn v. Flagler*⁷ the plaintiff relied on the following memorandum: "Will deliver S. R. & Co. best refined iron, 50 tons, within 90 days, at 5 ct. per lb., 4 of cash. Plates to be 10 to 16 inches wide, and 9 ft. to 11 long. This offer good till 2 o'clock Sept. 11, 1862. J. H. F., J. B. R." The plaintiff proved the initials to have been affixed by the defendant and himself, and the acceptance of the offer by himself, before 2 o'clock on the day named. This was held sufficient; BIGELOW, J., saying: "The acceptance of the con-

win v. Francis, L. R. 5 C. P. 295; Norris v. Cooke, 7 Ir. C. L. Rep. 41; Williams v. Morris, 95 U. S. 454; Byrne v. Marshall, 44 Ala. 357; Esmay v. Gorton, 18 Ill. 483; Wills v. Ross, 77 Ind. 1; O'Donnell v. Leeman, 43 Me. 158; Drury v. Young, 58 Md. 553; Atwood v. Cobb, 16 Pick. 230; Packard v. Putnam, 57 N. H. 43; Wright v. Weeks, 25 N. Y. 155; Peabody v. Speyers, 56 N. Y. 233; Raubitschek v. Blank, 80 N. Y. 481; Parish v. Koons, 1 Pars. Eq. Cas. 84; Ward v. Orr, 13 Pittsb. L. J. (U. S.) 416; Buck v. Pickwell, 27 Vt. 163.

¹ Scarritt v. St. John's M. E. Church, 7 Mo. App. 178.

² Neufville v. Stuart, 1 Hill, Ch. 166; Eargood's Estate, 1 Pears. 400.

³ Oakman v. Rogers, 120 Mass. 214; Reed, St. Frauds, § 398 et seq.

⁴ 35 Mich. 435.

⁵ 66 Ind. 474.

⁶ Irving v. Merrygold, 3 U. C. Q. B. 273; Patterson v. Underwood, 29 Ind. 610; Riley v. Farnsworth, 111 Mass. 153.

⁷ 9 Allen, 476.

tract by the party seeking to enforce it may always be proved by evidence *abundante*."¹

But if the alleged memorandum was not at the time intended to express a contract or an offer for acceptance, so as to complete the contract, it will not satisfy the requirements of the statute; as, where an agent sent a circular to tenants announcing the landlord's intention to grant new terms at an increased rental, and inclosing the draft of an agreement which the tenants signed, it was held that as the circular was not a contract, but a mere declaration of intention, and the landlord did not sign the agreement, the statute was not satisfied.²

A curious question, already touched upon in connection with admissions in pleadings, arises upon the effect of a letter or memorandum referring to a previous contract, which by the very letter itself is repudiated. In *Bailey v. Sweating*³ there was an action for goods sold and delivered. After making an oral contract, the vendee wrote a letter to the vendor, saying: "The goods selected for ready money was the chimney-glasses, amounting to 38l. 10s. 6d., [for the price of which the suit was brought,] which goods I have never received, and have long since declined to have, for reasons made known to you at the time." It was held that this was of itself a sufficient memorandum of the contract within the statute, the spirit of which, being to prevent perjury, was clearly not violated, since the contract was proved by the defendant himself. A different view had previously been expressed by Lord BLACKBURN, in his work on the Contract of Sale, p. 66, but he himself subsequently admitted⁴ that his opinion there expressed had been overruled by the later cases.⁵ Again, in *Ockley v. Masson*,⁶ a case in many respects similar to the principal case, the defendant's agent, Kerr, made a parol sale of groceries to the plaintiffs. Kerr entered the order in a book (which was not produced at the trial) and reported the sale to the defendants, who thereupon wrote to the plaintiffs: "Mr. Kerr reports a sale that we cannot approve in full, but will accept for, etc.," enumerating certain articles. Plaintiffs insisted upon completion of the order in full, and defendants thereupon canceled the whole order. It was held by PATTERSON, J. A.—*First*, that the agent's letter to his principal, reporting the sale, (which, it is to be observed, is distinguishable from an order as in the principal case,) was a sufficient memorandum, quoting therefor ERLE, J., who said, in *Gibson v. Holland*:⁷ "Now, a note or memorandum is equally corroborative, whether it passes between the parties to the contract themselves, or between one of them and his own agent;" but in this case he held it to be still stronger that the letter acknowledging the agent's report was from the defendants to the plaintiffs. *Second*, that the effect of the sale was not impaired by the disapproval expressed by the defendants.

The memorandum must show a completed contract; it is not sufficient if there appear to be a *jus deliberandi* or *locus penitentia*,⁸—see this subject treated at length in Reed, St. Frauds, §§ 395, 396,—but it does not render the memorandum invalid that it contains an agreement for a more formal contract to be made, if, in itself, the contract is clearly made out.⁹ If, how-

¹ See, also, *Simonson v. Kissick*, 4 Daly, 146; but, contra, *Corbitt v. Salem Gas Co.* 6 Or. 405.

² *Archbold v. Lord Howth*, 1 Ir. Rep. O. L. 619; 18 Ir. Jur. 88; and to the same effect, *Kurtz v. Cummings*, 24 Pa. St. 37; *Richards v. Porter*, 6 B. & C. 437; *Cooke v. Tombs*, 2 Anstruther, 424.

³ 9 C. B. (N. S.) 857.

⁴ *Buxton v. Rust*, L. R. 7 Ex. 280.

⁵ See, also, *Wilkinson v. Evans*, L. R. 1 C. P. 410; *Hicks v. Cocks*, 67 Law T. 383;

McFarson's Appeal, 11 Pa. St. 509; *Jackson v. Lowe*, 1 Bing 12; *McCaul v. Strauss*, 1 Cab. & Ell. 108; *Johnson v. Trinity Church*, 11 Allen, 123.

⁶ Ont. App. R. 108.

⁷ L. R. 1 C. P. p. 5.

⁸ *Williams v. Morris*, 95 U. S. 456.

⁹ *Fowle v. Freeman*, 9 Ves. 351; *Hammersly v. De Biel*, 12 Clark & F. 73; *Jones v. Victoria Graving Dock Co.* L. R. 2 Q. B. Div. 321; *Bonnell v. Jenkins*, 47 L. J. Ch. 758; *McFarson's Appeal*, 11 Pa. St.

ever, it appears that it was not the intention of the parties to be bound unless the final and formal contract is made out, then the memorandum is not a memorandum of a consummated contract. Indeed, this rule may be sustained by invoking that already referred to, that there must be no *locus penitentiae*. Thus, in *Winn v. Bull*,¹ an agreement was executed expressly "subject to the preparation and approval of a formal contract," and it was held to be insufficient.² If no conditions as to payment are contained in the memorandum, the usual or a reasonable time is to be inferred, and proof to the contrary will not generally be allowed.³

Apart from the question of the signature, the memorandum must contain the names of the parties to the contract, or at least sufficient to identify them. It is not necessary that their full names should be set out—their initials may serve for identification; neither is it necessary that the names of the real parties in interest should appear, if they were acting through agents, and the memorandum identifies the agent, and the agency can be proven.

In *Salmon Falls Manuf'g Co. v. Goddard*⁴ the memorandum was as follows:

"SEPT. 19th.	W. W. GODDARD.	12 mos.
"300 bales S. F. drills,	- - - - -	7 1/2
"100 cases blue do.,	- - - - -	8 1/2

"Credit to commence when ship sails. Not after Dec. 1st. Delivered free of charge for truckage. The blues, if color satisfactory to purchasers.

"R. M. M.
"W. W. G."

This was accompanied by a bill of parcels, sent shortly after to defendants. Suit was brought by the Salmon Falls Manufacturing Company to recover the price of the goods named in the memorandum. It appeared that the firm of Mason & Lawrence were the agents of the plaintiffs in Boston, and that the memorandum was signed with the initials of R. M. Mason, one of the firm, for the firm, and it was held (two judges dissenting, however) that the plaintiffs could recover.⁵

It will even suffice in some cases that the parties should be styled by some designation, if the identification can be proven.⁶ There has been great conflict of opinion on this point, however, and the true rule appears to be "that, where a description points directly to one set of persons and but one, and their identity can be shown from the writing or from other written evidence, or by parol evidence, which can indicate the persons described in the writing without involving inadmissible oral proof of anything in the contract itself, the writing is sufficient under the statute of frauds."⁷

III. THE SIGNATURE. The seventeenth section of the statute provides that the note or memorandum shall "be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized." In

510; *Caborne v. Godfrey*, 3 Des. 520; *Rautitschek v. Blank*, 80 N. Y. 490.

¹ L. R. 7 Ch. Div. 29.

² See, also, *Ridgway v. Wharton*, 6 H. L. Cas. 255; *Wharton v. Stoutenburgh*, 35 N. J. Eq. 274; and *Tawney v. Crowther*, 3 Bro. C. C. 318.

³ *Atwood v. Cobb*, 16 Pick. 230; *Hawkins v. Chace*, 19 Pick. 504; *Greaves v. Ashlin*, 3 Camp. 316; *O'Donnell v. Lee-man*, 43 Me. 160; *Ide v. Stanton*, 15 Vt. 689; *Smith v. Jones*, 7 Leigh, 165; *Lockett v. Mifflin*, 2 Ex. Ch. 92; *Ford v. Yates*, 2 Man. & G. 559. But see, also, *Paul v. Owings*, 32 Md. 406; *Hopkins v. Roberts*, 54 Md. 816.

⁴ 14 How. 446.

⁵ See, on the same point, *Bourdillon v. Collins*, 24 Law T. R. (N. S.) 345; *Barry v. Coombe*, 1 Pet. 651; *Mordecai v. Gadsden*, 2 Speer 568; *Cadwalader v. App.* 81 Pa. St. 210; *Irvine v. Dane*, 2 Ir. Jur. 210; *Forbis v. Shattler*, 2 Cinn. Rep. 95; *Lerned v. Wannemacher*, 9 Allen, supra; *Cossitt v. Hobbs*, 58 Ill. 231; *Walsh v. Barton*, 24 Ohio, 39.

⁶ *Hood v. Ld. Barrington*, L. R. 6 Eq. 221; *Commings v. Scott*, L. R. 20 Eq. 16.

⁷ *Reed*, St. Frauds, § 407, and the cases therein cited.

one respect the consideration of this clause has been anticipated by what has immediately preceded, but it was there mentioned, not with regard to the character of the signature of the party to be charged, but to illustrate the rule that the contract must be so far complete in itself as to require no parol testimony to show who are the parties to the contract. The consideration of the signature involves (1) the meaning of the word "parties;" (2) the requisites to the signature; (3) the place of the signature; and (4) the signature of an agent. It may be observed in passing that the memorandum itself need not be in the handwriting of the party to be charged; it may be either in other handwriting or printed.¹

(1) There is no difference between the fourth and seventeenth sections of the statute, caused by the use of the word "party" in the one and "parties" in the other; in either case, in the absence of special provisions in local statutes, the memorandum need be signed only by the "party" to be charged.²

(2) In *Sanborn v. Flagler*³ BIGELOW, C. J., said: "It is hardly necessary to add that the signature is valid and binding, though made with the initials of the party only, and that parol evidence is admissible to explain and apply them."⁴ So, too, the statute is satisfied by the mark of the person to be charged, or any figure or designation, if the party affixing intends to be bound thereby.⁵ Finally, it is not even essential that the party to be charged should have affixed either signature, initial, or mark of any kind with his own hand, if his name be even printed with his authority, and the printed signature be intended to bind it will be sufficient. In *Drury v. Young*,⁶ STONE, J., said: "In *Schneider v. Norris*⁷ Lord ELLENBOROUGH decided that the appropriation and recognition of a printed name was sufficient." In *Boardman v. Spooner*,⁸ however, FOSTER, J., said: "The stamping of the purchaser's name and a date on the bill, and memorandum of weights at some time, while these papers were in their possession, without evidence when or for what purpose this was done, did not show that they had adopted such a stamp as a signature and affixed it to the instruments with the intent to bind themselves thereby. * * * We do not regard the mere fact that when these papers were produced at the trial by the defendants they were found to be so stamped, as a circumstance which either a court or a jury should be at liberty to treat as proof of a signature by the party to be charged."

(3) It is quite immaterial in what part of the memorandum the signature may be, if it sufficiently appear that it was intended to govern the whole agreement which it authenticates,⁹ but the signature must be intended to govern the whole contract, otherwise its position may make a difference.¹⁰

¹ Morton v. Copeland, 16 C. B. 535.

² Morin v. Martz, 13 Minn. 192, (Gil. 180); Egerton v. Matthews, 6 East, 308; Liverpool Borough Bank v. Eccles, 4 H. & K. 143; Bank of British America v. Simpson, 24 U. C. C. P. 357; Kizer v. Locke, 9 Ala. 269; Vassault v. Edwards, 43 Cal. 453; Weldon v. Porter, 4 Houst. 239; Linton v. Williams, 25 Ga. 391; Perkins v. Hadsell, 50 Ill. 220; Cook v. Anderson, 20 Ind. 15; Balch v. Young, 23 La. Ann. 272; Getchell v. Jewett, 4 Greenl. 366; Williams v. Robinson, 73 Me. 195; Dresel v. Jordan, 104 Mass. 407; Scott v. Bush, 26 Mich. 420; Marquee v. Caldwell, 48 Miss. 30; Luckett v. Williamson, 37 Mo. 395; Nat. Fire Ins. Co. v. Loomis, 11 Paige, 431; Mirzell v. Burnett, 4 Jones, (N. C.) 249; Johnston v. Cowan, 59 Pa. St. 275; Sheid v. Stamps, 2 Sneed, 172; Brandon Co. v. Morse, 48 Vt. 326; Capehart v. Hale, 6 W. Va. 550.

³ 9 Allen, 474.

⁴ See, also, *Chicester v. Cobb*, 14 Law T. (N. S.) 433; *Phillimore v. Barry*, 1 Camp. 513; but see, also, *Sweet v. Lee*, 8 Man. & G. 453.

⁵ *Palmer v. Stephens*, 1 Denio, 471; *Brown v. Butchers' Bank*, 6 Hill, 443; *Weston v. Myers*, 33 Ill. 432; *McFarson's Appeal*, 11 Pa. St. 503; *Madison v. Zabriske*, 11 La. 251; *Helshaw v. Langley*, 11 L. J. Ch. 17.

⁶ 58 Md. 546.

⁷ 2 Maule & S. 286.

⁸ 13 Allen, 358.

⁹ *Torrett v. Cripps*, 27 W. R. 706; *Drury v. Young*, 58 Md. 547; *Penniman v. Harts-horne*, 13 Mass. 87; *Sayers v. Patterson*, 2 W. N. C. 334; *Johnson v. Dodgson*, 2 Mees. & W. 653; *Bleakley v. Smith*, 11 Sim. 150; *Saunders v. Jackson*, 2 B. & P. 239; *Schneider v. Norris*, 2 M. & S. 288; *Reed, St. of Frauds*, § 385, note c.

¹⁰ *Caton v. Caton*, L. R. 2 H. L. 135

(4) The general rule is that the same person cannot be agent for both parties.¹ There is an exception to this rule, however, in the case of a professional broker, who is usually, apart from the statute of frauds, the agent of both parties, and who may make a memorandum under the statute binding upon both of his principals.² The authority of the agent to make a sale of chattels under the statute may be given orally.³

Before closing this note, the annotator must add an acknowledgment of the assistance which he has received from N. Dubois Miller, Esq., of the Philadelphia bar, in the preparation and arrangement of the points of law which have just been considered.

HENRY REED.

Philadelphia, Pa.

¹ Wright v. Dannah, 2 Camp. 203; Bailey v. Ogden, 3 Johns. 418; Hazard v. Day, 14 Allen, 494; Rayner v. Linthorne, 2 C. & P. 124; Johnson v. Buck, 35 N. J. Law, 340; Marx v. Bell, 48 Ala. 499; Strong v. Dodds, 47 Vt. 354.

² Lusk v. Hope, 17 Low. Can. Jur. 19; Colvin v. Williams, 8 Har. & J. 38; Sale v. Darragh, 2 Hilt. 196; Hinckley v. Arey, 27 Me. 363; Spyer v. Fisher, 37 N. Y. Su-

per. 100; Pringle v. Spaulding, 53 Barb. 17; Hicks v. Hawkin, 4 Esp. 114; Glengal v. Barnard, 1 Keen, 788; Rucker v. Cammeyer, 1 Esp. 105; Butler v. Thompson, 92 U. S. 412.

³ McBlaine v. Cross, 25 Law J. (N. S.) 804; Shaw v. Nudd, 8 Pick. 12; Chapman v. Portridge, 5 Esp. 257; Lawrence v. Gallagher, 73 N. Y. 613.

In re GLEN IRON WORKS, Bankrupt.¹

(Circuit Court, E. D. Pennsylvania. June 6, 1884.)

1. CORPORATIONS—INSOLVENCY—CAPITAL SUBSCRIPTIONS—LIABILITY OF STOCKHOLDERS—ATTACHMENT EXECUTION.

Unpaid subscriptions to the capital stock of a corporation which has become insolvent, may be levied upon under writs of attachment execution, although no assessment has been made by the board of directors. *Bunn's Appeal*, 14 Wkly. Notes Cas. 193, distinguished.

2. SAME—SUBSCRIPTION NOTES—ASSESSMENTS AND CALLS.

Where the articles of association of a corporation provided for a capital stock of \$140,000, and stipulated that the stockholders should give their notes, without interest, for their respective subscriptions, which should not be liable at any time to an assessment for more than 50 per centum of their face, *held* that, in case of insolvency, the whole capital subscribed was liable to creditors; and the corporation having become bankrupt after 20 per centum of the capital had been assessed and paid in, *held*, that the stockholders were liable to attaching creditors for their respective proportions of the whole unpaid amount of the subscriptions.

3. SAME—BANKRUPTCY—LIEN OF PRIOR ATTACHMENTS.

The corporation having been declared bankrupt, upon proceedings instituted subsequently to the service upon stockholders of such writs of attachment execution, and the unpaid capital having been awarded to and collected by the assignee in bankruptcy, without prejudice to the rights of the attaching creditors, and with leave to them to intervene, *held*, upon the intervention of such creditors, claiming the amounts of their judgments out of the fund in the hands of the assignee, that the same was liable to the lien of the attachments, and should be awarded to the attaching creditors.

4. BILL OF REVIEW—RIGHT OF ASSIGNEE TO BRING—REV. ST. § 4956.

The assignee in bankruptcy is a proper party to bring a bill of review where the claim of attaching creditors is put forward as paramount to the rights of the assignee.

¹ Reported by Albert B. Gullbert, Esq., of the Philadelphia bar.

Bill of Review to the District Court, brought by E. P. Wilbur, assignee in bankruptcy of the Glen Iron Works, bankrupt. The facts are set forth in the report of the decision of the district court, 17 Fed. Rep. 324, and in the following opinion:

W. D. Luckenbach, Furman Sheppard, and Geo. W. Biddle, for petitioner.

R. E. Wright, Jr., P. K. Erdman, and R. C. McMurtrie, for claimants.

BRADLEY, Justice. This is a bill of review under the bankrupt law of 1867, brought by the assignee in bankruptcy of the Glen Iron Works to review the decision of the district court upon the claim of Charles W. Cooper and others as attachment execution creditors. Cooper and the other respondents obtained a judgment against the corporation of the Glen Iron Works in the court of common pleas of Lehigh county, in January term, 1871, for \$25,000, on which an attachment execution was issued on the first of January, 1875, with a clause of *scire facias* against stockholders of the corporation holding stock therein, on which only 20 per centum had been paid, the object of the attachment being to garnishee the unpaid balance. The attachment was served upon the corporation and the garnishees on the second of January, 1875. On the third of March, 1875, a creditor's petition was filed in the district court of the United States to have the corporation declared bankrupt; it was adjudicated such on the thirtieth of March; and on the fifth of May, Wilbur, the assignee, who brings the present bill of review, was appointed assignee in bankruptcy. In November, 1875, the assignee brought suits at law in *assumpsit* in this court against the several stockholders of the corporation to recover the amount of their unpaid subscriptions to the stock, to-wit, the remaining 80 per cent. The suits were tried and disposed of upon affidavits of cause of action and affidavits of defense filed. It was alleged in the former that the corporation was insolvent, and in the affidavits of defense that there was no assessment, either by the board of directors of the corporation or by a court, and without such assessment there was no liability on the part of the defendants to pay the unpaid stock. The court held the defense good, and suggested that the proper mode of proceeding was by bill in equity against all the stockholders. The actions at law were thereupon discontinued, and a bill in equity was filed in the district court, which resulted in a decree that the stockholders should pay the whole amount of their unpaid subscriptions. One of the defenses set up by the stockholders in the equity suit was the service upon them of the attachment executions, which they allege their liability to pay, if they were liable at all, on their unpaid subscriptions. But the court, speaking by Judge CADWALLADER, (*Wilbur v. Stockholders*, 35 Leg. Int. 346,) decided that the attachment executions, which were prior to the commencement of the proceedings in bankruptcy, could not prevent the entering of the decree or its enforcement; but that the

decree would be made without prejudice to the rights (if any) of the respective attaching creditors; and that they might, if so advised, intervene for their own interests. This decree was affirmed by the circuit court on appeal the twenty-sixth of April, 1879, and the assignee collected the fund, or so much of it as was collectible. On the second of April, 1881, the attachment execution creditors, acting upon the suggestion of the court, intervened in their own behalf, presented before the register in bankruptcy proof of their judgment, their attachment execution, and the service thereof on the stockholders, and claimed that the said attachment should be paid out of the money recovered by the assignee. The register decided against the claim, holding that the debt arising upon the unpaid subscriptions was only due, under the contract of subscription, in case of an assessment, and no assessment having been made in January, 1875, when the attachment was served, there was nothing in the hands of the garnishees due the corporation, and nothing passed to the execution creditors. The register's report was made March 31, 1883. 17 FED. REP. 324. The district court overruled this decision of the register, allowed the claim of the attachment execution creditors, and referred the matter back to the register, with directions to make a new report in accordance with its opinion. This being done, and a decree in favor of the execution creditors being entered, the assignee brought the present bill of review to reverse that decree.

A preliminary question is raised as to the right of the assignee to bring the bill of review. On this question, however, we have but little difficulty. The section of the bankrupt law which gives to the circuit court power to review the decisions of the district court in matters of bankruptcy (Rev. St. § 4986) declares that "the circuit court for each district shall have a general superintendence and jurisdiction of all cases and questions arising in the district court for such district when sitting as a court of bankruptcy, * * * and, except when special provision is otherwise made, may, upon bill, petition, or other proper process of *any party aggrieved*, hear and determine the case as in a court of equity." It is contended that the assignee is not "a party aggrieved" within the meaning of the law; that it is a question of distribution of proceeds among the creditors, and that only creditors, namely, general creditors, opposed to the claim of priority on the part of the attachment creditors, are the parties aggrieved. But while the general creditors may be proper parties to file the bill, in our judgment, the assignee is also a proper party, for the reason that the claim of the attaching creditors is put forward as paramount to his rights, and as standing upon a superior title. The assignee represents the general estate of the bankrupt corporation; but the attaching creditors claim that they have a lien on portions of that estate, to which the interest of the assignee, as transferred to him from the corporation by operation of law, is subject. The assignee, in the interest of the general creditors, opposes

this lien, and claims to hold the estate free from it. And while we think, therefore, that he is a proper party to file the bill, it is certainly more convenient and less expensive for him to do it than for the creditors to do it, either jointly or separately. The terms of the act ought to be construed liberally in this regard, in order that the proceedings may not be defeated by technical objections as to parties, and that the interest and convenience of all may be subserved. If it be apprehended that the assignee might carry on litigation when the creditors were indisposed to do so, it is no more than might happen in reference to all the interests of the estate in his charge, and their wishes could at any time be made known to the court, and would undoubtedly be prevailing when expressed by those entitled to weight and importance in the administration of the estate.

Another matter proper to be disposed of before proceeding to consider the principal question in the case, is the point made by the assignee, that the attachment proceedings were waived by the issue of a *fi. fa.* and levying on and selling the real estate of the corporation pending the proceedings in bankruptcy. But we are satisfied that under the state law there is no objection to the suing out of contemporaneous executions. And so far as the bankrupt law is concerned, if a judgment creditor levies on a portion of the bankrupt estate on which his judgment is a prior lien, he may, perhaps, be enjoined from proceeding; but if no action is taken by the bankruptcy court we do not see how such a levy can affect a fixed lien which he has on other property, unless he makes his debt out of that levied on. In the present case, the real estate being incumbered to its full value, only a hundred dollars were realized by the sale, and neither the bankruptcy court, nor the assignee, nor the creditors, seem to have troubled themselves about the matter. We think there is nothing in the point.

The main ground of contention of the appellant's counsel is that the liability of the stockholders on their unpaid subscriptions of stock as it stood in January, 1875, when the attachment was issued, was not a debt due to the corporation, attachable under process of execution by the laws of Pennsylvania. The law under which it is claimed by the execution creditors that the subscription was attachable is the "act relating to executions," passed June 16, 1836, the thirty-fifth section of which declares that "in the case of a debt due to the defendant, or of a deposit of money made by him, etc., the same may be attached and levied in satisfaction of the judgment in the manner allowed in the case of a foreign attachment; and by the thirty-seventh section it is declared that "from and after service of the writ all debts and all deposits of money, and all other effects belonging or due to defendant by the person or corporation upon which service is made, shall remain attached in the hands of such corporation or person" as in foreign attachment.

The Glen Iron Works was incorporated under a charter granted by act of the legislature, approved March 16, 1865, which declared that

the capital stock of the company should be divided into shares of \$50 each, and should consist of 1,000 shares, with power of increasing it to 3,000 shares. Under this act the subscribers, in July, 1870, entered into articles of association, by which they agreed to associate themselves together for the purpose of manufacturing iron, under a capital of \$140,000, divided into 2,800 shares of \$50 each, and to take the number of shares set opposite their respective names, giving their notes, without interest, for the full amount subscribed, but not liable to an assessment of more than 50 per cent. of the face thereof, and not liable to an assessment of more than 20 per cent. within 18 months after organization. The stock notes given were in the ordinary form of promissory notes, dated August 1, 1870, payable one day after date to the Glen Iron Works or order, without defalcation; and to each note was appended a memorandum that it was for the full amount of the party's subscription to the capital stock, and subject to assessments from time to time, as the board of directors might deem necessary, subject to the condition specified in the agreement as to the amount of assessments, and with a stipulation that dividends declared from profits should be credited upon the note until the note should be paid. It is this condition—that there should be no liability to pay the notes without assessment, and that the assessments should not exceed in the aggregate 50 per cent. of their face—upon which the assignee on behalf of the general creditors relies for the position that there was no attachable debt due to the corporation from the stockholders when the attachment execution was issued, inasmuch as no assessment had then been made of any part of the 80 per cent. still unpaid. A resolution for a call of 30 per cent. had been made, it is true, but had been repealed before the attachment issued; and the question is whether, in that condition of things, the liability on the subscription was attachable or not?

It is contended that there was no debt until an assessment was made, and, in proof of this, reference is made to the decision of this court in the actions at law brought by the assignee against the stockholders, to the effect that such actions would not lie in the absence of an assessment; and reference is also made, on the same point, to certain recent decisions of the supreme court of the United States, namely, *Scovill v. Thayer*, 105 U. S. 143, and *Patterson v. Lynde*, 106 U. S. 519; S. C. 1 Sup. Ct. Rep. 432. And, if it be true that no debt can be attached for which an action at law will not lie, either at the suit of the principal debtor or that of his assignee in bankruptcy, it follows, as a matter of course, that the liability of the stockholders, in this case, could not be attached in January, 1875. But this does not appear to be universally true, since it has been repeatedly decided by the Pennsylvania courts that the efficacy of attachment process is not confined to the garnishment of legal demands, but extends to those of an equitable nature as well. Property, assets, debts, and choses in action assigned by the principal debtor, in a manner

valid and binding as against himself, and so as to be only available to his creditors by an equitable proceeding, are nevertheless subject to an attachment execution, as where assignments or conveyances are made in fraud of creditors, or are void, as against creditors for want of being recorded as required by law. Whatever is done in fraud of creditors, or calculated to hinder and delay them in recovering their debts, is not allowed to stand in their way. *Flanagin v. Wetherill*, 5 Whart. 280; *Stewart v. McMinn*, 5 Watts & S. 100; *Watson v. Bagaley*, 2 Jones, 164; *Driesbach v. Becker*, 10 Casey, 152; *French v. Breidelman*, 2 Grant, 319; *Robinett v. Donnelly*, 5 Phila. 361.

By the flexibility of Pennsylvania procedure, long deprived as it was of the forms of chancery pleading, whereby an expansive application of legal remedies to equitable rights became a necessity, it is possible that some of the cases embraced in the category referred to might have been amenable to some legal remedy, though, as between law and equity, properly speaking, they are all strictly of equitable cognizance. Thus, where the object was to reach goods fraudulently assigned and still in the hands of the assignee, that learned jurist, Judge HARE, in the case last cited, said:

"Although a conveyance in fraud of creditors, with intent to create a secret resulting estate or interest in the grantor, vests a title in the grantee which is, as between himself and the grantor, as absolute as if the transfer had been made in good faith, and for value, it will, notwithstanding, give rise to a trust in favor of the parties who are meant to be defrauded, which may be enforced in this state through the medium of an action at common law. So far as they are concerned, the trust will be viewed as express, and the trustee, if privy to the fraud, made answerable, as if the duty of holding the property for their benefit had been set forth on the face of the deed."

But a mere uncollected debt thus assigned could not certainly be reached by an action at common law, but only by a proceeding in equity, or an attachment.

So, generally, any debt owing to the principal debtor, but not yet due, cannot be made the subject of an action at common law, whether he has assigned it or not. It can only be reached by his creditors by a proceeding in equity, or by an attachment. That it may be reached in this manner is very clear from abundant authority.

It cannot be said, therefore, that the existence of a right to an action at law, for the collection of a claim, is the criterion for determining whether it is or is not attachable. There must be something more, something in the nature of the obligation itself, to put it outside of the reach of an attachment.

It is contended that such an impediment did exist in the case now under consideration; that at the time of issuing the attachment no debt existed; that the condition (namely, an assessment and a call) had not been performed to give it existence; and that those conditions could only be performed by the board of directors of the corporation, or by a court of chancery. But, if there was not a technical debt in existence, it must be conceded that there was an obligation

in existence, which only required the happening of certain contingencies to make it a technical debt. The word "debt," as used in the statute of 1836, is of very broad application, and embraces many obligations which, in strict speech, are not debts. This is shown by the cases already referred to, and by many others that might be cited. A contract to pay money at a future day is not strictly a debt until the day of payment arrives, although it is called *debitum in presenti, solvendum in futuro*, and is undoubtedly attachable. When the condition is performed (which in this case is mere lapse of time) it will be a strict debt. So a promise to pay money on any other of many conditions that might be specified, comes within the same category. A contract to pay a builder so much money when a house which he has contracted to build is completed, is not a debt until the work is finished; yet, if it be partly completed, and requires little more to be done, as, for example, the painting, or the putting of locks on the doors, or weights on the windows, no one would say that such an obligation is not attachable, or that the condition may not be performed after the attachment had been laid, either by the builder himself, or by the party interested in the attachment. This would certainly be so in all cases, except where personal trust and confidence are reposed in the contractor, as in the painting of a picture, and where the performance of the condition by any other person would make a material difference to the other party to the contract.

Now, what was the condition to be performed in the present case in order to convert the obligation of the stockholder into a perfect and complete debt? Nominally, as between the stockholders themselves, or (which is the same thing) between them and the corporation, (which consisted of themselves,) the condition was that there should be an assessment by the board of directors, and a call, and this could not extend beyond 50 per cent. of the whole subscription. But everybody concedes that this condition need not be strictly and literally performed, and that, as to creditors who cannot otherwise be paid than by a resort to the stockholders, it is void, and does not require strict performance. As a whole, considering it in all its parts, it is an agreement calculated to hinder and delay creditors in the collection of their debts against the corporation; for, as to them, the whole subscribed capital of a corporation is a trust fund, (as is sometimes said,) but, at all events, it is a sacred fund, absolutely devoted by the law to the payment of all their just demands, notwithstanding any private agreements between the stockholders themselves. But when such an agreement is adopted in good faith, and without any real intent to defraud, equity will carry it out, or, at least, will pay regard to it so far as it can be done without injury to the creditors; and hence will not compel any stockholder to pay more than his proportionate share of what may be necessary to pay the creditors; and will, through the judicial machinery at its command, make such fair and equitable assessment as will produce, by its application to those

who are responsible and able to pay, all that is needed to pay all the debts of the corporation. This gives to the stockholders the substantial benefit of their mutual agreement, so far as it can be regarded at all. But this is not a strict performance of the condition. It is only paying such regard to the terms and effect of it as will secure to the stockholders the most essential benefits of it consistent with the claims of the creditors. It is a substituted performance which answers all the purposes of justice.

But this action of the court of chancery does not create the obligation to pay. It only ascertains the just amount to be paid by each stockholder. The obligation to pay is founded—*First*, on the subscription to the stock; *secondly*, upon the existence of creditors and debts of the corporation requiring the payment of the subscription to satisfy them. As to such creditors and the debts due to them, the condition is but a spider's web, which the first breath of the law blows away. Nevertheless, where the judicial constitution of the commonwealth or state provides a forum in which full and complete justice may be done to both creditors and stockholders, as is the case where a chancery jurisdiction is established, the equity courts will assume the administration of the estate, and will divide the burden among the several stockholders in accordance with the agreement which they have made between themselves. This is what is effected by the interposition of a court of chancery. It does not create the duty to pay, it only assesses the equitable amount to be paid by each. It would be too much to say that, in a state where no chancery procedure exists, the courts would be powerless to enforce the duty, although they might be unable to enforce it in a manner so convenient and complete. In the absence of any other method, they might, perhaps, leave it to the stockholders themselves to obtain just contribution from each other, thus throwing upon them the burden of enforcing an agreement made between themselves, which, strictly speaking, is void as against creditors.

From these considerations it is apparent that the obligation of the subscribing stockholder becomes a *debitum in præsenti* when the debts of the corporation cannot be paid without resort to the unpaid stock; but *solvendum in futuro*, that is, when the fair and equitable amount to be paid has been ascertained and liquidated. It becomes a debt when there are debts of the corporation to pay,—the law discounts any contrary idea,—though the amount may be a matter of examination and adjustment. The courts of common law, not having at their command the requisite machinery to ascertain the amount in an ordinary action, will not entertain such an action at the suit of an assignee; especially is this so where another jurisdiction exists which has all the machinery for effecting complete justice between the parties. But this is a question of procedure, rather than a question of right, and ought not to affect the real and substantial rights of parties. We are aware that a different mode of speaking in rela-

tion to the subject has frequently been used,—a mode of speaking more in accordance with the view that an assessment and a call, to be made by a court, or some officer or agent of a court, (if not made by the directors themselves,) are necessary in order to create the debt as well as to ascertain its amount. But, looking at the matter in its essence and true reason, it seems to us that the substantial thing, in addition to the fact of subscription, is the existence of corporation debts, which cannot be paid without a resort to such subscription. It is this which overrides the condition on which the subscription is made, by bringing the case within the paramount edict of law, which nullifies all devices for hindering and defrauding creditors.

If we are right in this view of the subject, the question then arises whether a debt of this nature, before being liquidated by an account showing the proportionate amount due from each stockholder, though not in a situation to be recovered in a common action at law, may be attached on execution. The law gives the creditor a right by an attachment execution to reach the debts, property, and effects of his debtor, however skillfully covered up or concealed, and in whatever hands or condition they may be found. This is a substantial right, and is not to be thwarted unless insuperable difficulties in its attainment present themselves. We have seen that it is not confined to legal demands of the debtor, but extends to those of an equitable nature; that it extends to debts not due, as well as to debts that are past due; that it extends to demands not yet liquidated, as well as to those which are certain in amount.

And at this point it is pertinent to ask whether the attachment execution, and the proceedings which are proper to be had upon it, do not, in their nature, partake of an equitable character. Inquiries are instituted, interrogatories are propounded, and it is, at least, somewhat difficult to assign strictly the limits of the investigation and proceeding which may ensue under the direction of the court. Had not chancery powers been conferred upon the courts of Pennsylvania, can there be any doubt that this supplementary proceeding on execution would have been moulded to effect all the results in regard to the satisfaction of creditors which are conceded to be available in equity? Why is not the service of an attachment with *scire facias* as much of a call as is a formal order of a court of equity? And why may not the court from which the execution issues inquire, as well as a court of equity may, as to the percentage necessary to be paid by each stockholder to raise the amount of the judgment? At all events, if it should be shown, as in many cases there would be no difficulty in showing, that the whole subscription would be necessary, what would there be to hinder the establishment of such a fact? But if, after serving the attachment, it should be found necessary to resort to an equitable proceeding to ascertain the proportional amount which ought to be paid by each stockholder, this need not necessarily have the effect, and we see no reason why it should have the effect,

to dissolve the attachment, or to destroy the priority acquired by the attaching creditor. It would be an ancillary proceeding in aid of the attachment, and a proper mode of giving it full and complete effect.

The case of *Hays v. Lycoming Fire Ins. Co.*, lately before the supreme court of Pennsylvania on two different occasions, (2 Outerbridge, 184, and 3 Outerbridge, 621,) seems to us directly in point. That was the case of a mutual fire insurance company, in which the members gave notes for their premiums, assessable *pro rata* for the payment of any loss that might occur, and only payable as and to the extent thus assessed. This regulation was not the result of a mere agreement of the stockholders between themselves, but was expressly made in the charter of the company. By a supplement to the charter, the company was further authorized to issue policies for cash premiums to outside parties not becoming members, payable, in case of loss, by assessments on the premium notes of the members in the same way as other losses. A loss occurred on a cash policy, and, having been adjusted, the president of the company, by order of the directors, gave the insured an order on the treasurer for the amount. This order, not being paid, was sued on, judgment was recovered, and an attachment execution issued, with a *scire facias* directed to various members of the company who had given premium notes. The directors had levied an assessment on all notes in force on a certain day, to provide for the payment of losses and expenses up to that date, and another assessment on all notes in force on a subsequent day, to pay losses occurring between the two dates. These assessments were insufficient to pay more than 30 per cent. of the policies due, which amount was offered to the plaintiff and refused. The defense was that an attachment execution would not lie, because claims could only be paid by way of assessment, and the assessments levied were appropriable to those claims for which they were levied *pro rata*, and did not really belong to the company, which acted as a mere trustee; that prior assessments could not be attached to pay subsequent losses; and that subsequent assessments could not be attached, because moneys in the hands of the collectors are virtually in the hands of the company itself. This defense was sustained by the common pleas, but the supreme court reversed the judgment, holding that, as to cash policies, the company was virtually a stock company, and that its premium notes represented its capital stock, and that whenever, by an assessment regularly made, the whole, or any part, of such notes becomes due, there is such an indebtedness in favor of the company as may be attached by any of its creditors other than its own members. The case came before the court the second time on a different state of facts. In October, 1881, the insurance company was dissolved by a decree of the common pleas, and a receiver was appointed. He reported that the assets of the company (almost wholly premium notes) amounted to over \$1,000,000, and that the liabilities (mostly losses by fire) amounted to over \$360,-

000. The court thereupon directed the receiver to levy an additional assessment on premium notes, to meet these liabilities, which was done. The plaintiff, whose judgment still remained unsatisfied, filed supplemental interrogatories, and one of the garnishees admitted that the receiver's assessment on his note was \$96, which he was willing to pay to whomsoever was entitled to it. The court of common pleas again decided adversely to the attachment, principally on the ground that the receiver, being an officer of the court of chancery, could not be made amenable to an attachment. But the supreme court again reversed the judgment. The court, by Mr. Justice TRUNKEY, said:

"The question now presented is whether assessments on the premium notes of the garnishees, made during the pendency of the attachment suit by the receiver of the company, are bound by the attachment. It can hardly be denied that, if so bound, the plaintiff is entitled to recover and collect the money from the garnishee. If, by virtue of the writ of attachment, he is entitled to the debt attached, neither the company defendant, if still in being, nor the receiver, if the company has been dissolved, can collect the money for him against his will. A receiver has no right to property of the defendant which was taken in execution before his appointment. This proceeding was pending at the time and before the civil death of the company. It is by no means the case of an execution, or an attachment, issued and levied after the appointment of the receiver."

The court then goes on to discuss the question thus presented, and the discussion is so apt to the case before us that we cannot do better than to quote its exact language. The learned justice proceeds to say:

"The garnishee gave his notes to the defendant, to be paid in such portions and at such times as the directors may, agreeably to the act of incorporation, require. The losses by fire occurred, and this judgment for one of said losses was obtained prior to the proceedings for the dissolution of the company. Before its dissolution the garnishee became indebted on his premium notes for the proportionate sum necessary for payment of said losses, and nothing remained to be done except to ascertain the proper amount of his indebtedness, prior to his liability to an action to enforce payment. The writ of attachment was issued and served before the dissolution of the company, and the debt owing to the defendant by the garnishee became bound by it. After the receiver was appointed by the court he ascertained the measure or amount of the debt which had been levied upon by the attachment of the plaintiff.

"A garnishee is liable for money belonging to the defendant in the attachment which is received by him after service of the writ. *Sheets v. Hobensack*, 20 Pa. St. 412. When the defendant is a corporation, and has been dissolved, and a receiver appointed, the case would be different with respect to money so received after the dissolution. But if a debt was attached before the dissolution and appointment, though not due, it will be held as if due, the garnishee having the right to withhold payment till it becomes due; and if the debt was subject to a condition he may hold the money until the performance of the condition. In such cases an existing debt is attached, though not presently due, or some action is necessary to ascertain its amount."

As before said, we do not well see how a case could be more directly in point than this. The question now before us was directly in issue, and was the only material question in the case; and the decis-

ion appears to have had the unanimous assent of the court. If this decision correctly declared the law of Pennsylvania as it was in February, 1882, the time when it was pronounced, it was certainly the law which governed the rights of the parties in the case before us, for those rights accrued and became fixed prior to that date.

We are referred, however, to a recent decision of the supreme court of Pennsylvania, in the case of *Bunn's Appeal*, 14 Wkly. Notes Cas. 198, announced in January of the present year, which seems adverse to the views expressed in *Hays v. Lycoming Ins. Co.*, though it professes not to be so, but to be distinguishable therefrom. We have carefully examined the opinion in the case of *Bunn's Appeal*, and are unable to concur in that part of it which relates to the question under consideration. It was a question which did not necessarily arise in the case; for the jurisdiction of the court below, as a court of equity, clearly appeared from the other considerations which were so ably expounded by the supreme court; and the objection that one of the creditors might have had relief by an attachment execution could not have prevailed against the jurisdiction of equity which was much more adequate and complete, and was competent to the determination of the whole controversy between all the parties. And we are unable to see how the fact of the company's insolvency could distinguish the case from *Hays v. Lycoming Ins. Co.* Surely the substantial rights of an attachment creditor cannot depend upon the question whether the company is solvent or insolvent. The obligation of the stockholder is the same in either case, except as to mere amount, and if liable to be attached in the one case, it must be liable in the other. The lien acquired by the attaching creditor equally binds the debt, whatever may be the financial condition of the corporation. With all due respect for the distinguished court which rendered the decision in the case of *Bunn's Appeal*, we feel constrained to abide by its previous decision in *Hays v. Lycoming Ins. Co.*, not only because it better accords with our own views, but because it is declarative of the law of Pennsylvania as that law stood in the jurisprudence of the state when the rights of the parties before us were acquired.

The decree of the district court is affirmed, with costs.

SALADIN v. RACINE WAGON & CARRIAGE Co. and others.

(Circuit Court, E. D. Wisconsin. April 23, 1884.)

1. PATENT LAW—WHAT IS NECESSARY PROOF OF INFRINGEMENT.

To make the defendant liable as an infringer it must appear that he has appropriated all the elements of the plaintiff's combination, or their equivalents.

2. SAME—SUBJECT-MATTER OF THE INVENTION INFRINGED AS ALLEGED.

Alleged infringement of reissued patent No. 9,729, for a running gear for vehicles, in which there are combined an endless perch and an equalizing bar, connected to the adjacent ends of semi-elliptic springs, supporting the body of the vehicle between the perches, *held* not established.

In Equity.

Cotzhausen, Sylvester & Scheiber, for complainant.

Fish & Dodge, for defendants.

DYER, J. This is a bill to restrain the alleged infringement by the defendants of reissue letters patent No. 9,729, granted to the complainant, May 31, 1881, for certain improvements in running gear for vehicles. The original patent (No. 148,497) was issued March 10, 1874. It is essential to determine, first, precisely what the complainant's invention is. The specifications and claims of the original patent are as follows:

"The first part of my invention consists in bending the front and rear bolsters and side perches in one piece, and splicing them together at or about the cross-center of the gearing in such manner as to make literally an endless perch for carriage gearing. The second part of my invention consists in supporting and operating two half-elliptic side springs between the two outside perches, and upon two separate connecting rods, the bearings of which latter are also secured to the perches. Carriage gearing with two or more perches have a bolster resting upon both the front and rear axles, and in or upon which are secured the opposite ends of the two outside perches, each corner of the gearing presenting two ends, viz., the end of the perch and the end of the bolster, to be finished with a scroll, or otherwise, besides involving the cost of bolts and other necessary fastenings to make these connections secure. To obviate all this I proceed to unite the bolsters and side perches as follows, viz.: In the first place I take two pieces of wood, of the required thickness and depth, for the bolsters at their heaviest point, and of a length equal to the length of one bolster and the half length of each perch. These pieces are now bent into substantially the form shown from H to F of the drawing, and with the round corners, SS, SS. The opposite ends of these pieces, A and A', are then finished up as required, and are spliced together at F and F, after which the side perches, A and A', are plated with iron in the usual way. It will now be seen that I have produced an endless perch by bending the bolsters, A', with the side perches, A, and splicing the latter at or about the cross-center of the gearing. By this means I not only get rid of joining the perches, A, to the ends of the bolsters, A', at S, and the work of finishing the ends of each, as is required upon the old plan, but I produce a cleaner and smoother finish at these points, and save a great deal of work in the iron connections, otherwise necessary at these points. In all cases where elliptic springs are to be used over the front and rear axles, they are made to rest upon the ends of the perches or bolsters, A', between the dotted lines, E; but in this case the front bolster, A', will be made considerably shorter than

the hind one, so that the rear ends of the perches, A, will be further apart than the front ends, and not parallel to each other, as seen in the drawing. If preferred to bend the perches in one piece only, one splice, F, will be necessary.

"I am aware that two perches have been bent in one piece, as shown and described in the patent of John Curtis, of Cincinnati, Ohio, and in a former patent of my own. In the former case the perches are closed by the bend in front of the head-block over the front axle, with the rear ends of the perches left open and framed into the hind axle-bed or bolster, while in the latter case the perches are closed by the bend in the rear of the hind axle, and the front ends left open and framed into the head-block over the front axle. But my present invention, let it be well understood, differs materially from both of the forms above described, as well as from all other kinds of bent perches of which I have any knowledge, in this: that both ends of the perches are closed by the bend of the wood, making the bolsters and perches, when completed, in one continuous piece, or, in other terms, an endless perch.

"The half-elliptic side springs, B and B, are linked to two separate connecting rods, C and C, at D, between the two opposite perches, A and A, and the body of the vehicle is then supported upon the center of the springs in the usual way. The bearings, in which the connecting rods are hung and operate, are also secured to the perches, and not to the bolsters, as is the general custom.

"Two advantages are attained in this mode of suspending the springs upon and between the perches, viz.: *First*, the springs being suspended and operating between the perches, instead of on the one side of them, as is usual, the body can never strike the perches by the over-depression of the springs. I can attach the steps directly to the perches and not to the springs, as is usual, by which I gain the advantage of relieving the springs of the strain imposed upon them in all cases where the steps are secured to either the body or springs, as is now the almost universal custom.

"I claim as my invention (1) an endless perch, A and A', substantially as and for the purpose set forth; (2) connecting rods, C and C, pivoted at or near the opposite ends of the perches, A and A, and provided with links, D, and springs, B and B, all combined to operate between the opposite perches, A and A, substantially as and for the purpose set forth."

The specifications and claims of the reissue patent are as follows:

"My invention relates to that class of road wagons in which the front and rear bolsters or axles are connected by side-bars or perches, and in which the body is hung upon semi-elliptic springs; and the object of my invention is to hang the body low down and close to the side-bars without being liable to strike the latter. This object is secured by arranging the side springs inside the side-bars or perches instead of outside, as heretofore, and by connecting their adjacent ends to an equalizing device arranged to operate between said bars, as fully described hereinafter.

"The frame connecting the axles is made of one or more strips or pieces, as shown in the accompanying drawing, which is a plan of sufficient of a road wagon to illustrate my invention. It consists of two pieces, A, A', each sufficient to form one bolster and the half of each perch, and bent to the U shape shown; the ends of the two bent pieces being then spliced at F, F. The frame thus formed has no jointed corners, and constitutes an endless perch of great strength.

"Heretofore, in hanging the bodies between side-bars or perches, it has been necessary, to prevent the body from tilting and striking said bars, to arrange the latter at such a distance from the body that they limit the movement of the wheels in turning so that a 'short turn' cannot be made. I obviate this by hanging the springs inside the perches, and by so equalizing the

action of the springs that the body is prevented from tilting laterally, permitting the perches to be arranged much closer to the body than heretofore. To secure this action I unite the adjacent ends of the side springs, arranged between the perches to ears, D, of an equalizing bar, C, turning in suitable bearings so that any excess of weight upon one spring turning the bar, C, also lowers the other spring to an equal extent, and preserves the body horizontal, so that it will not strike the side perches.

"The arrangement of equalizing bars in combination with both ends of the springs, as shown, secures a like effect at each end of the spring platform. Another result of this arrangement is the suspending of the body lower down than is possible when the springs are outside of the perches, which would be struck by the body if it were not raised well up above them. I am aware that equalizing bars have been used in connection with bodies hung to springs outside the perches; but in such cases the result which I effect is not attained, which is the perfect support of the body, while allowing all desirable vertical movement without unduly spreading the springs apart.

"I claim, (1) in a road wagon, the combination, as set forth, of a body, side perches, semi-elliptic springs arranged between the perches, and means for equalizing the action of such springs, as set forth; (2) the combination, with the semi-elliptic springs supporting a body between the side-bars or perches of a vehicle, of an equalizing bar arranged opposite and connected to the adjacent ends of said springs, substantially as set forth."

From the language of the specifications in the original patent and of the claims, also, it is plain that the invention of the complainant consisted of (1) the endless perch; and (2) the connecting rods pivoted at or near the opposite ends of the perches, and provided with links and springs so as to operate between the opposite perches. In the reissue patent the same form of perch is described; that is, it is constructed so as to form by its connection with the bolster an endless perch without jointed corners. Neither of the claims in the reissue distinctly specify an endless perch, as in the original, but the claims must be read with the specifications; and, when so read, there is no doubt the patentee intended to claim the same form of perch in the reissue as in the original patent. So, too, in the reissue, the parts described in the original patent as connecting rods, are made another essential element in the patentee's invention. In the reissue they are described as equalizing bars, and their operating effect is more elaborately stated than in the original patent; but in both it is evident that it was the intention of the patentee to claim that the effect of the connecting rods or equalizing bars is to equalize the action of the springs. The conclusion, then, must be that the endless perch and the equalizing bars, constructed as described, are alike claimed in the original and reissue patents.

These devices are not, either separately or in combination with other parts of a vehicle, anticipated by any patent here exhibited. In the Curtis patent, No. 147,613, dated February 17, 1874, two perches bent in one piece are shown, but the perches are closed by the bend in front of the head-block over the front axle, with the rear ends of the perches left open and framed into the rear axle bed or bolster. In the Saladee patent of February 20, 1872, No. 123,937,

the perches are closed by the bend in the rear of the rear axle, and the front ends left open and framed into the head-block over the front axle. In the Miller patent of September 6, 1870, No. 107,076, for an improvement in buckboard wagons, the buckboard rests upon the springs, which are attached to a cross-bar at the forward end, which is fastened to the reaches, but the springs at the rear end are attached to two hangers, fastened to the under side of the axle. In the Miller patent, No. 134,916, dated January 14, 1873, the endless perch is not shown, nor the half-elliptic side spring. In the Tophliff and Ely patent, No. 122,079, of December 19, 1871, the springs are outside the perches or reaches, and are arranged upon separate rock-rods, secured directly to the front and rear axles. In the Curtis patent of March 26, 1867, No. 63,223, the perches are open at the rear end and mortised into the rear axle, with end springs attached to the axles. But these various inventions, which preceded the complainant's, show the state of the art when the complainant obtained his patents, and narrow the scope of his invention to such extent that the defendants cannot be adjudged infringers unless they have appropriated, in substantial form of construction, the identical elements which the complainant has the right to claim as new in his patent. Side springs placed between the perches are shown in the Curtis patent, No. 147,613. The complainant, in the specifications of his patent, No. 123,937, states that the idea of equalizing the action of springs by means of cross-bars or connecting rods was at that date, February 20, 1872, old and well known, although the particular form of construction and attachment of such connecting rods, shown in the patents in suit, was not exhibited before the issuance of these patents. Perches bent at one end were also old when the complainant obtained his patents. Assuming, therefore, that the reissue patent sued on is valid, the question is, do the defendants make a running gear for vehicles in which there are combined an endless perch and an equalizing bar connected to the adjacent ends of semi-elliptic springs, supporting the body of the vehicle between the perches? If they do not, then there is no infringement. In other words, to make the defendants liable as infringers it must appear that they have appropriated all the elements of the complainant's combination, or their equivalents, and this they have not done.

First, the gearing made by the defendants does not exhibit the endless perch. It is true that in their gearing two perches are bent in one piece, but only the front end is closed, while the rear ends are open, each end being connected with the rear axle. In short, instead of making the Saladee perches, the defendants make the perches shown in the Curtis patent of 1874.

Secondly, the defendants connect the springs with an equalizing rod at the rear of the gearing, substantially as is shown in the complainant's patents. But the springs are connected at the front end of the gearing directly with the bent end of the perches, and there is

no equalizing rod at that end of the running gear. That the complainant, when he obtained his patent, regarded two equalizing bars—one at each end of the vehicle—as essential parts of his invention, is apparent (1) from the drawings which he submitted to the patent-office; and (2) from the language of the specifications and second claim of the reissue. In the specifications he says that to secure an equalized action of the springs, “I unite the adjacent ends of the side springs, arranged between the perches, to ears, D, of an equalizing bar, C, turning in suitable bearings, so that any excess of weight upon one spring turning the bar, C, also lowers the other spring to an equal extent and preserves the body horizontal, so that it will not strike the side perches. The arrangement of equalizing bars in combination *with both ends of the springs, as shown*, secures a like effect at each end of the spring platform.” In the second claim there is claimed as part of the combination “an equalizing bar arranged opposite and connected to the adjacent ends of said springs.” From all this it is apparent that the defendants omit from their running gear one of the parts necessary to make the complainant’s combination. And, as the court has already indicated, the field of invention with reference to running gear for vehicles was so covered prior to the complainant’s patents that upon settled principles of patent law his patents cannot have the broad construction to which a patent for a wholly new and original device might be entitled. The defendants make a vehicle with side-springs between the perches, which are as fully shown in the Curtis patent of 1874 as in the complainant’s reissue. They make the Curtis perch and not an endless perch. They omit one of the equalizing rods described and claimed in the complainant’s patent. Upon this state of facts can the defendants be adjudged infringers? The court is clearly of the opinion that they cannot; and upon the ground of non-infringement, without deciding the points made by defendant’s counsel involving the validity of the reissue patent, the bill will be dismissed.

HAYES v. DAYTON.

(Circuit Court, S. D. New York. June, 1884.

1. PATENT LAW—REOPENING CASE ONCE DECIDED FOR TRIFLING REASONS.

Matter having been once decided will not be reheard because it is alleged that certain drawings before court at first trial were defective, and that evidence now proposed will show the structures in the original and the reissue to be the same, unless the new evidence is so clear and positive that an entirely different case is presented.

2. JURISDICTION OF CO-ORDINATE COURTS WITH RESPECT TO EACH OTHER.

One court does not reverse or review judgment of a court of co-ordinate jurisdiction.

In Equity.

James H. Whitelegge, for complainant.

C. G. Frelinghuysen, for defendant.

COXE, J. The bill alleges infringement of six reissued letters patent. The claims in controversy are as follows: Claim 4 of No. 8,597, claims 6 and 10 of No. 8,674, claims 1 and 6 of No. 8,675, claim 1 of No. 8,676, claims 2 and 6 of No. 8,688, and claim 8 of No. 8,689. The decision of Judge BENEDICT in *Hayes v. Seton*, 12 FED. REP. 120, disposes of all these claims with the exception of claim 6 of 8,688, and, possibly, claim 2 of the same patent, and claim 6 of No. 8,675. Reissue No. 8,676 was not before the court in that action. As to the other claims referred to it was decided either that they were void as enlarging the scope of the original patent, or that devices identically or substantially similar to those introduced here did not infringe.

It is urged by the complainant that, as to one of the patents at least, the drawings then before the court were defective, and that the evidence, now for the first time presented, indicates that the structures described in the original and in the reissue are substantially the same. For this reason, and others similar in character, the court is urged to re-examine the questions involved without reference to the fact that they have already been disposed of by the decision in the *Seton Case*. No sufficient reason has been suggested to induce the court to adopt this course. It cannot be said that in that case a different conclusion would have been reached had all the proof now presented been introduced. It is not enough to show that in the original drawings and specifications the disputed structure is described. It must be claimed also. *Manuf'g Co. v. Stamping Co.* 27 O. G. 1131. The claims of the reissues referred to alone were dealt with, and after a careful examination and comparison thereof with the originals a construction adverse to the complainant was placed upon them. So long as this decision is undisturbed by the only tribunal which has a right to review it, it must remain the law governing the case. The spectacle of one court overruling or reversing another court of co-ordinate jurisdiction, in the same circuit, would certainly be an anomalous one. It would be without precedent and would lead to inextricable confusion. The examination here must, therefore, be confined to claims 2 and 6 of reissue No. 8,688, claim 6 of reissue No. 8,675, and claim 1 of reissue No. 8,676.

Regarding claim 2 of reissue No. 8,688, Judge BENEDICT says:

"I am unable, therefore, upon the testimony, to find that this claim has been infringed, unless it be held that the construction of the gutters so as to keep them under cover of the bases is not an essential feature of the invention. But if it be so held, then I must hold the claim void for want of novelty."

In the case at bar the complainant in his testimony mentions no infringing device, and there are no such devices opposite the marginal

Nos. 23 and 24. Upon the argument, however, other devices elsewhere represented were pointed out, which, it was insisted, contained all the elements covered by the claim.

With the claim construed as above I am unable to find any testimony sufficiently definite and certain to base thereon a finding that the defendant has infringed.

Claim 6 of this reissue is clearly void as an expansion of the original patent. The movable sashes sought to be secured are not even mentioned in the claims of the original.

Of claim 6 of the reissue No. 8,675, Judge BENEDICT says:

"The subject-matter of the sixth claim of this reissue is not found in the structures claimed to be infringing structures. In those structures there is but one set of openings, and those from the gutter directly to the outside."

The claim is as follows:

"(6) In the base or base-frame of a metallic skylight, the combination of outlet-apertures, *f* and *g*, arranged to break-joint, as it were, or form an indirect escape for the water accumulating in the bar-gutters, *c c*, and base-gutter, *C*, without permitting the passage inward of wind, dust, rain, snow, etc., substantially as described and set forth."

I have looked carefully through the proofs to find any satisfactory evidence of infringement. The complainant testified that in some of the structures which he examined the apertures were directly opposite each other, and he was not sure that this was not true of all. The witness Campbell testified positively that he found none that were not direct. As the break joint or indirect escape is an essential element of this claim it cannot be said that one who uses a direct escape with the openings opposite each other is an infringer.

Claim 1 of reissue No. 8,676 is as follows:

"(1) The combination of an internal angle-piece having one or more laterally extending flanges, ribs, or wings with a sheet-metal bar or casing, essentially as and for the purposes described and set forth."

If this claim is construed to cover the device shown in the drawing attached to the patent and described in the specification it must be said that the defendant does not infringe. His bar is flat upon the top. The upper edges are not bent upward in juxtaposition to each other. There is no cap plate. There is no metal cap at the bottom. It is said that the cap at the bottom is not part of the invention, but it will be observed that there would be nothing to hold together the two pieces of the bar, as shown in the drawing, if the cap-plate to which the bar is riveted and the metal cap at the bottom were both omitted. The defendant uses neither. If, on the contrary, the claim is construed to cover broadly the combination of an angle-piece having two laterally extending flanges inclosed in a sheet-metal bar, it must be held void for want of novelty.

For these reasons the bill is dismissed, with costs.

THAYER v. HART, Jr., and others.

(Circuit Court, S. D. New York. June, 1884.)

PATENT LAW—PRIOR PATENT—PRIOR INVENTION—BURDEN OF PROOF.

Where the defendant, in an infringement suit, proves that he invented the patented device before the date of the plaintiff's application, the burden is transferred to the plaintiff to satisfy the court beyond a reasonable doubt that he first conceived the invention.

In Equity.

Josiah P. Fitch, for complainant.

Frederic H. Betts and *C. Wyllys Betts*, for defendants.

COXE, J. The complainant is the owner of letters patent No. 202,673, dated April 23, 1878, for an "improvement in neck-tie shields." The application was filed December 20, 1877. The defendants are owners of letters patent No. 220,610, dated October 14, 1879, for a similar invention. Their application was filed August 28, 1879. Both patents are designed to secure a pin formed with a shoulder, and so constructed that it may be conveniently and firmly attached to a neck-tie shield without using any device for the purpose of fastening except the pin itself. The only difference so far as the pin in question is concerned, irrespective of the method of attaching it, is, that in complainant's device the upper end of the pin is turned away from the point, and in defendant's it is turned towards the point. The principal controversy relates, therefore, to the question of prior invention. The complainant's patent antedating the defendants', it was incumbent upon them to prove beyond a reasonable doubt that theirs was the prior invention. This they have done by proof so positive that the complainant's counsel conceded on the argument that the date of their invention was January 15, 1877; 11 months prior to the filing of the complainant's application. This date being fixed the burden was transferred to the complainant to satisfy the court by proof as convincing as that required of the defendant that his invention preceded theirs. The rule in such cases is very strict. It is so easy to fabricate or color evidence of prior invention and so difficult to contradict it, that proof has been required which does not admit of reasonable doubt. Where interests so vital are at stake, where intervening years have made perfect accuracy well nigh impossible, where an event, not deemed important at the time, has been crowded from the memory and obscured by the ever varying incidents of an active life, it is not difficult to imagine that even an honest man may be led erroneously to persuade himself that the fact accords with his inclination concerning it.

The evidence of prior invention is usually entirely within the control of the party asserting it, and so wide is the opportunity for deception, artifice, or mistake, that the authorities are almost unani-

mous in holding that it must be established by proof clear, positive and unequivocal; nothing must be left to speculation or conjecture.

In *Coffin v. Ogden*, 18 Wall. 120, Mr. Justice SWAYNE says:

"The invention or discovery relied upon as a defense, must have been complete, and capable of producing the result sought to be accomplished; and this must be shown by the defendant. The burden of proof rests upon him, and every reasonable doubt should be resolved against him."

In *Webster Loom Co. v. Higgins*, 4 Ban. & A. 88, the court (at page 98) says:

"The burden of proof rests upon the defendants, to show, beyond a fair doubt, the prior knowledge and use set up; but, where they have sustained that burden by showing such knowledge and use prior to the patent, the burden of showing the still prior invention claimed, by at least a fair balance of proof, must rest upon the plaintiff."

In *Wood v. Cleveland Rolling-mill Co.* 4 Fish. 550, the court, referring to the witnesses called to establish prior invention, says, at page 559:

"Their imagination is wrought upon by the influences to which their minds are subjected, and beclouds their memory. When the defense is made, it is the duty of courts and juries to give it effect. But such testimony should be weighed with care, and the defense allowed to prevail only where the evidence is such as to leave no room for a reasonable doubt upon the subject."

In *Howe v. Underwood*, 1 Fish. 160, Judge SPRAGUE, at page 175, says:

"How invariable is it that after a great invention has been brought before the world, has become known to the public, and put in form to be useful, that people start up in various places and declare that they invented the same thing before. After having seen what has been done, the mind is very apt to blend subsequent information with prior recollections, and confuse them together. Prophecy after the event is easy prophecy."

Within the rule thus established the question to be answered here is: Has complainant satisfied the court beyond a reasonable doubt that he conceived his invention prior to January 15, 1877? After making every allowance for the inexperience of some of complainant's witnesses, several of them being young women called for the first time to the witness stand, it must be said that his evidence is involved in such contradiction, uncertainty and confusion that he has failed to bring himself within the rule above adverted to. The complainant fixes the middle of October, 1876, as the time of his invention. The circumstances which, among others, lead him to do so, are as follows: During his absence at the centennial exhibition in October, on which occasion his wife and child accompanied him, the firm of Hubbs & Klein left an order with his forewoman for five gross of "Chancellor shields" with pins attached. On his return, in order to avoid the expense of purchasing the pins then in the market, he commenced experimenting with a common pin and in connection with Albert M. Smith succeeded in making the patented invention. A shield and pin precisely like the defendants' device, alleged to have been made

shortly after this time, was produced in evidence. In the latter part of the same month or early in November another order for similar shields and pins was filled for the same firm, and also one for Anson Pitcher, of Boston. The pliers and other tools used in bending and fastening the pins and a memorandum book of one of the workwomen in which appears an entry in complainant's handwriting, under date of October 28, 1876, alleged to refer to the "Chancellor shields" in question, were also exhibited to the court.

The witnesses are further enabled to locate the date of the invention by the circumstances,—*First*, that it occurred a short time prior to complainant's removal of his place of business from Walker street to Center street, and very soon after some fans, known as "Centennial fans," were finished. Though these are the salient features, there are several other circumstances which tend to corroborate the complainant in fixing upon October, 1876, as the time when the idea of the patented pin first entered his mind. But the defendants have succeeded in contradicting or casting suspicion upon each one of the principal transactions which the complainant has grouped around his invention as forming the *data* by which he locates the time. It is shown, for instance, that he visited the exhibition at Philadelphia with his wife and child in August and not in October. It must, therefore, be said either that the invention was not immediately after that visit or that it was not in October, and it is difficult to reconcile either conclusion with the other testimony. Being recalled the complainant testified that he again visited Philadelphia in October, but he went alone and was there but a single day. This could hardly have been the occasion referred to by the witness Cordelia White, as her recollection relates to the former rather than the latter visit.

The defendant also offered evidence proving or tending to prove the following facts: That although Hubbs & Klein were associated together in business no partnership between them ever existed; that the October order referred to was never given and no entry thereof appears upon complainant's books for 1876, notwithstanding the fact that it is alleged to have been given in circumstances which would ordinarily require an entry to be made. Indeed, no mention is made in the ledger of 1876 of Hubbs & Klein, either as a firm or as individuals, and there is no entry, either that year or the next, of which it can be positively asserted that reference is made to the patented pin. The books do show, however, that for a year and more after the alleged invention of this cheap and simple device the complainant purchased of the defendant Hart large quantities of a much more expensive pin, and a few days before he bought 25 gross of "barrel pins" and a pair of pliers for attaching them to the shields. There are circumstances which strongly connect these pliers with the pair produced by the complainant.

No satisfactory evidence is offered that the shields sent to Anson Pitcher had pins of any kind attached.

The proof leaves little room for doubt that the removal to Center street did not take place until November, 1877. In addition to complainant's letter pointing to this date, bills emanating from his establishment are produced, dated from Walker street as late as October 13, 1877, and from Center street November 10, 1877. There is certainly a strong presumption, in the absence of direct proof, that in October the complainant was at Walker street and in November at Center street.

These circumstances, taken in connection with the testimony that the invention was conceived just before removing, and that the patented pin was first manufactured after the removal, furnish very persuasive evidence that the invention was in the fall of 1877 instead of the fall of 1876. The witnesses were testifying to events which took place six and seven years before. They certainly are mistaken as to some of them. Why may they not, without any wrongful intent, have mistaken the year also?

It is not thought necessary to enter upon a more extended review of the evidence, which is very voluminous and is discussed with great care and elaboration upon the briefs presented. It is enough to say that no one of the principal circumstances relied on by the complainant is free from perplexity; either its own date is uncertain or there is difficulty in connecting it with the invention. It would be idle to assert that all this does not create the doubt which the authorities hold must be absent from the mind of the court.

The result has been reached without reference to the declarations or admissions of the joint inventor Albert M. Smith, either in writing or otherwise.

It follows that the bill must be dismissed, with costs.

HART, Jr., and others *v.* THAYER.

Circuit Court, S. D. New York. June, 1884.

Points in dispute decided in preceding case of *Thayer v. Hart*.

In Equity.

Frederic H. Betts and C. Wyllys Betts, for complainants.

Josiah P. Fitch, for defendant.

COXE, J. This action involves the same patents examined in *Thayer v. Hart*, *ante*, 693. Infringement is admitted, and the question of prior invention alone is involved. The result reached in that action disposes of this also.

There should be a decree for an injunction and an account, with costs.

RUMSEY and others v. BUCK.¹

(Circuit Court, E. D. Missouri. May 30, 1884.)

1. PATENTS—ASSIGNORS ESTOPPED FROM DISPUTING VALIDITY.

A., B., and C., who were tenants in common of an interest in a patent on drilling clamps, obtained another patent for an improvement in such clamps. Thereafter C. transferred his interest in the former patent to A. and B., and they transferred their interest in the latter patent to him, and his heirs and assigns, to hold and enjoy the benefit thereof during the period for which the letters had been granted. And they agreed with C. upon the price which each of the parties was to charge for the clamps to be manufactured under their respective patents. In a suit subsequently brought by A., B., and another to enjoin the manufacture and sale of clamps under C.'s patent, *held*, that A. and B. are estopped from claiming that their patent is infringed by clamps manufactured under C.'s patent.

2. SAME—IMPROVEMENT IN CLAMPS FOR HOLDING RATCHET-DRILLS FOR DRILLING RAILROAD RAILS.

Letters patent granted Louis Beland, January 16, 1877, No. 186,225, for an improvement in clamps for holding ratchet-drills for drilling railroad rails, *held*, not infringed by clamps manufactured under letters patent granted Flavius J. Underwood, Andrew Warren, and Perrin G. March, July 9, 1878, No. 205,927, for an improvement in railroad track-drills.

In Equity. Suit for the infringement of a patent for an improvement in drilling clamps for drilling railroad rails.

Parkinson & Parkinson, for complainants.

George M. Stewart and Britton A. Hill, for defendants.

TREAT, J., (*orally*.) It appears from the bill that complainants Warren and March derive title to the patent, which it is alleged has been infringed, through Flavius J. Underwood, and the complainant Rumsey derives his title direct from the patentee, Beland. From the averments of the bill and answer, which were supported by the evidence, it appears that in September, 1877, Beland, the patentee, under whom complainants claim title, leased or assigned his patent to Flavius J. Underwood, for a period of 17 years from its date, subject to a royalty of two dollars for each track-drill manufactured by Underwood. Subsequently, Underwood assigned to Perrin G. March, one of the complainants, one-third of the interest he had thus acquired, and to Andrew Warren another third, and the three added to this tenancy in common of the patent a copartnership to operate under it. During the existence of this copartnership, Underwood invented another track-drill, and, by agreement with his copartners, secured a patent on the same on the twentieth of April, 1878, which is numbered 205,927, and is the one under which the defendant in this case is operating. This patent was issued to Perrin G. March, Andrew Warren, and Flavius J. Underwood. In November, 1878, the copartnership between Underwood, March, and Warren was dissolved by mutual consent, and the agreement of dissolution was such that Underwood transferred to them jointly the remaining interest which he held in

¹ Reported by Benj. F. Rex, Esq., of the St. Louis bar.

the Beland patent, and Warren and March transferred to Underwood their interest in the patent No. 205,927. This is a full and absolute assignment of the interest of March and Warren to Underwood, his heirs and assigns. On the sixteenth day of November, 1878, Warren and March, then lessees of the Beland patent, and Underwood, as sole owner of his own patent, entered into an agreement as to the price which should be charged for drills which they were respectively to manufacture under the two patents. Thereafter, on the twenty-fifth of February, 1881, Beland assigned the interest remaining to him in his patent to Rumsey. Whether this transfer was made to Rumsey for his benefit, or was merely colorable, and for the benefit of Warren and March, is a question upon which there was evidence both ways. The defendants claimed that the evidence established the latter state of facts conclusively.

It is now claimed by the complainants that clamp-drills manufactured under the Underwood patent infringe the Beland patent, and they ask for an injunction to restrain their manufacture and sale, and for an account.

Under this state of facts, the defendants insisted, among other things, that complainants Warren and March were estopped from claiming that drills manufactured under the Underwood patent, No. 205,927, are in infringement of the Beland patent, and that in any event the Underwood patent does not infringe the Beland patent. The Beland patent is a combination consisting of the following parts: An open rectangular iron or steel frame, at the open end of which the side bars are bent at their ends, so as to engage the lower outer flange of the rail, and are offset so as to adapt the ratchet-drill to the proper position for use. The side of this rectangle, opposite the rail to be treated, or the open side, consists of two parallel bars, between which a flanged nut is placed, and so adjusted as to slide between these parallel bars at will. This nut is bored and threaded to receive and hold a screw, which is to be so operated as to furnish the motive power of the drill when in operation. This feed-screw has a hand wheel or lever attached at the outer end, by means of which the motive power is communicated to the drill. The inner end of this drill is made concave to receive the outer end of a ratchet-drill. When thus connected, this screw may be turned by the hand when the drill is being operated, and the drill projected forward as rapidly as necessary, until it has pierced the rail. Inasmuch as the drill must receive its motive power from this feed-screw, when held by this nut, it becomes indispensable to this patent that the nut which holds this screw shall be held firmly in position, so as to enable the screw to force the drill forward, and this nut must be so held that it can carry and permit the operation of the feed-screw through its center. For this reason the nut is placed between and held by parallel bars. The machine is operated by working the ratchet-drill with one hand, and the feed-screw with the other. No one of the parts is claimed as

new, but combination of all these parts alone is secured by the patent.

The Underwood patent, No. 205,927, has the open rectangular iron or steel frame, with the ends of the sides which approach the rail so bent as to engage the lower and outer flange. On the side opposite the rail to be pierced, and underneath the single bar which forms that side of the rectangle, is a bail so attached to the frame as to swing out and enable the frame to become firmly attached to the rail, and to hold the frame in position while the drill is in use.

In place of the parallel bars made necessary in the Beland patent, there is here a single bar, which forms this side of the rectangle. On this bar a mortised center-piece is placed, and made to slide upon the bar, and is held rigidly in position by a key or set-screw. On the inside of this center-piece is a counter-sink or hole to receive the center of the ratchet-drill. This center-piece is moved along this single bar to the place opposite the hole to be drilled in the rail and then made fast, and the ratchet-drill applied. In this device the motive power which is communicated to the drill is in the drill itself; that is, to the frame adjusted, as described, the ordinary ratchet-drill is applied, which has its own motive power. Besides omitting the parallel bars and the nut holding the feed-screw, the Underwood patent has added the bail and the device for holding the support of the drill fast; that is, the set-screw or key. Thus the combination found in the Beland patent is not found in the Underwood patent.

I dismiss this bill on two grounds: *First*, that the parties plaintiff here—two of the three, at least—are estopped. *Second*, that there is no infringement.

**DAVIS IMPROVED WROUGHT IRON WAGON WHEEL Co. v. DAVIS
WROUGHT IRON WAGON Co.**

(*Circuit Court, N. D. New York. June 21, 1884.*)

1. PATENT LAW—LEGAL TITLE AS OPPOSED TO EQUITABLE—NOTICE.

The legal title to a patent will prevail over the equitable title, unless the rights of the holder of the legal title were acquired with notice of the equities of the party in whom the equitable title is.

2. CORPORATION—EFFECT OF KNOWLEDGE OF STOCKHOLDERS.

A corporation is not affected with notice of facts because some of the promoters who organized the corporation had knowledge of the facts, or because some of its stockholders had notice.

3. SAME—PRESUMPTION OF KNOWLEDGE.

A corporation is charged with notice of facts known to a director who is an active agent of the corporation in the transaction affected by his knowledge, although he acquired his knowledge unofficially.

4. SAME—KNOWLEDGE OF OFFICERS OR AGENTS.

A corporation is not charged with notice of facts known to its officer or agent in a transaction between him and the corporation in which he is acting for himself and not for the corporation.

In Equity.

R. H. Duell, C. H. Duell, and G. W. Hey, for complainant.

John A. Reynolds, for defendant.

WALLACE, J. The defendant relies upon its equitable title to the patents in suit to defeat the complainant's bill. The complainant has the legal title to the patents, having taken not only an assignment of the inventions from the Messrs. Davis, who were the inventors, but also the statutory title, the letters patent being issued to the complainant. The defendant claims to have succeeded to the rights of the Davis Iron Wheel Company, under an agreement made by that company with the Davises, by the terms of which the Davises covenanted to apply in the name of that corporation, its assigns or successors, for all patents for any improvements they might invent in iron wagons or any wheeled vehicle, or any parts thereof, and to transfer any such patents which they might procure to the company, its successors or assigns. The patents in suit are for inventions made by the Davises after this agreement was executed.

As the complainant has acquired the legal title to the patents, its title must prevail over the equitable title of the defendant, unless the complainant's rights were acquired with notice of the equities of the defendant.

Actual notice of these equities is not shown, but the defendant contends that the complainant is chargeable with constructive notice. The defendant was incorporated after the execution of the agreement between the Davises and the Davis Iron Wheel Company, and the Davises were two of the five incorporators. They were also two of its five directors when they assigned to it the inventions patented, and when the letters patent were issued to it. The circumstance that the Davises were promoters or associates with others in forming the corporation is not material. A corporation can have no agents until it is brought into existence, and after that it acts and becomes obligated only through the instrumentality of its authorized representatives. Stockholders cannot bind it except by their action at corporate meetings, and it is undoubted law that notice to individual stockholders is not notice to the corporation, and their knowledge of facts is not notice of them to the corporation. *In re Carews Act*, 31 Beav. 39; *Union Canal Co. v. Loyd*, 4 Watts & S. 393; *Fairfield Turnpike Co. v. Thorp*, 13 Conn. 182; *The Admiral*, 8 Law Rep. (N. S.) Mass. 91. Instances may occur where associates combine together to create a paper corporation, as a form or shield to cover a partnership or joint venture, and where the stockholders are partners in intention. The liberal facilities offered by the statutes of many of our states for organizing such corporations are undoubtedly often utilized by those whose only object is to escape liability as partners by calling themselves stockholders or directors. Where such a concern is formed, a court of equity might treat the associates as partners in fact, disregard the fiction of a corporate re-

lation between them, and subject the title of the property transferred to it by the promoters to any equities which might have existed as against them. If it had been shown here that the Davises formed the corporation for the purpose of transferring to it the inventions and patents which they were in equity obligated to transfer to another corporation, and that they contributed the capital and were the only persons having a substantial interest in the corporation, it might be successfully urged that the corporation would stand in no better position than theirs. Nothing of this, however, is in the proofs; and, in the absence of evidence, the court cannot assume that those persons who have been associated with the Davises as corporators and stockholders have not the ordinary rights and interests of stockholders.

The question remains whether the complainant is charged with constructive notice of the defendant's rights because the Davises were directors of the complainant at the time it acquired its interest in the inventions, and when the letters patent were issued to it. The authorities do not agree whether a corporation is to be held cognizant of facts which have come to the knowledge of an officer or director unofficially; but the better opinion would seem to be that if the officer or director is an active agent of the corporation in the transaction affected by his knowledge, it is not material how or when he acquired his information. There is no evidence here to show what took place between the Davises and the other directors or officers of the complainant in regard to the purchase of the inventions, or whether the Davises took any official part in the transaction which resulted in the issuing of the letters patent to complainant. The defendant relies on the mere fact that they were directors when the corporation derived its title, and insists that this circumstance alone is notice to the corporation of the infirmity of the title it obtained. This is not enough. It cannot be assumed that they participated as directors when they were representing their own interests as parties contracting with the corporation; and it would be most unreasonable to charge the corporation with notice of facts within their knowledge, but which it was not for their interest to communicate to the officers or to their co-directors. They were selling to the complainant what they had already sold to another, and, if they had communicated the facts, the corporation would have purchased only a worthless title. If they had imparted their knowledge to the other directors or officers they would have defeated the object in view. The general rule which charges a principal with the knowledge of his agent is founded on the presumption that the agent will communicate what it is his principal's interest to know and the agent's duty to impart. In the language of Mr. Justice BRADLEY, the rule "is based on the principle of law that it is the agent's duty to communicate to his principal the knowledge which he has respecting the subject-matter of the negotiation, and the presumption that he will perform that duty." *The Distilled Spirits*, 11 Wall. 367. The rule has no application when an agent divests himself of his fidu-

ciary character and becomes a contracting party with his principal, because there is no reason to presume that he will impart information which it is for his interest to suppress. "When a man is about to commit a fraud it is to be presumed that he will not disclose that circumstance to his colleagues." *Kennedy v. Green*, 8 Mylne & K. 699. Accordingly, it has been repeatedly adjudged that a corporation will not be charged by the knowledge of a director in a transaction in which the director is acting for himself, because he represents his own interests, and not those of the corporation. *Com. Bank v. Cunningham*, 24 Pick. 270, 276; *Housatonic & Lee Banks v. Martin*, 1 Metc. 308; *Winchester v. Balt. & S. R. Co.* 4 Md. 239; *Seneca Co. Bank v. Neass*, 5 Denio, 387; *La Farge Fire Ins. Co. v. Bell*, 22 Barb. 54; *Terrell v. Branch Bank of Mobile*, 12 Ala. 502.

As the defendant has failed to show that the complainant's title is affected by notice of the facts upon which the defendant's equities rest, the complainant is entitled to a decree.

THE E. B. WARD, JR.

Circuit Court, E. D. Louisiana. June 5, 1884.

1. MARINE TORT—LIABILITY OF SHIP—NEGLIGENCE OF FELLOW-SERVANT.

In the admiralty, no more than elsewhere, should the owner, without fault himself, be held as a general warrantor of the competency of any of his servants to the others, all alike engaged in the common employment of navigating the ship.

2. SAME—CONTRIBUTORY NEGLIGENCE.

Nor in the admiralty should one, as a general rule, be compensated in damages who has, by his own fault, contributed to bring about his own injury. *The Wanderer*, *ante*, 140, distinguished.

Admiralty Appeal.

Emmet D. Craig, for libellant.

J. Ward Gurley, Jr., for claimant.

PARDEE, J. James Breslin, in April, 1883, shipped as engineer on the steam-ship *E. B. Ward, Jr.*, plying between New Orleans and Central America. The ship sailed at midday on the twenty-eighth of April, 1883, and on the first night out, when in the Gulf of Mexico, between 8 p. m. and 12 midnight, he went on watch in the engine-room. At about 12 o'clock he called a fireman to take his place until he could go on deck to the lunch-room and get his lunch, which was set out from 6 p. m. to daylight, for all who were on duty during the night. In ascending from the engine-room upon the deck, on his way to the pantry, he stubbed his foot against the curbing of the hatchway, and fell over into the open space several feet to the bot-

¹ Reported by Joseph P. Hornor, Esq., of the New Orleans bar.

tom, striking against obstructions on the way and catching at them until he reached the floor, where he lay stunned a short time, and then attempted to alarm the crew by his cries, but, failing to be heard, he scrambled up the hatch as best he could, and reached the engine-room in an exhausted condition. The Ward being engaged in the fruit trade, although at the time having no fruit on board, as she was bound to the fruit islands for a cargo, was provided with a sort of railing some three and a half or four feet high, called a booby hatch, through which the air could pass, and which at the same time served as a protection around the hatchway so as to prevent accidents of the kind that did happen to Breslin. The officers neglected on this occasion to place this hatch on, although the owner testifies that it was his instructions to keep this booby hatch on, and adds that if it had been on this accident would not have happened. There were no lights about the hatch, although the ship had her regular lights for navigation, and, to make the hatchway more obscure, an awning was spread over it some distance above. Breslin was seriously injured by his fall, being badly bruised and having a rib probably fractured, and he was laid up unfit for work for three months or more. The weight of the evidence, although there is much conflict, is that it was customary on the Ward for the engineer on duty during the night-watches to leave the engine and engine-room to go to another part of the vessel to get lunch, although from the evidence of the master and owner such custom was not with their authority, and was against the rules of the vessel.

Upon the whole case, after much consideration, I conclude, (1) that the booby hatch should have been placed over and around the hatchway, and that it was not so placed, through the neglect of the officers of the vessel; (2) that it was not the duty of the libellant, though one of the officers, to see that the booby hatch was properly placed; (3) that notwithstanding the prevailing habit or custom on the Ward for the engineer to leave his duty, without competent relief, in the night-time, to seek lunch or anything else, in a distant part of the vessel, the libellant was in fault in leaving his post for the purpose he did, and that his so leaving his duty, as aforesaid, and thus endangering the safety of the vessel, was a gross breach and neglect of duty.

In this connection it is proper to state that there is evidence in the record tending to show that the lunch was provided on the Ward for the officers to partake of in going on and coming off watch in the night-time, and was not intended as an invitation for officers on duty to quit their stations. And it would seem that no matter how slack and easy-going the discipline and rules may be on steam-ships on the high seas, a habit or practice for the engineer to leave his post without proper relief ought not to be countenanced.

The case, therefore, is one where the libellant has been injured through the negligence of the other officers on the vessel, while he himself was grossly neglecting his own duty to the ship and her own-

ers. In the courts of law and equity the rule is well settled that a master is not liable to his servant for the negligence of a fellow-servant while engaged in the same common employment, unless he has been negligent in his selection of the servant in fault, or in retaining him after notice of incompetency. Nor does the master warrant the competency of any of his servants to the others. Shear. & R. Neg. § 86. See, also, Moak, Underh. Torts, rule 14. In the present case there might, perhaps, be a question as to whether, as between the libellant and the master of the ship, there was that common employment, as the master commands and controls the whole ship and crew; but then, to make it pertinent, there should be evidence to show that the negligence resulting in injury was attributable to the master. It is also well settled in the same courts, as a general rule, that one who is injured by the mere negligence of another cannot recover any compensation for his injury if he, by his own negligence or willful wrong, proximately contributed to produce the injury of which he complains. See Shear. & R. Neg. § 25. Courts of admiralty administering maritime law are not bound by these arbitrary rules; but so far as they are applicable to cases arising within admiralty jurisdiction, the reasons of justice and equity on which they are founded are proper considerations for the court that in such cases exercises a large discretion under all the circumstances of the case in giving or withholding damages in cases of maritime torts and injuries. In the admiralty, no more than elsewhere, should the owner, without fault himself, be held as a general warrantor of the competency of any of his servants to the others, all alike engaged in the common employment of navigating the ship. Nor in the admiralty should one, as a general rule, be compensated in damages who has, by his own fault, contributed to bring about his own injury.

In the present case I am clearly of the opinion, under all the circumstances, that it is not one where the libellant is entitled, in reason or justice, to damages against the claimant. It seems that the libellant was furnished with such care and attendance as were within the means of the ship, and was brought back to this port and paid his wages, so that there is no claim of any neglect of duty by the ship in these respects.

In the case of *The Wanderer*, ante, 140, recently decided, the libellant was given costs, but the contributory fault in that case was trivial compared with the neglect of duty in this, and there were other circumstances to distinguish that case.

A decree will be entered dismissing the libel herein, with costs of both courts.

WILSON v. ROCK ISLAND PAPER Co.

(Circuit Court, N. D. Illinois, June 11, 1884.)

REMOVAL OF CAUSE—TRIAL—ISSUE RAISED BY DEMURRER.

The trial in the state court of an issue raised by a demurrer, which involves the merits of the action, is a trial of the action within the meaning of the act of March 3, 1875, and the cause cannot thereafter be removed into the United States court.

Motion to Remand.

G. W. Kretzinger, for plaintiff.

Charles M. Osborne, for defendant.

DRUMMOND, J. The Rock Island Paper Company, being indebted, executed two deeds of trust on its real property to secure two notes. These deeds of trust contained certain covenants to keep the premises insured for the benefit of the creditor. The company afterwards effected insurance with various underwriters for the different amounts, and some of these policies were made for the benefit of particular creditors for specific amounts. The policies contained the usual apportionment clause in case the loss was less than the amount insured. Afterwards the mill and machinery, which were insured and upon the land covered by the deeds of trust, were destroyed by fire, so that the amount of loss was about 60 per cent. of the amount of the policies, and this amount was remitted by the various insurance companies to their agents. The instruments which directed the payments of these various amounts were in the hands of a party for the benefit of whom it might concern. The plaintiff in this case, being the creditor under these mortgages, caused the property to be sold. He bought it in for an amount much less than the debt, and then filed a bill, by which he claimed that under the covenants of the trust deeds he had a lien upon the entire insurance fund created by all the policies of insurance to the extent of the debt due to him; and he insists that these policies of insurance became a security for the payment of his indebtedness, and that he had an equitable lien. To this bill the paper company were made a party, and all the insurance companies, and the different creditors to whom the policies were made payable. The plaintiff is a citizen of Illinois, and the paper company is also a corporation of Illinois, and some of the creditors to whom these policies were assigned were also citizens of Illinois. In order to obtain the relief he sought, the plaintiff would be entitled to an account between himself and the paper company, and the creditors of the company, and all persons who claimed any interest in the policies. The summons in the case was returnable to the September term, 1883, of the Rock Island circuit court. At that time, certain of the defendants, some of the creditors for whose benefit the policies were made, filed a demurrer to the bill, and on September 28th the court sustained the demurrer, and the plaintiff, on the following day, took leave to

v.20,no.11—45

amend, and thereupon filed the amendment, and, at the same time, a petition and bond for the removal of the cause. The motion is now to remand the case to the state court, and the question is whether this court has jurisdiction of the case.

It may be doubted whether there is, within the meaning of the act of 1875, a separate and distinct controversy between the plaintiff and any one of the defendants, and which can be fully determined as between them. The bill makes the various defendants named parties for the purpose of enforcing a lien which the plaintiff claims he has upon the fund. It may be that every one of the defendants is interested as to his contributory portion for which he may be liable, but that controversy is one which may effect, more or less, all the other parties. But, however this may be, it seems clear that the application in this case was not made in proper time. There was a general demurrer filed by some of the defendants to the bill. Other defendants filed a special demurrer. Upon argument the court held that the demurrers were well taken, because there was no equity in the bill, and afterwards granted leave to the plaintiff to file amendments to the bill, and after that the plaintiff filed a petition for the removal of the cause. There had been some difference of opinion in the courts as to whether, under such circumstances, it was competent for a party to ask for the removal of the cause; but that question seems to have been decided by the supreme court of the United States in the case of *Alley v. Nott*, 111 U. S. 472; S. C. 4 Sup. Ct. Rep. 495. In that case the court says that an issue of law, such as was raised in this case, "is the trial of the cause as a cause, and not the settlement of a mere matter of form in proceeding. * * * Under such circumstances the trial of an issue raised by a demurrer, which involves the merits of the action, is, in our opinion, a trial of the action within the meaning of the act of March 3, 1875. To allow a removal after such a trial would be to permit a party to experiment on his case in the state court, and, if he met with unexpected difficulties, stop the proceedings and take the suit to another tribunal."

Now, in this case, the bill which the plaintiff had filed had become the subject of a general demurrer. On that issue of law the court decided the case against the plaintiff. He had thus tried an experiment with the court, and had found it against him on the merits of his case. The fact that he had asked and obtained leave to amend his bill, as the case of *Alley v. Nott* decides, did not change the rule upon the subject. So that, according to this decision of the supreme court, the application in this case was made too late, and therefore a motion to remand the cause will be granted.

NATIONAL BANK OF CLINTON, IOWA, *v.* DORSET PIPE & PAVING CO.*(Circuit Court, N. D. Illinois. January 17, 1884.)*

1. REMOVAL OF CAUSE—DILIGENCE OF APPLICANT.

The law requires diligence on the part of the applicant for removal. He cannot remain passive, and then, after the lapse of several terms of the state court, make an application for removal.

2. SAME—MATTERS NOT IN THE RECORD.

Court cannot take judicial notice of matters that do not appear in the record.

On Removal from the Superior Court of Cook County.

DRUMMOND, J. This is a suit commenced in the superior court of Cook county, Illinois, in July last. The declaration was filed on the twenty-fourth of July, and on August 8th the defendant filed a plea of the general issue and three special pleas. No steps seem to have been taken in the case on either side until the thirtieth day of November last, when a demurrer was filed to the third special plea, and on December 1st this demurrer was sustained.

There are two facts assumed by the counsel, of neither of which, I think, the court can take judicial notice, as they do not appear in the record. The first is that the case was put upon the calendar in October; the second is that there was no court held at a particular time, or, rather, that there was a vacation. Neither of these statements is verified by the record, and I do not think I can take judicial notice of either fact. On December 6th the third special plea was amended, and on the 15th a demurrer to the special plea, as amended, was sustained.

By the law of this state there is a term of the superior court of Cook county on the first Monday of each month. The declaration was filed in July and the pleas were filed on August 8th. There was, then, so far as I can judge, the August term, the September term, the October term, and the November term. It does not appear that any issue was made on the other special pleas, either of law or fact, and it does not appear that the defendant made any application, after the filing of the pleas on the eighth of August, requiring the plaintiff to reply or take issue on the other pleas; and the question is whether the bond and petition which were filed on the twenty-fourth of December were filed in due time, under the act of 1873, so as to authorize the removal of the cause, and I am of the opinion that they were not filed in time. In order to reach this conclusion we have to hold that it is not competent for the party who makes the application for removal to remain passive after a certain act has been done by the other party; namely, when the pleas were filed it was not competent for the defendant to say—"provided the plaintiff takes no step, makes no motion in the case—I will not make any motion; I will let the matter rest indefinitely, always reserving my right,

whenever the time comes, no matter how far it may extend, and an issue is made up, to make the application for the removal of the cause."

I decided in the case of *Public Grain & Stock Exchange v. Western Union Telegraph Co.* 11 Biss. 568, S. C. 16 FED. REP. 289, that the law required the exercise of diligence on the part of the applicant for removal; that it was not competent for him to lie still; or, if he had the right under the law or practice of the court to take certain steps in order to bring the case to an issue, that it was his duty to take them; and that he could not lie by and decline to act,—remain passive, in other words,—and then, after the lapse of several terms, make an application for removal. I am satisfied of the correctness of that decision, and must hold it to be the law until it is overruled by the supreme court of the United States.

On the other side, there has been cited also a decision made by me, (*Scott v. Clinton & S. Ry. Co.* 6 Biss. 529,) where, although a term had elapsed after the commencement of the suit before the issue was made up, I held that the party was not prevented from making the application on that account; but that case is put expressly on the ground that it did not appear that the applicant had been guilty of any negligence, and therefore he was in time.

Now, in this case, I cannot say that the applicant was not guilty of any negligence. It will be recollected that the question is not whether the case could have been tried absolutely, but only whether the case was triable; whether by any possibility it could have been tried. For instance, it might happen that the court, owing to the pressure of other business, could not try the case; but that is not a sufficient reason to authorize the applicant to make the removal after the lapse of the term. So that the true question is whether the case was in a position where it could have been tried, or could have been placed in that position by the exercise of reasonable diligence. Now, I cannot say but that this case could have been in a position where it could have been tried, provided the defendant had exercised reasonable diligence. It could have asked the plaintiff to reply to the plea; that is, to make an issue, either of law or fact. The plaintiff did make an issue of law on one of the pleas. The defendant did not ask that anything should be done as to the other pleas. That issue of law was decided against the defendant. Then the plea was amended and demurrer interposed, and that issue of law was decided against the defendant. Just observe what is the effect of exercising such great liberality as it is claimed by the defendant should be exercised in this case, so as to authorize a removal. It may be that the whole case turns on a question of law. The defendant goes on, so to speak, experimenting with the state court; makes an issue with the plaintiff on one of the pleas: that is decided against him; it makes another: that is decided against him. It may be that that is substantially the whole issue between the parties. Having thus experimented with the

state court, and that court being against the defense which is set up, it comes to the conclusion that it will leave the state court and try the federal court, and thereupon files its bond and petition, and asks for the removal of the cause. There has been the August term, the September term, the October term, and the November term before the application was made for the removal of the cause on the twenty-fourth of December. I think it comes too late; and it seems to me that the case itself furnishes a strong reason why the court ought to require the exercise of reasonable diligence on the part of the applicant for removal, otherwise, unless, as in this case, the plaintiff sought to force the issue, the defendant might lie by indefinitely, as I before said, and then after the lapse of a dozen terms might ask for the removal of the cause. I do not think that was the meaning of the act of 1875, therefore I shall remand this cause.

SMITH v. BAKER.

Circuit Court, S. D. New York. July 5, 1884.)

NEGLECTENTLY SPREADING CONTAGIOUS DISEASE—BOARDING-HOUSE—ACTION FOR DAMAGES.

Defendant took his children when they had whooping-cough, a contagious disease, to the boarding-house of plaintiff to board, and by reason of his negligence her child, and the children of other boarders, contracted the disease, whereby she was put to expense, care, and labor in consequence of her child's sickness, and sustained pecuniary loss by reason of boarders being kept away. *Held*, that defendant was liable for damages.

At Law.

Francis S. Turner, for plaintiff.

Wheeler H. Peckham, for defendant.

WHEELER, J. The defendant took his children, when they had whooping-cough, a contagious disease, to the boarding-house of the plaintiff to board, and exposed her child and children of other boarders to it, who took it. The jury have found that this was done without exercising due care to prevent taking disease into the boarding-house. She was put to expense, care, and labor in consequence of her child's having it, and boarders were kept away by the presence of it, whereby she lost profits. Words which import the charge of having a contagious distemper are, in themselves, actionable, because prudent people will avoid the company of persons having such distemper. *Bac. Abr. "Slander," B 2.* The carrying of persons infected with contagious diseases along public thoroughfares, so as to endanger the health of other travelers, is indictable as a nuisance. *Add. Torts, § 297; Rex v. Vantandillo, 4 Maule & S. 73.* Spreading contagious diseases among animals by negligently disposing

of, or allowing to escape, animals infected, is actionable. Add. Torts, (Wood's Ed.) 10, note; *Anderson v. Buckton*, 1 Strange, 192. A person sustaining an injury not common to others by a nuisance is entitled to an action. Co. Litt. 56a. Negligently imparting such a disease to a person is clearly as great an injury as to impute the having it; and negligently affecting the health of persons injuriously as great a wrong as so affecting that of animals.

It is objected that the jury may have awarded damages for what the plaintiff might have prevented by sending the children away. But the jury were instructed not to give damages for anything that the plaintiff might, by the exercise of the reasonable care of a prudent person, have avoided, and it is not to be presumed that they did. The evidence was somewhat conflicting; and it does not appear that any of the findings are without evidence to support them, or are against the substantial weight of evidence; nor that the jury were actuated by any improper motives. There must be, therefore, a judgment for the plaintiff on the verdict.

Motion overruled, and stay of proceedings vacated.

UNITED STATES *v.* HAYS, *alias* McELFRESH, and others.

(Circuit Court, W. D. Missouri. May Term, 1884.)

1. PENSIONS—SECOND MARRIAGE—FIRST HUSBAND LIVING.

A second marriage by a deserted wife who imagines her first husband dead, and her continuing to live with the other party to such marriage after discovering her husband to be alive, precludes her from claiming a pension, such husband having meantime entered and died in the service of the United States.

2. MARRIAGE—LEGAL INTENT—PRESUMPTION FROM CONTINUED INTERCOURSE.

The presumption of the legal intent, with which parties innocently entered into on marriage, continues after the discovery of a prior husband of the woman, still alive; and their continuing living together and holding themselves out to the world as husband and wife constitute a relation to which the law attaches all the legal rights, obligations, and disqualifications which flow from a marriage entered into according to the forms of law.

3. SAME—LAW OF THE PLACE—ACT OF CONGRESS OF 1882.

The act of congress of 1882 provides that, in determining the fact of marriage, the law of the place controls.

At Law.

Mr. Warner, U. S. Dist. Atty., for the United States.

Waters & Wyn, for defendants.

KREKEL, J. The United States brings this suit to recover of defendants the sum of \$1,887.06 paid to Lucinda Hays, as widow of Milton Hays, on account of pension moneys. The testimony in the case tends to show that Lucinda Hays, in 1840, was married in the state of Illinois, to Milton Hays; that after said marriage they lived together as husband and wife until 1859, when Hays abandoned his family.

Mrs. Hays in the following year came to Grundy county, Missouri, and some time during 1860, under the impression that her husband had died, married Absolom McElfresh. About two years after this marriage, in 1862, Hays not being dead, as supposed, appeared at the residence of McElfresh and wife, in Missouri, and caused them some annoyance, but finally went off and took up with a woman in Iowa. In order to avoid a prosecution for this illegal conduct, he joined the federal army in March, 1864, and died in the service in June of the same year. Mr. and Mrs. McElfresh, after the appearance of Hays at their home in 1862, continued to live together as man and wife until 1865, when they separated. In 1879, Mrs. McElfresh, claiming to be the widow of Milton Hays, applied for a pension for herself and two minor children, alleging and proving that she was the widow of Milton Hays, and had not married again since Hays' death. A pension certificate was issued to her on the sixteenth of December, 1881. This certificate was assigned by her to her daughter Mrs. Dyer, and by her to the defendant bank, who collected the money, and now holds it under a notice of claim by the United States. The question thereupon arises: Was Mrs. McElfresh the widow of Milton Hays, and as such entitled to a pension? It is claimed for Mrs. Hays that her marriage with McElfresh was illegal and void, the statute of Missouri declaring it so, because Mrs. Hays had a husband living at the time. There can be no question of the illegality of the marriage for the reason stated. The question still remains, however, what was the *status* of Mrs. McElfresh after the death of Mr. Hays? The testimony clearly shows that after the appearance of Hays in 1862, McElfresh and Mrs. Hays continued to live together as husband and wife the same as they had done before Hays' appearance in 1862, and continued so to live up to 1865, when they separated. There is no proof that any new or different relation was entered into after the appearance of Mr. Hays; on the contrary, it has been stipulated between the parties litigant "that no new or different arrangement or marriage was entered into between them, but that their cohabitation and reputation continued the same as before." Upon this it is argued that the first relation between McElfresh and Mrs. Hays, being illegal, and no new relation having been entered into, the relation remained illegal, as it was from the first. It seems to us that this is an erroneous view. The original intention of McElfresh and Mrs. Hays was not to commit an illegal act by their marriage, but, on the contrary, they attempted to conform to the law. This must be borne in mind in order to determine the *status* of the parties. Their intention being a legal one at the time of entering into the marriage, the presumption of this intent continues, even after they know that Hays was alive, though after that time their relation as husband and wife became to them a known illegal relation. McElfresh and Mrs. Hays being at the time of the death of Hays found in the relation of husband and wife, the presumption of the legal in-

tent with which they entered into the marriage continued, and their continuing living together as husband and wife, and holding themselves out to the world as such, constitutes a relation to which the law attaches all the legal rights, obligations, and disqualifications which flow from a marriage entered into according to the forms of law. *Holabird v. Ins. Co.* 2 Dill. 167; *Dyer v. Brannock*, 66 Mo. 401. The act of congress of 1882 provides that, in determining the fact of marriage, the law of the place controls.

The foregoing view negatives the idea that any new or different arrangement between McElfresh and Mrs. Hays became necessary, after the death of Hays, to remove the incipient illegality of their marriage. We assume it to be true, as stipulated, that no new or different arrangements regarding the marriage were made between the parties, and that they continued living together as man and wife. Their so continuing to live was an ever-recurring affirmance of the good faith of the relation into which they had entered in the beginning. The intent with which relations such as are here spoken of are entered into is all important. As to Mrs. McElfresh's own views regarding her widowhood, it may be remarked that she did not apply for the pension until 1879, 14 years after the death of her husband, and that after she did apply she bought and conveyed property in the name of Lucinda McElfresh, the name by which she was known where she resided.

The conclusions arrived at make it unnecessary to determine the correctness of the ruling of the pension department, by which widows who lived in open and notorious adultery were denied pensions. Congress, in the act of the seventh of August, 1882, seems not only to have affirmed this ruling, but to have gone beyond it by enacting "that the open and notorious adulterous cohabitation of a widow who is a pensioner, shall operate to determine her pension from the commencement of such cohabitation."

The judgment of the court is in favor of the United States.

BREWER, J., concurs.

NORTHWESTERN FUEL Co. v. BURLINGTON, C. R. & N. R. Co.

(Circuit Court, D. Minnesota. June, 1884.)

COMMON CARRIERS—CONTRACT—TENDER OF GOODS.

A railroad company is not responsible in an action for an alleged infringement of a contract to carry coal for the plaintiff, unless it is proved that the plaintiff actually tendered the coal to the company for transportation, and the company then refused to carry it.

C. D. O'Brien, I. V. D. Heard, and Geo. B. Young, for plaintiff.
J. D. Springer and C. K. Davis, for defendant.

MILLER, Justice. At my suggestion, at the end of about a three-days' trial before a jury at a term of this court, held a year ago, the plaintiff submitted to a nonsuit, with leave to make a motion to set aside the same. That motion was made, and was argued very elaborately by counsel on both sides, and since that time I have given the matter due consideration, and am prepared to give my opinion on the case at this present time.

In my view of the case, there is nothing but a question of fact involved in this motion to set aside the nonsuit. I told counsel that they could go on and complete the case to the jury, in which case I should be compelled to tell the jury that I believed there was no evidence upon which a verdict could be given of a violation of the contract; the contract being one by which the defendant, the railroad company, agreed to transfer to a certain place, at a certain rate, a certain amount of coal, and also some iron, for the Northwestern Fuel Company. I was of the opinion that no tender of the coal to be carried had ever been made, or refused by the railroad company; and I permitted counsel for two days to make efforts to prove a tender of the coal by the fuel company to be carried under that contract. During that time a good many bills of lading were offered in evidence that were intended to show by implication that the fuel company had tendered that coal to the railroad company, and that the latter had refused to carry the same. I do not believe that any tender or any refusal was ever proved. I thought so then, and I am satisfied of it now. It would be idle—it would be folly—to allow this proceeding to go further. This sum claimed by the plaintiff—the amount of money sought to be recovered—is enormous; and if the kind of proof which they offered of the violation of the contract could have been permitted, they could have recovered of the railroad company millions of dollars. They certainly expected to recover a million or half a million of dollars by virtue of this company not carrying this coal under the contract. It was amazing to me—it is now—that the company could be held liable when there was never a clear tender, saying, "Here is the coal of the fuel company which I want you to carry over your road." I do not think there was any tender, and I do not believe that there can be anything substituted for it.

The motion to set aside the nonsuit is denied.

SCOTT'S EX'RS v. CITY OF SHREVEPORT.¹

(Circuit Court, W. D. Louisiana. May Term, 1884.)

1. PRESCRIPTION—EFFECT OF PLEDGE—INTERRUPTS AGAINST PRINCIPAL OBLIGATION.

The pledge of a thing, legally made, in Louisiana is a tacit acknowledgment of the debt, and interrupts prescription against the principal obligation.

2. MUNICIPAL CORPORATIONS—POWERS.

A municipal corporation can exercise only the powers expressly granted to it, —those fairly implied from the granted powers, and those essential and indispensable to its declared objects.

3. SAME—POWER TO PLEDGE CITY PROPERTY.

The power to pledge city property is not essential to the declared objects of a municipal corporation in Louisiana, and when an act incorporating a city contains no rules relating to the pledging of municipal property, the city has no power to do so. Civil Code, § 3151.

4. PLEA OF PRESCRIPTION—TACIT ACKNOWLEDGMENT OF DEBT BY MUNICIPAL CORPORATION.

Where city authorities turn over bonds to creditors, the act not being that of the municipal corporation, because illegal, it is not a tacit acknowledgment of the debt so as to preclude the city from setting up a plea of prescription.

5. MUNICIPAL CORPORATION—AUTHORITY OF AGENT—POWER OF CITY—SUBSEQUENT ACTS CANNOT MAKE VOID OBLIGATIONS BINDING.

Where an agent of a municipal corporation has no authority to bind a city by giving notes, because the city has no authority to raise money to donate to a railway company, no subsequent act of the municipal authorities can make the obligation binding.

6. SAME—POWER TO DONATE AID TO RAILWAY COMPANY—OBLIGATION NOT BINDING UNLESS AUTHORITY TO ISSUE.

In the absence of express power, a municipal corporation cannot incur any binding obligation when its authorities borrow money in the name of the city for the purpose of donating pecuniary aid to a railway company.

At Law.

Wise & Herndon, for plaintiff.

W. A. Seay, for defendant.

BOARMAN, J. The defendant is a municipal corporation; the official representatives thereof being desirous of donating certain city lots to the Texas Pacific Railway Company for depot purposes, issued 260 \$1,000 bonds. The bonds recite the purpose for which they were issued. In order to raise the money for the purchase price of the several lots, the 260 bonds were placed in the hands of a special agent, to be sold or used by him in any way he thought best to secure the sum required. At Philadelphia he executed a promissory note with himself, individually, and Thomas A. Scott, as the drawers, for \$67,590, "payable to the order of ourselves, 90 days after date." He pledged the 260 bonds as collateral security to secure the holder thereof, and by discounting the note, about \$67,000 were realized and paid as a part of the purchase price of the several lots which were donated to the company. This note not being paid at maturity, an extension of 90 days was effected by the agent, who gave a new note similar in

¹ We are indebted to Talbot Stillman, Esq., of the Monroe, Louisiana, bar, for this opinion.

every particular as to the first note, except as to the amount. Thomas A. Scott, now deceased, whom the plaintiff represents, after the maturity of the second note, paid the holder thereof \$22,259, and the matter remained without settlement until in A. D. 1875, a compromise settlement, in pursuance of a city ordinance, was entered into by all the parties in interest. In making this settlement the mayor was directed by an ordinance of the city to execute and sign the three notes now sued on, which are as follows: One note for \$8,373.20, due 90 days after date; one for \$13,292.94, due one year after date; one for \$14,162.59, due two years after date; all amounting to \$36,328.73, and bearing date February 20, 1875. The first of these notes was made payable to Jameson & Co., and the others to Scott, who now holds all of them. Four thousand dollars were paid on the sum of these notes December 20, 1875; the last of the notes became due February 20, 1877, and this suit was filed April 15, 1882.

Defendant pleads the prescription of five years against the notes; besides, he presents several strong grounds of defense on the merits of the suit. The only payment made on the notes was made more than five years before the institution of the suit; it follows that the plea of prescription must protect the defendant, unless, as is contended by plaintiff's counsel, the pledge of the bonds was a tacit acknowledgment of the debt and a complete interruption of prescription during the time the thing pledged remains in the hands of the pledgee. The authorities in Louisiana are clear enough that the pledge of a thing, legally made, is a tacit acknowledgment of the debt, and interrupts prescription against the principal obligation. But, in answer to this view, defendant holds that the bonds were never legally pledged to the holder of the notes, or to any one else. The Civil Code, after laying down a number of rules on the subject of pledge, showing what formalities are required in giving a valid pledge, in article 3150, provides: "The property of cities and other corporations can *only* be given in pledge according to the rules, and subject to the restrictions, prescribed on their heads by their respective acts of incorporation."

The acts incorporating the city of Shreveport contain no rules or restrictions relating to the pledging of municipal property; and in these acts, so far as I have been advised, no power to pledge property is anywhere granted. The defendant corporation, like all municipal governments, can exercise the following powers and no others: "*First*, those granted in express words; *second*, those necessarily or fairly implied in or incident to the powers expressly granted; *third*, those essential to the declared objects and purposes of the corporation, not simply convenient, but indispensable." Dill. Mun. Corp. 173; *Wilson v. City of Shreveport*, 29 La. Ann. 674. The power to pledge the property of the city is not an expressed power, and it is not one of the powers which the Louisiana courts have ever held to be essential to the declared objects and purposes of a corporation.

If no rules or restrictions, such as are suggested in article 3150,

appear in any of the several acts affecting the defendant city, it follows that the power to pledge these bonds never lawfully belonged to the authorities representing the city in making the compromise settlement.

It is further contended by the city attorney that the things pledged—the 160 city bonds—were not then and are not now, in law, of any value. While it is true that, so far as they bind the city to pay anything, they are wholly worthless, it is hardly necessary to discuss the point as to whether a city bond that no one is bound in law to pay, can, when it is given in pledge under legal formalities to secure the payment of a valid note, interrupt the running of prescription against the note; for, it is now sufficient to say that the city authorities, exercising only the limited powers of a municipal corporation, were wholly without the power, in law, to pledge or put in pledge anything belonging to the corporation; that no legal effect, such as is claimed by plaintiff's counsel, is deducible from the placing of these bonds into the hands of the holder of the notes. The city authorities, making the compromise settlement in 1875, had no lawful power to put these bonds in the hands of the creditors as a pledge. The creditors knew this fact, and they must have known, even if the debt for which the notes were given was a valid debt against the corporation, that the city authorities, with whom the creditors compromised, could not, in the absence of an expressed power, make a valid pledge of the bonds which they now claim to hold as collateral security. The act of the city authorities in turning the 170 bonds over to the holders of the compromise notes was not the act of the municipal government, and there could have been no tacit acknowledgment of the existence of the debt, even if it is valid, caused by the fact that these bonds remained in the hands of the holders of the notes. The city, by these unauthorized acts of the authorities, cannot be precluded from successfully setting up the plea of prescription. While there can be but little room for doubt that the obligation, if there ever was any, evidenced by these three notes has been extinguished by prescription, yet I prefer to discuss and pass upon, as the turning point in this suit, the fact that the special agent at Philadelphia, in 1873, acting for defendant, in the matter in which the first and second notes were given, was without authority to bind the defendant, because the corporation had no authority in law to raise money, or to expend the money of the city, for the purpose of making a donation to the railway company; and no subsequent action of the authorities novating or compromising the debt can vitalize it into a binding obligation.

It is in proof in this case that 90 of the said 260 bonds came into the hands of C. E. Lewis, who sued defendant in the United States circuit court for the interest thereon; that the supreme court affirmed the judgment of the circuit court, which was for the defendant. *Lewis v. City of Shreveport*, 108 U. S. 282; S. C. 2 Sup. Ct. Rep. 634. The supreme court said:

"Unless specific authority has been given by the legislature to the municipal corporation to grant pecuniary aid to railroads, all bonds purporting on their face to be for such purposes are void. In this case no such power has been granted, and there is nothing in the charter of Shreveport from which any such power can be inferred."

This decision of the supreme court cannot be limited to the view that it merely declares the want of authority to issue the bonds, which are only evidences of a debt; but it reaches further, and, in the absence of this expressed power, denies that a municipal corporation incurs any binding obligation when its authorities raise or borrow money in the name of the city for the purpose of donating pecuniary aid to a railway company. If the authorities of the city could not incur a debt for the purpose mentioned, it follows that no action or effort on their part, however repeatedly or persistently made, to ratify, settle, or compromise a debt, unlawfully incurred as this was, can result in imposing any obligation on the city which the law will enforce.

The proof shows that the notes given by the city's agent in 1873 are the evidences of a loan made to the city for the purpose of enabling the city to donate pecuniary aid to a railway company; and the three notes now sued on were given in compromise of the debt evidenced by the said note. All these transactions were without legal effect against the defendant, and no recovery can be had on this cause against the corporation.

OREGON & TRANSCONTINENTAL Co. v. HILMERS and others.

(Circuit Court, S. D. New York. June 21, 1884.)

PLEDGE—SECURITIES—REHYPOTHECATION BY BROKER.

Where the owner of securities pledges them with a stock-broker as collateral to a loan, the latter has no right to rehypothecate them in such a way that they cannot be restored to the owner upon payment of the loan, although both parties understood that the broker would have to use the securities to obtain the loan. Usage is inadmissible to destroy a contract.

Order of Arrest.

Holmes & Adams, for complainant.

Chamberlain, Carter & Hornblower, for defendants.

WALLACE, J. By the contract of pledge entered into between the plaintiff's assignor and the defendants, the former deposited with the latter certain shares of stock as collateral security for the payment of \$1,000,000 in one year, with interest, with authority to the defendants to sell, assign, and deliver the collaterals on the failure of the pledgor to fulfill his agreement. It is probably true, as alleged by the defendants, that the pledgor understood that the defendants, who were stock brokers, could not advance this large loan out of their own funds, but would be obliged to hypothecate the collaterals to ob-

tain the money. Upon this theory, if they had hypothecated the collaterals as his agents, or in such a way that they could be restored to him upon payment of the sum loaned on them, the defendants would not be liable for conversion. Such a use of the stock might not be inconsistent with the intention of the parties, and would not subvert the ultimate rights of the pledgeor, and, if sanctioned by usage, or if within the contemplation of the parties, would not be a conversion. But the defendants assert that, according to the understanding between them and the pledgeor, they were to be at liberty to mingle the securities with their own, and raise money on them generally as though they were their own. Such a use is utterly inconsistent with the contract of pledge. No evidence of usage is admissible which would destroy the contract. If the defendants have used the collaterals in such manner that they could not at once regain them and restore them to the pledgeor, when the obligation of the latter is discharged, they are liable for conversion. As this seems to be the case, the order of arrest is granted.

UNITED STATES *v.* HOWELL.¹

Circuit Court, W. D. Louisiana. May Term, 1884.

1. REVENUE LAWS—LIQUOR LICENSE—PURCHASE FOR ANOTHER WITHOUT RECEIVING PROFIT.

A grocer who, without obtaining a license for selling liquor, purchases a barrel of whisky for a customer, and enters on his books a charge against the customer for the price at which it was actually obtained from the liquor dealer, does not transgress the spirit of the revenue laws.

2. SAME—ONE NOT PRESUMED TO OFFEND ON ACCOUNT OF BEING A "GROCER."

The fact that one is a grocer, rather than in any other line of business, should not raise a presumption of wrong-doing against him, in case of his purchasing a barrel of whisky to oblige a customer, and his entering on his books a charge therefor.

3. SAME—NOT INTENDED TO BE ODIOS OR OPPRESSIVE.

The revenue laws are for the purpose of aiding the collection of the government revenue and taxes, and they should not be construed by the courts so as to become odious or oppressive to the people

Violation of Section 3242, Rev. St.

M. Elstner, U. S. Dist. Atty., for the United States.

BOARMAN, J., (*charging jury orally.*) The facts admitted in this case preclude a dispute on any matter of importance on this trial. The defendant, a member of a large commercial firm in this city, makes the admissions, and the government submits the case on his admissions.

¹ We are indebted to Talbot Stillman, Esq., of the Monroe, Louisiana, bar, for this opinion.

He says he has no license as a wholesale liquor-dealer; that he is not in fact such a dealer, and he is not so in law unless his further admissions impose such a character upon him. He is a grocer merchant, but never sells liquor in small or large quantities. He says that B., living in the country, wrote him a letter telling him to purchase for him a barrel of whisky of a certain brand and quality and for a fixed price, and send it to him; that he accordingly purchased a barrel of whisky from C., a liquor-dealer in this city, and forwarded it direct to B.; that he made an entry in his books against B. for the amount which he paid C. for the whisky, not charging him any profits or commissions thereon; that the liquor-dealer, C. had him, defendant, charged in his books in the same amount, and the revenue collector, finding such a charge on C.'s books, came to him and found on his firm's books the charge against B. for the whisky. He is now on trial for violating section 3242, Rev. St., which provides a penalty for every person who carries on the business of a wholesale liquor-dealer without first obtaining a license. On this statement the district attorney advises you to find the defendant guilty, and suggests that the chief of the revenue department at Washington holds, in his advices to the agents of the department, that such a statement of facts shows defendant to be a wholesale dealer in liquor.

The fact that the dealer, C., had on his books an entry or charge against the defendant for a barrel of whisky, and that defendant had a charge on his firm's books against B. for the same barrel, when coming to the knowledge of the revenue agent, was sufficient to cause him to report defendant as wholesale liquor-dealer; but such a finding by the agent makes, at best, but a *prima facie* case against defendant. The revenue laws, which provide penalties for offenses like the one charged here, are for the purpose of aiding in enforcing the collection of the government licenses and taxes, and they should not be construed by the courts so as to become odious or oppressive to the people. In my view of the law the fact that the defendant's firm were dealers in groceries is of no special consequence; and when this fact is considered, in connection with the other facts stated by him, it should not in any way damage his defense; indeed, under my view of the law, he is on that account no more to be considered a wholesale liquor-dealer than a milliner would be if B. had written to such a person or dealer for the whisky. The statement submitted shows that the defendant was a special agent to purchase the barrel of whisky for B., under special instructions as to the price and quality. The barrel went directly from the store of C., the liquor-dealer, to B., and it was not at any time, or in any way, the goods of defendant. C., the liquor-dealer, it is presumed, had his license; and the defendant, without considering whether he was a grocery merchant or milliner, or a blacksmith, under the facts, cannot be considered a wholesale liquor-dealer. Congress, in passing these laws could, if it had chosen to do so, have made the sections of the Revised Statutes cover such a case as th-

prosecution now presents; but I do not think such a construction as now contended for is warranted by any of the rules of law which should control the United States courts in construing such laws.

Verdict, not guilty.

UNITED STATES *v.* STAFFORD.

(*District Court, E. D. Arkansas. October Term, 1883.*)

1. **INTERNAL REVENUE—SALE OF DISTILLED SPIRITS AND WINES.**

Distilled spirits and wines cannot lawfully be sold in any quantity, or for any purpose, by any person who has not paid the special tax required by law.

2. **SAME—SALE BY PHYSICIANS AND DRUGGISTS.**

The law does not treat distilled spirits as a drug or medicine, and doctors and druggists are not privileged to sell it as such without first paying the special tax required of dealers in liquor.

3. **SAME—SALE OF PACKAGES CONTAINING DISTILLED SPIRITS—SPECIAL TAX.**

Where packages contain distilled spirits in a form to be got at by squeezing, suction, or any other process, and the spirits, and not the fruit, or other ingredients contained in the packages, is the inducement to their sale, purchase, and use, one selling such packages must pay a special tax as liquor dealer.

This was a criminal information filed by the United States attorney charging the defendant with selling liquors at retail without payment of the special tax. The defendant plead not guilty. By the proofs it appeared that the defendant conducted business in a one-story frame building in the town of Clarendon. That the room had been used as a saloon until the state local option law suppressed saloons in Clarendon, since which time it had been used as a billiard-hall, in the rear part, and in front several articles were sold behind a bar, among them tobacco, cigars, sardines, and chiefly "brandy cherries." Several witnesses testified as to the contents of the bottles alleged to contain "brandy cherries," as appeared by the printed labels pasted thereupon, and the method of dealing in them. They stated that the bottles, when purchased, were almost invariably opened at once on the counter, and the contents were not eaten, but drank upon the spot; that the bottles were usually opened by the customer, but in some instances had been opened by defendant or his clerk or bartender; that the "cherries" were usually left behind, and was sometimes thrown out for the hogs. In one instance, the "cherries," after the liquor had been drank up, were given to the deputy sheriff, upon the suggestion that his prisoners in the county jail near by might like them for their stimulating qualities. The witnesses testified that the liquid contained in the bottles was whisky,—one witness, that it was mean whisky, and another witness that he drank several drinks of it and it made him "very drunk," and that he saw other persons made drunk by drinking the contents of such bottles. The witnesses also testified that they bought the bottles for the liquor they con-

tained, and not on account of the fruit, and that they knew of no one purchasing them for any other reason. It also appeared in testimony that there was no trade in Clarendon in these articles until after prohibition had been established, and since the decision of the supreme court (*Rabe v. State*, 39 Ark. 204) on the subject of "brandy peaches."

Chas. C. Waters, U. S. Atty., for plaintiff.

S. P. Hughes, for defendant.

CALDWELL, J., (*charging jury*.) A portion of the revenue to support the government and pay the public debt is derived from a tax on distilled spirits, and a license tax imposed on dealers therein. The act of congress provides that "every person who sells or offers for sale foreign or domestic distilled spirits or wines, in any less quantities than five gallons at the same time, shall be regarded as a retail dealer in liquors;" and persons engaging in that business are required to pay a license tax to the United States at the rate of \$25 a year. You will observe this license tax is required of "every person who sells or offers for sale foreign or domestic distilled spirits or wines." The quantity sold, whether a gill or a gallon, or the purpose for which it is sold, whether as a beverage or a medicine, or for any other purpose, is not material. Distilled spirits or wines cannot be sold in any quantity, or for any purpose, by any person who has not paid the required special tax. It is a popular error that doctors or druggists can sell liquors without paying the special tax. Doctors and druggists have no greater privileges in this business than other people. The law does not treat liquor as a drug or medicine. If a doctor prescribes liquor for a patient, neither he nor a druggist can sell the liquor to fill such prescription unless he has paid the special tax required of liquor dealers.

In this state there seems to be a strong incentive to evade the payment of the license tax. The state has a local option law combined with a high license. Under the operation of the local option law it is unlawful to sell liquor for any purpose in many localities; and where prohibition does not prevail it is unlawful to sell without the payment of a high license to the state, county, and towns, amounting in the aggregate from \$600 to \$1,000 a year. The United States laws require dealers who have paid their special tax for the privilege of selling liquor to "place and keep conspicuously in his establishment or place of business" the license which he receives from the United States collector. The state law provides that the finding in any house, room, or place of business of such a license shall be *prima facie* evidence that the person doing business in the house is selling liquor in violation of the state law, unless he has a state license. It will thus be seen that there is a strong motive on the part of those selling in violation of the state law to evade the payment of the license tax required by the laws of the United States, not so much on account of the amount of the United States tax as the effect of its

payment in discovering them to the state authorities. The result is that numerous fraudulent devices have been resorted to from time to time to evade the payment of the license tax to the United States and the state, or to escape the payment of the license tax to the United States, and sell in prohibition districts in violation of the state law.

You have all heard of "blind tigers." One of the most common of these fraudulent devices is to put a few drugs, barks, or extracts into very common liquor and put it on the market for sale as a pretended medicine, under the name of "cordial," "tonic," or "bitters." "Hostetter's Bitters," "Fitzpatrick's Bitters," "Home Bitters," "Home Sanitive Cordial," "Reed's Gilt-Edge Tonic," and other compounds were of this character, and have all rightly been adjudged to be mere shams as medicines, because they were sold and used as intoxicating beverages, and for the liquor, and not for the drugs and barks they contained; and dealers in them have been dealt with precisely as if they had sold plain whisky without any disguise. *Williams v. State*, 35 Ark. 430; *Foster v. State*, 36 Ark. 258; *Gostorf v. State*, 39 Ark. 450; *U. S. v. Cota*, 17 Fed. Rep. 734. Mere names go for nothing. The law cuts through frauds and shams of every character, and regards only the substance of things.

The so-called "brandy peaches" and "brandy cherries" seem to be the latest and most popular device for dealing in spirits without paying the special tax. This is particularly the case in the districts in which the sale of liquor is prohibited by state law. The witnesses tell you there is little or no demand for these articles in localities where there are licensed dealers in liquor, and where it can be had without the incumbrance of peaches or cherries. The introduction of peaches or cherries into liquor does not necessarily change its character any more than did the introduction of drugs in the cases of the "tonics" and "bitters" which I have mentioned. There is probably not a package of genuine brandied peach or cherry preserves in the state, outside of those put up by housewives for family use. Between the genuine brandied peach or cherry preserves put up for legitimate domestic use as confectionery, and the so-called "brandy cherries," described by the witnesses in this case, and sold by the defendant, there is not the faintest resemblance. One is an edible and palatable preserve, and used as such; the other, as the proof shows, is neither edible nor palatable, and is not used as a preserve or for food, but as a stimulating beverage, and for the spirits it contains. The method of making brandied peach preserves is laid down in the standard authorities on the subject of the preservation of food. The fruit, after being properly prepared, is boiled in a syrup made of refined sugar, and is then placed in a bottle, the syrup poured over it, and a sufficient quantity of pure, pale brandy added to impart to it the desired brandy flavor, just as brandy is used as an ingredient in our pudding sauce or mince pies, for the purpose of improving their flavor. It is obvious the defendant sold no such preserves. Alcohol is used to

preserve specimens of fruits for exhibitions at fairs, or to advertise the products of the country, but fruits so preserved are not put up for sale, and are not known in the trade.

It is quite clear the so-called brandy cherries described by the witnesses in this case are not an edible preserve, and are not put up for ornament. What, then, is the proper definition of the brandy peaches and brandy cherries now so popular in the prohibition districts in this state? If they are not used as confectionery, nor as food, nor for ornament, what is their use? I know not what definition you gentlemen may give of them, and it rests with you to define them in the light of the evidence; but from the proof in the case, I confess it seems to me the proper definition would be: a compound of drugged whisky and poor peaches or cherries, the fruit being added as a mere disguise, and with a view to evade the payment of the license tax imposed on liquor dealers by the United States, and to escape the penalties of the state law for selling liquor in districts where its sale is prohibited. I repeat that the quantity of liquor sold is not material, nor is the size, form, or chemical composition of the vessel or other thing that contains the spirits material. If a cocoa-nut or gourd was filled with spirits and labeled brandy cocoa-nut or brandy gourd, it would be idle to say that one selling liquor in that way could escape payment of the license tax. So, if one were to stuff sponges in bottles and then fill them with liquor and label them brandy sponges, he could not escape payment of the tax on the plea that the sponges absorbed the liquor and that there was therefore no liquor in the bottles. Such a plea would not be entitled to respectful consideration. It is then wholly immaterial whether the liquor sold is contained in a bottle, cocoa-nut, gourd, sponge, peach, or cherry, or what label is put upon it, if the package contains distilled spirits in a form to be got at by squeezing, suction, or any other process, and the spirits in the package, and not the other ingredients, are the inducement to its sale and purchase:

To sum up the law applicable to the case, I instruct you that if you find from the evidence that the bottles of so-called "brandy cherries," sold by the defendant, contained whisky or other distilled spirits, and that they were purchased by his customers, not for the fruit in them, but on account of the distilled spirits they contained, and for the purpose of using the spirits contained therein as a beverage, and that the contents of the bottles were in fact used as a beverage, and for the purpose of obtaining the effects produced by the use of intoxicating liquor, and that such effects were in fact produced by their use, and that the defendant knew these facts,—then you will find him guilty. If you find these facts, it makes no difference whether the defendant opened the bottles or not when he sold them, nor whether the purchaser drank the contents of the bottle at the defendant's counter or took it elsewhere for that purpose, and it makes no difference that the bottles were sealed up, and that the sales were made in what has been spoken of in the course of the trial as original packages.

I have discussed with you the facts and the law bearing on this case at greater length than is usual in cases of no more importance, because your verdict will probably be accepted as settling all other cases of like character. Of course, you understand you are the sole judges of the facts in the case, and that any fair or reasonable doubt in your minds as to the defendant's guilt should be resolved in his favor.

ROOSEVELT v. WESTERN ELECTRIC CO.

(Circuit Court, S. D. New York. July 7, 1884.)

PATENT LAW—SALE OF PATENTED ARTICLE—VENDOR AND VENDER.

The purchase of a patented article from the patentee or owner of the patent confers upon the buyer the right to use the article to the same extent as though it were not the subject of a patent; but the sale does not import the permission of the vendor that it may be used in a way that will violate his exclusive property in another invention.

In Equity.

Dickerson & Dickerson, for complainant.

Geo. P. Barton, for defendant.

WALLACE, J. The case made by the motion papers is this: The complainant's patent is for an improvement in electric batteries, consisting of a prism and other elements, and the claims are for the prism, and for various elements in combination with it. The defendant is selling an electric battery which contains the prism in combination with the several other elements which are covered by the claims of the patent; having purchased the prisms from complainant, but having obtained the other elements of the battery from other sources.

If it were true that the prisms are not capable of any use except in combination with the other elements covered by the several claims of the patent, the complainant can nevertheless insist that the purchaser should only be permitted to use them as substitutes for prisms which have been deteriorated or destroyed, or to sell to others. They could be used in this way without infringing the complainant's rights.

The purchase of a patented article from the patentee or owner of the patent confers upon the buyer the right to use the article to the same extent as though it were not the subject of a patent; but the sale does not import the permission of the vendor that it may be used in a way that will violate his exclusive property in another invention. Where the article is of such peculiar characteristics that it cannot be dealt in as a trade commodity, and cannot be used practically at all, unless as a part of another patented article of the vendors, it would be preposterous to suppose that the parties did not contemplate its use in that way. It would be against good conscience to allow an injunction to a vendor under such circumstances. He

would be estopped from asserting a right which the purchaser must have understood him to waive.

Upon the argument of the motion, the case seemed to be like the one last stated, but it is not such a case.

The motion for an injunction is granted.

NEW PROCESS FERMENTATION CO. v. MAUS and others.

(Circuit Court, N. D. Indiana. June, 1884.)

1. PATENTS FOR INVENTIONS—PROCESS—RIGHTS OF HOLDER OF PATENT.

A party is not entitled to the exclusive right to have his beer ferment or be come clarified, by stopping up the bung-holes of the casks and making the carbonic acid gas escape some other way.

2. SAME—PROCESS—PATENTABILITY.

A person cannot patent a result, but only the means or art by which the result may be effected.

3. SAME—CHEMICAL COMBINATION — MECHANICAL COMBINATION—No CONFLICT.

If a process consists of a chemical combination, by which the particular result is produced, its existence does not prevent another inventor from making a mechanical combination which produces the same result.

This was a bill filed against the defendants for an alleged infringement of a patent granted May 20, 1879, to Bartholomae, as assignee of Meller & Hofmann. Bartholomae has assigned his interest to the plaintiff, a corporation of the state of Illinois. Meller & Hofmann had previously (1876 and 1877) taken out patents in France and Belgium. The specifications give a description of the manner in which beer had been brewed previously, viz.: That after cooking and cooling it was put in open vessels for fermentation, and after a certain number of days it was drawn off from the yeast into large casks nearly closed, where it remained for a considerable time, in some instances for months, to settle; that the beer was then put into shavings casks and mixed with young beer or krausen; that during the process of fermentation the carbonic acid gas rose, so that often the lighter particles of yeast and solid matter were thrown to the top and escaped over the edges of the cask, some portion of the beer being thus wasted, which had to be replaced daily by new beer. This wastage was supposed to be about one barrel in 40; the escape of the beer in this manner, falling upon the floor of the cellar where the casks were, affected the air so as to be injurious to persons there working, and the flavor of the beer. In remedying this, by the washing of the outside of the barrels, the temperature of the cellar was raised. After the beer had been in the shavings casks from 10 to 15 days, the clarifying substance was introduced and the beer became clear. The casks were then closed, in order to confine the last portions of the rising carbonic acid gas; that then it must be immediately drawn off

into kegs and used. At the time of drawing off the beer from the shavings casks, the beer was never to be under more than a certain pressure. If the beer were not put upon the market at once, the bungs had to be removed, and the escaping gas then stirred up the yeast and the impurities that were settled at the bottom, and it had to be again put through the shavings casks. According to a process then in use it required about 20 days to put the beer on the market after it had been placed in the shavings casks, and this delay required a large amount of capital to be invested during the time.

The specifications then proceed to state that the object of the invention was to overcome these difficulties, and to produce in a shorter time a better quality of beer, containing more sugar and less alcohol; and they state further that the invention consists in treating the beer, when in the shavings casks step of operation, in one or more closed casks under carbonic acid gas pressure, automatically controllable, and caused by the fermentation of the beer. The pressure in the cask is thus equalized, and the effervescing quality of the beer in all the casks, when two or more are connected together, is uniform. The casks being closed, none of the beer wastes, and the foul smell and washing of the casks are avoided. The escaping carbonic acid gas is conducted from a relief-valve to the open air; and further, the invention consists in treating the beer in the same way at the kräusen stage, or subsequently thereto, or both; that is to say, the invention consists in so treating the beer at any time or times previous to racking off, or bunging and bottling. And then the specifications proceed to give an account of the manner in which the invention becomes useful and practicable by describing the drawings which are annexed. There are three shavings casks with faucets and valves inserted in their bungs. These faucets are connected to what is called the main pipe, by means of flexible sections provided with couplings. The connections have valves. The pipe bends upward and passes above the level of a water column, and then passing downward enters the base of the column, at the top of which a cup is provided. The water column has a faucet to draw off the water when it is desired to decrease the pressure. A branch pipe serves to discharge any condensed moisture, and there is a pressure-gauge to indicate the pressure. There is a gas generator connected with the pipe, which is so constructed as to test the joints of the apparatus and drive all atmospheric air from the pipes when the operation begins. A pipe is projected out of the building and leads all the gas into the open air, and there is a device by which, when the gas in its escape becomes so rapid as to lift the body of water upward, the water will be arrested by a "diaphragm."

This general description is supplemented by reference to the various parts of the apparatus, by letters, so as to designate particularly the manner in which it is constructed and operates. It is declared that the pressure in all the shavings casks connected with the pipe will be equal, and will be kept so indefinitely; whereas, in the process before

practiced, the beer had to be bunged at a particular time, for a particular day's market. But this process enables the brewer to keep on hand merchantable beer which can be shipped at once, or, if not then desired, a stock can be kept on hand for future use. And it is alleged that what is true of a series of shavings casks, applies equally to a single cask. The specifications declare that other means than a water column may be adopted for equalizing the pressure of the gas, as by safety-valves and the like, and that the apparatus is susceptible of many other variations. A description is then given of the result of what is alleged to be this new method. They then refer to the introduction of what is called "clarifying gelatine" into the shavings casks, and they state what is done when it is desired to make beer for bottling. There are annexed to the specifications eight distinct claims, all of which are qualified by the terms "substantially as described," the first of which refers to holding the beer under controllable pressure of carbonic acid gas when in the kräusen stage; the second, to the mode of treating beer when in the kräusen stage, by holding it in a vessel under automatically controllable pressure of carbonic acid gas; the third refers to holding it under controllable pressure of carbonic acid gas from the beginning of the kräusen stage until such time as it is transferred to kegs and bunged; the fourth, to the method of preserving the beer after it has passed the kräusen stage, which consists in holding it under pressure of carbonic acid gas, the pressure automatically regulated by a contracting hydrostatic pressure; the fifth, to the treatment of the beer when it is in the second fermenting stage, "ruh beer," which consists in holding it under automatically controllable pressure of carbonic acid gas; the sixth, to the treatment of beer in holding it in closed connected vessels under automatically controllable pressure of carbonic acid gas; and the seventh refers to the process of clarifying and settling the beer in a series of shavings casks equalizing the rate of fermentation, etc., as before; the eighth refers to the machinery or apparatus by which the process is carried into effect.

Among other defenses set up in the answer it is alleged that Meller & Hofmann were not the original and first inventors of the process of preparing beer for the market by holding it under automatically controllable carbonic acid gas pressure when in the kräusen stage, nor of the process of treating beer when in the kräusen stage by holding it in a vessel as described, under the pressure of carbonic acid gas; that this had been known long before, and as to some parts or divisions of the apparatus described, the defendants say they do not infringe; and various patents are set forth, granted to others, which it is alleged show that the same principle and combination, or substantial and material parts thereof, described in the plaintiff's letters patent, had been described in the patents of other parties issued prior to the plaintiff's. The answer then proceeds to state and describe the apparatus and processes used by the defendants, which they say is an entirely differ-

ent apparatus from that described in the letters patent of the plaintiff, and in the specifications annexed thereto.

F. W. Cotzhausen, P. C. Dyrenforth, and Banning & Banning, for complainant.

C. P. Jacobs and Duncan, Smith & Duncan, for defendants.

DRUMMOND, J. Nearly all the claims in this case, as well as the specifications, speak of the beer in what is called the *kräusen* stage. The specifications term "*kräusen*" *young beer*, and also use the words "*kräusen* stage," the inference being that it refers to that condition of the beer when it is considered young. But, in the evidence of the plaintiff, one of the witnesses particularly describes what the *kräusen* stage is. He calls *kräusen* a fermenting sweet-beer wort during the first stage of the main fermentation, in which a foam of a very dense, curly white appearance is formed on the surface, and it is so termed because the beer has the appearance of curling, as *kräusen* in German means "curls." The *kräusen* stage, he declares, is the new fermentation which sets in after the "*kräusen* beer" has been added. Under the old method, when the beer was in this condition in shavings casks, and the bung was left open, the foam and some of the ingredients of the beer escaped through the bung-hole. As claimed in the plaintiff's patent, this was avoided by stopping up the bung-holes, and devising a method by which the carbonic acid gas formed in the fermentation was permitted to escape upon a certain pressure, which removed the danger, that otherwise would exist, of bursting the casks, or of injuring the beer when in fermentation, or while being clarified.

All the claims except the last, it is insisted by the plaintiff, are for a process, and that as to them the particular manner or instrumentalities by which the process is accomplished are immaterial.

It is well known that the term "process" is not used in the statute, but it has been uniformly held that there may be a patent for a process, because it is regarded as an art, which is a word used in the statute. But it must be confessed that it is often one of the most difficult questions to decide, in the practical application of claims made in a patent, what is a process which may be the subject of a patent. To illustrate and prove this, it is only necessary to refer to the case of *Mitchell v. Tilghman*, 19 Wall. 287, which was most elaborately argued and fully considered, and where a majority of the court held that although the manufacture of fat acids and glycerine from fatty or oily substances by the action of water at a high temperature and pressure was a process, yet that the patentee was limited to the particular method or means of applying highly-heated water under pressure, pointed out in the specifications, although the claim was on its face broader than that, and to the case of *Tilghman v. Proctor*, 102 U. S. 707, where the same patent was in question, and where the court held that it was a patent for a process, irrespective of the particular mode or form of apparatus for carrying it into effect. If, then, we now consider this last case in connection with one of the first cases

decided by the supreme court, (*Corning v. Burden*, 15 How. 252,) and some of the intervening cases where patents have been sustained for a process, we ought to be able to determine the rule established by that court as to what is a process for which a patent can issue.

In *Corning v. Burden* the court said that one might discover a new and useful improvement in the process of dyeing, tanning, etc., irrespective of any particular form of machine or mechanical device, and another might invent a labor-saving machine, by which the same process might be performed, and each might be entitled to his patent; that one by exposing India rubber to a certain degree of heat, in mixture or connection with certain metallic salts, might produce a valuable product and be entitled to a patent for his discovery as a process or improvement in the art, irrespective of mechanical devices. And another might invent a furnace or stove, or some apparatus by which the same process might be carried on with a saving of labor and of expense, and he would be entitled to a patent for his machine as an improvement in the art, and yet one could not have a patent for a machine, nor the other for a process. Each would be entitled to a patent for the method of producing certain results, but not for the result itself. And the court further stated that it was when the term "process" was used to represent the means of producing a result that it was patentable, and it would include all methods or means not effected by mechanism. This definition is intelligible. A part of it, but not the whole, is cited in *Tilghman v. Proctor*.

In *Corning v. Burden* the court held that Burden had not discovered any new process, but a new machine or combination of mechanism by which the result was produced.

In *McClurg v. Kingland*, 1 How. 202, where the only change made in the method of casting iron rolls was by directing the metal into the mould, when in a liquid state, at a tangent, the patent was sustained, although there does not seem to have been much discussion directly upon the patentability of the claim. All that was done in that case was simply to change the direction of the tube which carried the metal into the mould, the old method being to convey it from the furnace to the mould in a horizontal or perpendicular direction.

In *Mowry v. Whitney*, 14 Wall. 620, and *Tilghman v. Proctor*, *supra*, the court sustained the claim in each as a patent for a process. In the latter case, the court says that the patent law is not confined to new machines and new compositions of matter, but extends to any new or useful art and manufacture, and that a manufacturing process is an art.

Goodyear's patent was for a process; namely, vulcanizing India rubber. The apparatus for performing the process was not material, and was not patented, and the court then refers to Neilson's English patent. Neilson's patent was for the discovery, which he made, of applying a blast of hot air, instead of cold, to a smelting furnace, and for describing a method by which that was accomplished, that

method not being material, and the court declares that Neilson's patent was sustained as a process patent, and quotes the language of the court of exchequer, "that the plaintiff did not merely claim a principle, but a machine embodying a principle, and a very valuable one;" and also the language of Lord CAMPBELL, in the house of lords, that "the patent must be taken to extend to all machines, of whatever construction, whereby the air is heated intermediately between the blowing apparatus and the blast furnace;" and therefore it was unnecessary to compare one apparatus with another.

The court, in *Tilghman v. Proctor*, also quotes the language of Chief Justice TANEY in *O'Reilly v. Morse*, 15 How. 112, where he says, in commenting on *Neilson's Case*, 8 Mees. & W. 806,—

"That the manner in which air might be heated was immaterial. His patent was supported because he (Neilson) had invented the mechanical apparatus by which the current of hot air could be thrown in. The interposition of a heated receptacle in any form was the novelty he invented."

And, after quoting still further from the opinion of the Chief Justice in *O'Reilly v. Morse*, the court states:

"It seems to us that this clear and exact summary of the law affords the key to almost every case that can arise. 'Whoever discovers that a certain useful result will be produced in any art by the use of certain means, is entitled to a patent for it, provided he specifies the means.' It is very certain that the means need not be a machine or an apparatus; it may be, as the court says, a *process*. A machine is a thing. A process is an act, or a mode of acting. * * * The mixing of certain substances together, or the heating of a substance to a certain temperature, is a process. If the mode of doing it, or the apparatus in or by which it may be done, is sufficiently obvious to suggest itself to persons skilled in the particular art, it is enough in the patent to point out the process to be performed, without giving supererogatory directions as to the apparatus or method to be employed."

The majority of the court in *O'Reilly v. Morse* refused to sustain the eighth claim of Morse, because he disavowed the specific machinery or means mentioned, but claimed the use of the motive power of the electric current, however developed; and this was held to be a principle simply.

There has always been some difference of opinion as to the true grounds upon which this rejection of the eighth claim of Morse was placed, it being maintained by some that Morse was not entitled to have a patent including all applications of what he termed electromagnetism in the transmission of words, letters, and signs, but only his own particular application.

It has been uniformly held that a patent for a mere principle, or what is sometimes called a law of nature, cannot be sustained; but in all the cases referred to, from the Neilson to the Tilghman patent, the law or laws of nature discovered were utilized, and it is said that in giving this construction to principle and process, a patent for a process leaves the field open to future inventors; whereas a patent for a principle or a law of nature would give a monopoly to the person making that discovery. So that the rule established by the su-

preme court is said to be that the patent for a process will include every application of the principle that involves the use of the process described and claimed by the patentee, and this does not include the particular machine or apparatus described by the patentee, but the mode of operation which is carried out by means of the apparatus. Walk. Pat. § 14.

In *Neilson's Case* the defendant did not use the means employed by Neilson in throwing the hot air to the smelting furnace, for it was admitted he used a better device; but it was assumed that when once the idea existed in the mind of the superiority of a hot-air blast to a cold one, any person skilled in smelting could devise his own mode of introducing the hot air to the furnace. And see *Cochrane v. Deener*, 94 U. S. 780, and *Rubber Co. v. Goodyear*, 9 Wall. 796.

It is to be regretted that the difficulty inherent in the subject is so great that a more intelligible distinction has not been made, for it must be admitted that the application of the rule which has been established by the supreme court to other cases, as they hereafter arise, may cause embarrassment, for there must be a method by which the principle or law which has been discovered is applied; and, if that method is immaterial, then it is difficult to understand why it does not become substantially a patent for the discovery of the principle or the law of nature. Such seems to have been the opinion of Mr. Justice NELSON. See *Foot v. Silsby*, 1 Blatchf. 445, and 2 Blatchf. 260; and the case on appeal, 20 How. 378; *Le Roy v. Tatnam*, 14 How. 156, and 22 How. 132.

If it be true that the defendants have used the mechanical devices of the plaintiff, the question is whether, within these cases and the rules which have been established upon the subject, the plaintiff is entitled under his patent to the claims which he has made and as set forth; namely, the process of preparing beer for the market by holding it under controllable pressure of carbonic acid gas when in the kräusen stage; the process of treating it, when in the kräusen stage, by holding it in a vessel under automatically controllable pressure of carbonic acid gas; the process of preparing and preserving beer for the market, holding it under controllable pressure of carbonic acid gas from the beginning of the kräusen stage until it is transferred to kegs and bunged; to the method of preserving beer; to the process of treating it when in the second fermenting stage, and the process of treating it in the course of its manufacture; and to the process of clarifying and settling beer in a series of shavings casks and equalizing the rate of fermentation in all of them, whereby the beer is more rapidly and thoroughly clarified, irrespective of the mechanical means by which the specifications declare these various processes can be accomplished. That is to say, were Meller & Hofmann the first persons to hold the beer, when in its kräusen stage, under controllable pressure of carbonic acid gas, and were the means by which that result was accomplished immaterial?

There is not entire accord among the witnesses as to what constitutes the kräusen stage, but we may assume that it was understood to be, when the beer was in that condition in the shavings casks that young beer was added, upon which fermentation was produced, and during which the process of clarification was going on, in addition to other results caused by the mode adopted to act upon the beer; because, as soon as the fermentation began by the introduction of the kräusen, the shavings operated upon the ingredients contained in the beer.

Where, in a process, there is a combination of different substances, and to that combination another substance or element is added, by which a new result is obtained, that is a process which we can easily understand; and if unknown before, and it is useful, the person devising it may be entitled to a patent. Where there is a result produced by machinery, which result may be brought about by a process, and which may consist of different steps caused by a combination of different parts of the machine, and another part is added, before unknown, and by which a useful result is produced, that we can understand. The difficulty is to comprehend a process which may consist partly of a combination of different substances operating chemically, and the combination of different parts of a machine operating mechanically.

If a process exists which consists of different steps created by machinery, and there is an improvement in that process caused by a new element added to or taken away from the machinery, then, the process existing and being known, the party who added or took away the part of the machinery might, if it were useful, be entitled to a patent, not for the process which formerly existed and was well known, but only for that which had been added to or taken from the mechanism.

To apply the principle to this case: the process of manufacturing beer was not, at the time this patent was issued, *per se*, patentable, for beer had long been manufactured; in the first place by the preliminary steps which are referred to in the specifications, and which have already been mentioned, and by adding to the beer the kräusen while it was in shavings casks, and then permitting fermentation to proceed, then clarifying it so as to retain in the beer some of the carbonic acid gas, which of itself constituted an important ingredient in the beer, and then preparing it for the market, so that whatever was patentable in the process of manufacturing beer must consist of something new and useful being added to the process chemically or mechanically, and for whatever was new and useful the inventor might be entitled to a patent, whether it was connected with the chemistry or the mechanism of the process. It is very important to observe this distinction in discussing the patentability of a process.

It seems to be admitted in the various process cases decided in the supreme court, which have been referred to, and others which might

be named, if the process consists of a chemical combination by which the particular result is produced, that does not prevent another inventor from making a mechanical combination which produces the same result. Otherwise, there would be a revolution in what has always been understood to be a principle of the patent law, that a person could not patent a result, but only the means or acts by which the result was produced; and that certainly should be true as well of a chemical as a mechanical combination.

It will be borne in mind that the patentee in this case insists that the invention is not limited to the particular instrumentalities described, by which the beer is held under controllable pressure of carbonic acid gas when in the kräusen stage, because it is said that other means than a water column may be adopted for equalizing the pressure of the gas, without departing from the spirit of the invention,—as, for example, safety-valves, springs, and the like; and it is added that the apparatus is susceptible of many other variations without affecting the process itself. Now, a water column had been previously used to regulate the pressure of the carbonic acid gas, and valves and springs had often been used for the same purpose; and, indeed, some of the witnesses of the plaintiff seem to imply that the Wallace and Hicks devices, in use long before the plaintiff's patent, were, in their application to the manufacture of beer, like those of the plaintiff. I am, therefore, not prepared to concede that Meller & Hofmann were the first to hold under controllable pressure of carbonic acid gas the beer when in the kräusen stage, for, as already stated, that had been done as well by a column of water as by springs and valves when the shavings casks were bunged and stopped; and the gas was permitted to escape when the pressure became so great as to raise the valve or force the spring. This is shown by the evidence of Maus and Sturm. It may be admitted that the mode adopted by the plaintiff is valuable, and that it has facilitated the manufacture of beer, both as to quality and as to time. But it seems to me that this has been caused by the more complete mechanical devices of the plaintiff, without really changing the principles upon which beer had been theretofore manufactured.

No new principle or scientific fact has been discovered, as was true in the process patents which have already been referred to. The most that can be claimed is, and, indeed, the chief merit ascribed to the patent by the plaintiff's counsel is, that it applies the controllable pressure created by the carbonic acid gas, in a state of fermentation, at an earlier stage than was before known. But the essential parts of the apparatus used by the patentee were known before, and the same controllable pressure had been applied at various stages of the manufacture, and the application at one stage of the condition of the beer, instead of another, would seem not to involve anything more than a mere mechanical change, which could be employed by any one skilled in the art.

If we assume that the invention of a process always authorizes a patent, irrespective of the means by which the result is produced, it would seem to be attended with very important and far-reaching consequences, and to involve substantially a monopoly of the principle, or of the discovery of a new scientific fact; and in this way we would impair, if not destroy, the effect given by the supreme court to the various rules which have been heretofore referred to as established by that court, one of which has always been held to be firmly fixed; namely, that a person should only have a patent for the means by which the result is produced, and not for the result itself.

It follows, therefore, from what has been said, that the claims of the plaintiff for a particular process, irrespective of the means by which that process has been reached, cannot be sustained; and that the effort made to enlarge the construction of the patent law so as to cover any means which may be used in the process of the manufacture of beer—namely, by the methods which have been heretofore substantially employed—cannot succeed, it being a process well known before. A person could only have a patent for that by which the process was improved or cheapened; and it cannot be successfully claimed, I think, that the defendants have used the various mechanical devices which are set forth in the specifications. It is not necessary to declare in this case that those devices, taken in the aggregate, might not be the subject of a patent as mechanical devices.

The result is, the plaintiff's case fails on both grounds on which it is put: *First*, as a patent for a process, as described and claimed; and, *secondly*, for an infringement of the mechanical devices of the patent.

The bill must be dismissed.

GOMILA and others v. CULLIFORD and another.¹

(District Court, E. D. Louisiana. June 4, 1884.)

1. ADMIRALTY—LIABILITY OF CLAIMANTS—ADMIRALTY RULE, No. 2.

Where two parties appear and claim to be the owners of a vessel arrested under an admiralty warrant of arrest, containing the attachment clause, according to admiralty rule No. 2, and give a joint bond for her release, one of them cannot avoid liability by afterwards pleading that he was not an owner.

2. SAME—CONTRACTS.

When a contract is silent as to time of performance, and performance is tendered, without reservation, which is admitted to be defective, and the obligee acts irreparably upon such admitted non-performance, the contract is violated and damages result.

3. SAME—CHARTER-PARTY.

Where, under a contract of charter-party to furnish a vessel of a certain capacity, a vessel is tendered which, after loading, is admitted to be of less than the guarantied capacity and is declined and the charterer suffers loss, he is entitled to recover damages.

¹ Reported by Joseph P. Hornor, Esq., of the New Orleans bar.

In Admiralty.

J. Ward Gurley, Jr., John D. Rouse, and Wm. Grant, for libelants.
James McConnell and James R. Beckwith, for respondents.

BILLINGS, J. This is an action for damages for the breach of a charter-party, brought by the charterers against the owners. On June 19, 1883, Gomila & Co., the libelants, chartered the steamer *Deronda*. The charterers were to load the vessel. She was guaranteed to carry not less than 10,000 quarters of corn, of 480 pounds. The loading was commenced on June 28th. On June 30th the vessel was declared by the inspectors to be full. She then contained 9,635 quarters, *i. e.*, 365 quarters less than the guaranteed quantity. Upon the communication of this fact to the libelants, and by them to the parties with whom they had a contract to fill which the charter of the *Deronda* was entered into, they refused to accept of the delivery of the amount of 9,635 quarters, their contract being for not less than 10,000 quarters, and not more than 12,000 quarters. A settlement was made with these purchasers by libelants by the payment of some \$3,100. Negotiations were entered into between libelants and respondents—*First*, to have the respondents take the cargo at the price at which the libelants had contracted to sell, and afterwards to adjust the damages by fixing the value of the grain laden by what could be obtained by offer at private sale from other European parties, and no agreement as to the damages could be effected. Corn had declined, and after advertising the sale in the two leading morning New Orleans newspapers, in one for five days and in the other for three days, and in one of the evening newspapers for three days, the cargo was, on July 7th, sold at public auction by an auctioneer at a price which would be ——— per quarter. On the sixth of July De Wolf & Hammond, as agents of the owners of the *Deronda*, protested against the sale at auction as advertised, both to the libelants and their purchasers, E. Forestier & Co., through a notary public, and with the two witnesses required by the statute of the state of Louisiana. On the following day, July 7th, through the same formality, the captain of the *Deronda* and De Wolf & Hammond, agents, in behalf of the owners, gave a notice both to the libelants, as charterers, and E. Forestier & Co., transferees, that the said vessel would on that day, at 10 o'clock A. M., be ready to receive "the balance of the said cargo as per charter-party." On July 13th, the sale at auction having taken place and the remainder of the cargo having been furnished by the purchasers at the auction sale, the *Deronda* received the remaining 367 quarters, making the quantity guaranteed, namely, 10,000 quarters, her coal bunks having meanwhile been taken out and other space having been furnished by the representatives of the vessel; and with the cargo she sailed to the port of delivery mentioned in the charter-party, where she delivered the same.

There are two matters, which relate (1) to the manner in which the action is brought, and (2) to the effect of what was done as to trans-

ferring the charter-party to Forestier & Co., which have been set out fully in the answer of respondents, and have been strongly urged in the argument by their proctors, which I will now consider.

1. It is urged that the real and sole owner of the *Deronda* was Mr. Culliford, one of the defendants' firm, and not Culliford & Clark, against whom jointly this suit is brought. It is not necessary to consider what effect should be given to such a defense presented in an answer where it appears that the suit was commenced and jurisdiction acquired by a seizure of the *Deronda* under a warrant of arrest containing the attachment clause according to admiralty rule No. 2, and that the attachment was dissolved by the defendants appearing in the cause and giving their joint bond or stipulation, and filing their joint answer upon the merits, pleading performance of an alleged contract. If the defense could be allowed to avail at all, it would be only to cause judgment to go against the defendant Culliford alone. But upon the merits I think the court must find against both defendants, upon the ground that they held themselves out as owners for the purpose of making this charter-party, and as owners subsequently ratified the charter made by De Wolf & Hammond as agents of the owners. See telegram A 17 from Culliford to his firm, dated June 18, 1882, and letter from Culliford & Clark to Hammond, June 19th, and letters from defendants to plaintiffs, dated June 28d, and marked A No. 20 and A No. 21. It does not appear how the vessel was connected with defendants' business, but the whole evidence with reference to the transaction shows that the charter-party was executed by De Wolf & Hammond as agents for, and for the benefit of and under the direction of, the defendant's firm as owners. As in case of a question as to liability as a partner, the holding out may create the liability independently of the fact of ownership. It operates as an estoppel. The holding out of themselves as owners by Culliford & Clark is abundantly established.

2. As to the transfer there is no conflict in the testimony. The charter-party was executed to the libelants, who were willing to substitute E. Forestier & Co. in case the guaranty was complied with, but who objected to any such substitution before it was ascertained whether the guaranty would be fulfilled. De Wolf and the representative of Forestier & Co. made the cancellation. It is agreed to by all that Gomila never assented to it. It was possible in law and necessary for Gomila & Co. to retain their contract rights as charterers, with the defendants, of the *Deronda*, while they also designated her as the vessel which should receive the 10,000 quarters of grain from E. Forestier & Co. under the contract of June 7th, (marked "Bengston No. 1.") The market had fallen, and they must place themselves in such a position that they could fulfill the contract with Forestier and still hold the defendants to their guaranty. Had this obligation of guaranty been transferred to Forestier & Co., upon the default under it Gomila & Co. might have lost the sale of the 10,-

000 quarters of grain at 28s. 3d. The motive for Gomila & Co. not consenting to cancel is manifest, and the testimony of both Gomila and Bengston and Forestier is concurrent that they did not consent. Indeed, the protests made by the defendants through their captain and agents, two upon July 6th and one upon July 7th, marked "B, Nos. 2, 3, and 4," are inconsistent with the idea that the original charter-party had been canceled and another substituted in its stead. Gomila & Co. are, in those documents, treated as retaining their rights under the charter-party, with a designation of Forestier & Co. as parties who, under them, were to accept a fulfillment of the contract of purchase from them by means of it. There is but one charter-party referred to, and the firm of Forestier & Co. are spoken of as "transferees." So, too, the negotiation and correspondence and telegrams, as to an adjustment of the loss after the vessel was thought to be fully loaded, recognize Gomila & Co., the charterers, as being the persons who still hold all their rights under the guaranty. Indeed, all the evidence confirms Gomila and Bengston, and the so-called cancellation was effected without the assent, and with the expressed dissent, of Gomila & Co., and therefore their rights under the charter-party and guaranty have not been annulled, and remain in full force.

Upon the merits, the first question to be considered is, was there a breach in the undertaking of the owners whereby they guarantied that the *Deronda* would carry 10,000 quarters of grain?

It has been urged with great force that inasmuch as the representatives of the owners of the *Deronda* knew that the charter-party was entered into by Gomila & Co., the libelants, in order to carry out their contract to furnish a shipment in the month of June, this fact should control or influence the interpretation of the charter-party as to the time of performance. On the other hand, the respondents, with equal earnestness, urge that when a contract is silent as to the time of performance, the only qualification or limitation which the law will infer or supply is that the time of performance shall be reasonable. It is possible that these two propositions might, as applied to this case, be harmonious, for in determining what was reasonable, regard must be had not alone to the subject-matter of the contract, but the extrinsic circumstances, and among these would be the known object of the contract, and I think that the inquiry as to the exact carrying capacity of the *Deronda*, the insertion into the contract of the guaranty on that subject, and the negotiation as to the time of the commencement of the loading and the manner in which it was to be done, conclusively establish that the charter-party was avowed by the charterers and recognized by the agents of the owners as being the means of fulfilling a prior contract. In order to reach a decision of the case it is not necessary to consider the question of interpretation as a separate inquiry, but rather to apply the established facts to the matter of attempted performance, and admitted inability to perform. There

can be no doubt but that if it appears that after an attempt to load the *Deronda* with 10,000 quarters of grain, in accordance with the guaranty, the owners admitted, without reservation, their ability to place in her no more than 9,635 quarters, and notified Gomila & Co. of that fact; that in consequence of such unreserved admission and notification Gomila & Co. were induced to abandon their sale to E. Forestier & Co., thereby retaining on their hands the grain, with the market price so conditioned that a heavy loss ensued,—it would not be possible for the owners afterwards to revive the charter-party, except upon the condition of being responsible for such loss. This is just what the evidence shows. And the principle of law which is to be controlling is not one exclusively of interpretation, but that when a contract is silent as to time of performance, and performance is tendered without reservation, which is admitted to be defective, and the obligee acts irreparably upon such admitted non-performance, the contract is violated and damages result.

This is well settled as the law of Louisiana. The reason given by the court in numerous cases is that a putting in default would have been a vain thing. In *Cable v. Leeds*, 6 La. Ann. 293, the court held that where a merchant agrees to make and deliver a piece of machinery as soon as possible, and actually does deliver the machinery, but so defective that it will not answer the purpose intended, "he put himself into an irretrievable default, which superseded the necessity of being put into default by the other party." The same question is dealt with in *Knight v. Heinnnes*, 9 Rob. 377, where the court says, (p. 379,) the defendant's acknowledged inability to comply with his contract, rendered it unnecessary for the plaintiff to put him regularly in default. See, also, *Nicholson v. Desobry*, 14 La. Ann. 81.

As to whether, in point of fact, there was this acknowledged inability to load the stipulated amount of grain, I shall derive the evidence from the correspondence and telegrams which passed between the defendants and their agents.

On June 30th the agents of the defendants telegraphed to the defendants as follows:

"June 30th. To *Culliford & Clark, Sunderland*: *Deronda* loaded; carries 9,635 quarters. Cargo sold, not less than ten thousand quarters. Copenhagen, twenty-eight, three; present value, twenty-five. Buyers refuse acceptance, as cargo falls short. Charterers hold ship responsible. Advise.
[Signed] "DE WOLF & HAMMOND."

Under date of July 5th, the defendants having answered by telegram, also replied by letter, as follows:

"A No. 22.

"(Copy.)

SUNDERLAND, 5th July, 1883.

"*Messrs. De Wolf & Hammond, New Orleans*—DEAR SIR: We received your cable on Sunday, informing us that the *Deronda* had loaded 9,635 quarters, and the cargo sold not less than 10,000 quarters @ 28s. 8d.; present value 25s.; buyers refuse acceptance, as cargo falls short; charterers hold ship

responsible. In reply to this, we cabled at once for you to compromise the claim and pay the difference of 3s. 3d. per quarter, as between the quantity stated to be shipped and the 10,000 quarters. We were astonished on Tuesday to find, on receipt of your cable, "charterers trying to resell cargo," that you had evidently misconstrued the purport of our message; but how this could be done by any sane person into meaning that we were willing to pay the difference of 3s. 3d. per quarter upon the whole cargo we are at a loss to understand, and can only come to the conclusion that such a meaning of our cable has been construed purposely. How a business man, supposed so be acting on behalf of an owner, could think that, when a difficulty like the present arose, he (the owner) should right off agree to give up more than half his total freight on such a voyage, is too much even for any stretch of imagination, and if our interests can only be protected in the way you have managed this business, the less we place in your hands the better. In the beginning of the negotiations for the charter of this ship there was a considerable mull, at which we expressed ourselves pretty strongly to your Mr. Hammond when in Liverpool, and when you offered us this freight we accepted it, subject to the captain being satisfied he could carry the requisite quantity, and your cable of the nineteenth ult. distinctly told us she could carry about 10,000 quarters, from which we concluded you had consulted with the captain; in fact, his letter informs us you had seen him with our cable; but we must call your attention to the fact that in the same cable you informed us about 10,000 quarters, and how you could insert in the charter not less than 10,000 quarters, we are at a loss to comprehend.

"While writing, your reply has come that you were consulting McConnell and trying to arrange, but no mention about the ship's sailing; we therefore cabled you why the delay to give bail and get the ship away. We are at a loss to understand why the ship should be detained during these negotiations. The whole business is sickening. If you had understood your business at all you would have dispatched and settled the question after she had left; but how you have allowed the charterer to detain the ship in the way he has done we have yet to learn; but we certainly can come to no other conclusion than that you have grossly neglected our interest. Yours, truly,

"CULLIFORD & CLARK."

Under date of August 13th the defendants give a *resume* of the events attending the tender of the vessel, as follows:

"A No. 25.

"SUNDERLAND, 13th August, 1883.

"Messrs. De Wolf & Hammond, New Orleans:

'DERONDA.'

"DEAR SIRS: Your letters regarding this wretched business have all been received and well noted, but, we regret to say, they do not much alter our opinion of the manner in which this case has been handled by you. The captain's protest, although probably correct, is about as weak a document as we ever read, unless your object was to disclose our hand, and so strengthen that of the parties taking the action against the ship. Will you tell us why you and the captain rushed away to Gomila as soon as it was found the ship had not taken the guarantied quantity? What other position could you possibly expect him to take than holding the ship responsible for a breach of the charter? Both you and the captain knew the ship was guarantied to carry 10,000 quarters, and also knew there was no guaranty as to the time of shipment. With these two facts will you tell us why the ship was allowed to be so hurriedly loaded, and why it did not dawn upon you at once to take bunkers out, (which should never have been put in?) In running away to Gomila

you really played into his hands. If our captain was not competent for such a matter as this we would have thought ordinary common sense would have told you that care must be taken to get the guarantied quantity into the ship, and, to do this, how did you proceed actually, with the doubt in your minds about the ship carrying the quantity? You allow her to coal for Sydney; ordinary caution for our interest should have prevented this, and told you the ship must coal for Newport News."

This correspondence, coming from the defendants themselves, shows that it was admitted that the vessel could only carry 9,635 quarters, when that amount had been placed on board, and that, as having that limit in her capacity, she was without reservation tendered to the plaintiffs under the charter-party. These facts bring the case within the principle of the cases above cited, and establish a violation of the guaranty of the defendants that the *Deronda* would carry 10,000 quarters of grain.

The remaining question is as to the amount of recoverable damages which have been shown. The amount of damages would be the difference between the contract price and the market price, June 30th, the date of the defendants' admission of their inability to perform the contract, whereby the plaintiffs lost their opportunity of selling to Forestier & Co. The corn was laden on board, and the quantity was so great that it would be difficult to find a purchaser except in connection with the charter-party. Of course, the auction price is evidence of value. Where the thing could naturally be bought and sold at auction, the price is high evidence of value. Considering the peculiar situation of this property,—10,000 quarters of grain, laden on board a vessel,—and the increased price which it was reasonably possible the grain would bring if sold in connection with the charter-party, I think, as *gestor negotiorum*, the libellant was justified in incurring the expense of an advertisement and attempted sale at auction; though I think he was not justified in permitting a sale at lower terms than the evidence shows were the ruling terms. The difference between the contract price and the market price appears clearly in the telegram of De Wolf & Hammond to the defendants, dated June 30th, which is translated and fully assented to in the reply by letter of defendants, under date of July 5th. They say the price of cargo, 28s. 3d., present value 25s., making a difference of 3s. 3d. per quarter. To this must be added 3d. per quarter, the difference between the allowed freight (which, if diminished, was to be for account of seller) in the contract of sale with Forestier, and the rate fixed by the charter-party,—6s. and 5s. 9d.,—in all 3s. 6d. per quarter, which would make the loss \$8,426.25. To this should be added the charges which were paid the auctioneer for advertisement and fees, \$934.72, making a total of \$9,360.97, for which amount, with interest from June 30, 1883, libellants must have judgment.

THE MARY IDA.

THE MAGGIE BURKE.

*(District Court, S. D. Alabama. June, 1884.)***1. ADMIRALTY—COLLISION—BURDEN OF PROOF.**

In an action growing out of a collision of vessels consequent upon a failure of one to respond agreeably with the signal of the other, as directed in the navigation laws, (Rev. St. 4405 and 4412,) the burden of proof is on the vessel that fails so to respond to explain the failure satisfactorily to the court.

2. SAME—PARTY COMPLAINING MUST HIMSELF KEEP WITHIN THE LAW.

A vessel cannot evade *all* responsibility for damage given or received in a collision by showing that the other vessel did not respect her signal as the laws require, unless she further shows that she herself, in prudence, afterwards endeavored to avoid the peril imminent by checking her speed and backing water, as directed by the same laws.

3. SAME—APPORTIONMENT OF DAMAGES.

In cross-suits growing out of a collision of vessels, there being proved fault on both sides, damages will be apportioned according to the disparity of fault.

In Admiralty.

G. B. Clock and *G. M. Duskin*, for libelants.

I. L. & G. L. Smith, for respondents.

BRUCE, J. These cases are, by agreement, heard together. On the night of the nineteenth day of January, 1884, between 10 and 11 o'clock, the *Mary Ida*, a steam tow-boat, with three barges in tow, J. W. McDowell master and pilot on watch, while descending the Mobile river at a point about a mile and a half below Chestang's bluff, collided with the steamer *Maggie Burke*, ascending the river on one of her regular trips, with freight and passengers, James D. Vick being the pilot on duty at the time. The result of the collision was the sinking of the steam-boat *Mary Ida*, in some 56 feet of water, with her freight on board at the time, consisting of a lot of cotton-seed and a small lot of hard wood.

The owners of the *Mary Ida*, Robinson & McMillan, bring this suit, and libel the steamer *Maggie Burke*, alleging and charging that the collision and the resulting loss of the boat *Mary Ida* and her freight was caused by the negligence, want of skill, recklessness, and improper conduct of the officers and persons in control of the *Maggie Burke* at the time, and that it was without fault on the part of the officers and crew of the *Mary Ida*.

The cross-libel of the owners of the *Maggie Burke* allege and charge that the collision and consequent loss of the *Ida* and freight resulted also in large damage to the *Burke*, and was brought about solely and exclusively by the fault, negligence, and unskillfulness of the officers and crew of the *Mary Ida*, particularly by the fault, negligence, and unskillfulness of her pilot, J. W. McDowell, and without any fault whatever on the part of the officers and crew of the *Burke*. These libels are both answered by the respective parties respondent, and the question for solution and decision, upon which a large mass of

testimony has been taken, is, who was at fault, if any one, and at whose door does the responsibility for this collision and consequent loss lie?

That the collision was brought about by the fault of one or both of the colliding vessels seems to be clear, for the portion of the river in which the collision occurred is, by the testimony, neither difficult or dangerous for navigation, and the testimony discloses no reason for the conclusion that this collision was the result of circumstances beyond the control of skillful and careful navigators. The night was neither dark nor stormy. Some of the witnesses testified it was a gray night, others say it was star-light, a little windy, and the wind from the north. Assuming, then, that the collision was brought about by the negligence or unskillfulness of the officers charged with the navigation of one or both of these vessels, we proceed now, from the law and the facts in proof in the case, to ascertain where the fault lay, and so fix the responsibility for the loss resulting from the collision.

In this inquiry, attention must be given to the rules and regulations for the government of pilots of steamers navigating the rivers flowing into the Gulf of Mexico and their tributaries, adopted by the board of supervising inspectors, under the authority of sections 4405 and 4412 of the Revised Statutes of the United States. The authority of these rules is not questioned, but the counsel for the respondents denominate these rules supplemental rules, and call attention to the rules established by acts of congress set forth in section 433, c. 5, of the Revised Statutes, which provides that "the following rules for preventing collisions on the water shall be followed in the navigation of vessels of the navy, and of the mercantile marine of the United States." An examination of these rules, however, shows that they are primarily for the government of sea-going vessels, and they are little applicable to steamers navigating rivers whose waters flow into the Gulf of Mexico.

The rules and regulations first mentioned above were adopted by the board of United States inspectors of steam-vessels June, 1871, amended January, 1875, February, 1880, and 1883, and approved March 10, 1883, by the secretary of the treasury, so that they were in force on the nineteenth day of January last, when this collision occurred, and were the paramount rules for the government of the pilots on these two colliding vessels.

Rule 1 provides: Where steamers are approaching each other from opposite directions, the signals for passing shall be one blast of the steam-whistle to pass to the right, and two blasts of the steam-whistle to pass to the left. The pilot on the ascending steamer shall be the first to indicate the side on which he desires to pass; but if the pilot on the descending steamer shall deem it dangerous to take the side indicated by the pilot of the ascending steamer, he shall at once indicate with his steam-whistle the side on which he desires to pass, and the pilot on the ascending steamer shall govern himself accord-

ingly, the descending steamer being deemed to have the right of way. But in no case shall pilots on steamers attempt to pass each other until there has been a thorough understanding as to the side each steamer shall take; the signals for passing must be made, answered, and understood before the steamers have arrived at a distance of 800 yards of each other.

The *Ida*, the descending steamer, J. W. McDowell pilot on duty at the time, when at a point below Chestang's bluff, saw the *Burke* ascending the river, and blew two blasts of her whistle, indicating her purpose to pass to the left, that is, on the east side of the river. The steamer *Burke* responded, but whether promptly, as was her duty, or not, is a point on which there is much conflict of testimony, and her response was one whistle, which indicated that she did not accept the signal of the *Ida* for the east side of the river. The *Ida* blew two whistles again, and the *Burke* again responded with one whistle, and in a very short time the vessels collided, with the result before stated.

Between Seymour's bluff and Chestang's bluff the distance is about three miles, and in which distance there are two bends of the river, and at a point on the west bank, nearly opposite the point of collision, there is a point covered with trees extending a short distance out into the river, but not far enough to change the current in the river, and is for that reason called by river men a false point. The *Burke* came up the river in the usual place where it is navigated by ascending steamers, and below that point hugging the west shore, and was, consequently, under the false point, which obstructed the view, and this was doubtless the reason why the boats approached so near to each other before signals were exchanged as soon as required by the rule cited heretofore. The *Burke*, however, did not accept the signal of the *Ida*, but blew a cross-whistle, and thus refusing to govern herself according to the signal of the *Ida*, the burden is on her to show good reason for her failure or refusal to comply with the terms of the rule. The reason given is that she was crossing from the point on the west bank of the river to the point on the east bank, and thus was complying with a rule and custom in the navigation of the river; that is, that ascending boats run the points to evade as much as possible the force of the current, while descending boats follow the current in the middle of the river around the bends; that after she, the *Burke*, had started on her crossing she could not change her course and pass the *Ida* on the west side of the river, and that an effort to have done so would have increased the danger and hazard of a collision; that the *Ida* was approaching her in such position in the river that an effort on her part to change her course and pass on the west side of the river would have resulted in the *Ida* striking her on the starboard side; whereas, if, when the boats were approaching each other end on, each had ported her helm, as required by rule 16, § 4233, of the Revised Statutes, the *Ida* would have passed under the stern of the *Burke*, on the west side of her, and a collision been avoided.

This defense rests upon the fact, if it be a fact, that at the first signal of the *Ida* the steamers were so close together and the danger so imminent that the officers of the *Burke* cannot be held to a strict compliance with the rule.

It is therefore important to inquire how near the steamers were when the *Ida* blew her first two whistles for the east side of the river, where she was in the river when she blew, and where the *Burke* was in the river at that time; and upon these two points there is much discrepancy and uncertainty in the testimony. The testimony as to where the *Ida* was when she blew her first signal is by some of the witnesses that she was well up to the east bank, others the middle of the river, and others that she was on the west side of the river, out in the cove or bend of the river. The weight of the evidence is, and I so find the fact to be, that she was between the center and eastern bank of the river when she signalled the *Burke*, at considerable distance above the point of collision, to estimate which would be very difficult. At this time, that is, at the first signal of the *Ida*, where was the *Burke*? Capt. Finnegan testifies that he was on deck at the time. He thinks the *Burke* was at the time pretty well on the crossing, and the steamers were 150 to 200 yards apart, but he says it was a very hard thing to estimate. James D. Vick, pilot at the time, says: "I had just started on my crossing; did not see the *Ida* when she first blew, on account of the smoke, but saw her very soon." And he does not make a very clear statement of the matter, but estimates the distance at from 150 to 200 yards. Benham, the mate on the *Burke*, says: "When I heard the signal of the *Ida*, the *Burke* was coming around the port point, western shore; was quite up to make the crossing from the west to the east shore; was on the crossing; and had gone the length of the boat out from the shore; that by the time the *Ida* blew her second two whistles the *Burke* was in the middle of the river." McDowell testifies that he blew his first two whistles when he saw the smoke of the *Burke* above the trees on the point below him; that the *Burke* was then eight or nine hundred yards from him. And he is sustained by the witness Dan Williams, who was on board the *Ida*; heard the whistle of the *Ida*; went into the pilot-house some seconds afterwards, and estimates the distance between the boats, after he arrived in the pilot-house, at 450 yards. McDowell testifies that it was from one-half to one minute before the *Burke* responded to his signal, and he is sustained in that by Williams and other witnesses, though Capt. Finnegan and others testify the response of the *Burke* was given immediately.

It is difficult to say from the testimony how far the boats were apart at the first signal of the *Ida*; but the river at the point of collision—which is its narrowest point in that vicinity—is 528 feet wide, and the *Ida*, coming down from above, between the middle and east bank of the river, and the *Burke* ascending and commencing her crossing, they must have been considerable distance apart; and the estimate of 150

to 450 feet is much more likely to have been the distance between the boats at the second two blasts of the *Ida* than at the first; and an error of this kind, under the circumstances, is no reflection upon the truthfulness of the witnesses. This distance being difficult of determination, the testimony of the witnesses called as experts in the navigation of the river could not, in the nature of things, be very definite for the conduct of the officers of both boats, particularly that of the *Burke*, depended largely upon the distance she was from the descending boat when she first became aware of her presence. If the *Burke* had entered upon or was upon her crossing at the first signal of the *Ida*, and could not with safety have changed her course and passed on the west side of the *Ida*, still, what is there in the face of the signals of the *Ida* to justify the *Burke* in cross-whistles and persistence in her course? Why did she not stop and back her engines? She was the ascending steamer, and could more readily check her speed than the steamer descending with the current. This would seem to be the dictate of common prudence, and, if she could not accept the signals of the *Ida*, then the rule No. 2 prescribed the means that shall be used to avoid collisions. It provides:

"If, for any cause, the signals for passing are not made at the proper time, as provided in rule 1, or should the signals be given and not properly understood, from any cause whatever, and either boat become imperiled thereby, the pilot on either steamer may be the first to sound the alarm or danger signal, * * * when the engines of both steamers must be stopped and backed until their headway has been fully checked."

The point of the collision was well up to the eastern bank of the river; some of the witnesses say within 20 feet of it. The bow of the *Burke* struck the *Ida* on the starboard side, forward of the wheel-house, at an angle between the bows of the boats of less than a right angle, and the *Ida* swung around on the left of the *Burke*, her bows behind her making a circle in the river, and in a few minutes the *Ida*, probably by the force of her bows, passed to the rear of the *Burke* out into the river for a short distance and sunk. So that the boats must have come together with considerable force in order to have produced such a result, and the bow of the *Burke* was seriously damaged by the collision; and it is perhaps saying no more than the evidence shows that the *Burke*, with her freight and passengers, was saved from more serious disaster by the vigorous and skillful conduct of her officers.

Conceding that at the second two blasts of the *Ida* it was then too late for the *Burke* to change her course and go to the westward of the *Ida*, without imminent danger of exposing her starboard side to the *Ida* in such manner as to endanger her and the lives of her passengers on board, still the question remains, why did she not stop and back instead of persisting in her course? The witness Walker, engineer on the *Burke*, on duty at the time, when asked what his engines were doing at the time of the collision, says: "*I think they were*

backing." And in reply to the direct question, "Was the Burke backing at the time?" he says: "I gave her steam before she struck; I suppose she was backing." The most that can be said of this is that her engines had commenced backing at the instant or just before the collision.

My conclusion on this point is that although at the first signal of the *Ida* the *Burke* rang a slow bell, that at the time of the collision her heading had not been fully checked, and that she did not comply with rule No. 2 in that behalf.

There is a great deal of testimony to show that the *Burke*, just before and at the time of the collision, was just where she ought to have been by the customary course of navigation of the river at that point; that she was making her crossing in the usual place and in the usual manner; and the conclusion seems to be deduced from that that she was therefore not at fault. This conclusion, however, rests upon the assumption that the appearance of the descending steamer *Ida*, and her signal to pass on the left side of the river, made no change in the navigation of the *Burke* necessary. This view of the subject, however, is in conflict with a just and fair application of rules Nos. 1 and 2, *supra*, and I find that on the occasion in question the *Burke* violated both of those rules, and that such violation of the rules was the proximate and immediate cause of the collision.

A question, however, remains, which is, whether the fault of the *Burke* was the sole cause of the collision, or whether the *Ida* was also at fault? There are many points made against the *Ida*. It is said she was towing barges in her rear, and in a manner that the custom and usage of the navigation of the river forbid; that it interfered with her ability to back in the face of danger, and therefore she was at fault. It is claimed that she should have laid up at night, especially when her officers knew that on Saturday, as that was, she would meet the regular packets ascending the river. It is also claimed that she was not properly manned; that one and the same person was acting as master and pilot at the same time; but these points are not well taken, and I do not stop to discuss them.

It is claimed that the pilot of the *Ida* was at fault because he did not pursue the usual course in coming down the river; that is, following the current and pass close under the false point, and that had he done so a collision would have been avoided. True it is, he must be held to have known the river and the mode of navigating it. And it may be conceded that he had no right, doggedly, as the counsel say, to insist upon his right of way and insist upon the rule when it would have been the part of good judgment to waive it, still the rule was on his side, and the *Burke* seems to have insisted upon her usual course in violation of the rule, and in defiance of the signal of the *Ida*. Rule No. 2, *supra*, was as much binding upon the *Ida* as upon the *Burke*, and McDowell says he did not stop her engines until after the second cross-blow of the *Burke*. The *Ida* was coming down the river, and

the current added to her speed, and though she had a right to assume that the Burke would accept her signal, yet when that was not done, and a misunderstanding arose, the dictate of prudence, as well as the terms of the rule, required that every effort should be made to stop the headway of his boat.

In connection with this point may be considered the failure of the *Ida* to answer the cautionary whistle of the Burke, which she blew just after she passed the steamer *Alabama*, which had stopped at Seymour's bluff. McDowell says he heard the whistle when he was in the reach above Chestang's bluff, but he says he did not respond because he thought if he did the ascending boat would take his signal as indicating a purpose on his part to pass on the west side of the river, when his purpose was to pass on the east or left side of the river. The boats must have been some three miles apart at that time, and the reason given scarcely seems satisfactory. It may not be clear that the failure of McDowell to respond to the cautionary whistle of the Burke contributed in a direct way to the collision, but he was thereby advised of the approach of the ascending steamer, and aware also of the usual manner in which the river was navigated at that point, and should therefore have sooner stopped the headway of his boat, especially after he found his signal was not accepted by the Burke.

I find, however, that there was a great disparity of fault, and that the burden of it lies with the Burke, as we have already seen, and the loss is apportioned in the ratio of one-fourth against the *Ida* and three-fourths against the Burke.

The decree is therefore for the libelants, Robinson & McMillan, against the Burke, her tackle, etc., for the sum of \$7,023.95, and the costs in both cases are divided in the same proportion.

THE CRAIGALLION.

(*District Court, D. Maryland. May 20, 1884.*)

SHIPPING—CHARTER—PARTY—DAMAGE TO CARGO—LIABILITY OF OWNERS.

A steam-ship was chartered at a certain hire per month, the owners to appoint and pay the master, officers, and crew, and the charterers to direct what voyages the ship should make, and pay for the coals. The charterers sent the ship to Kingston, Jamaica, to bring back a cargo of green bananas to a port in the United States, and instructed the captain to pay attention to the temperature, and close the hatches whenever the thermometer fell to 50 deg. Fahrenheit, or else the fruit would become chilled and injured. This instruction was neglected, and the fruit was chilled and injured in consequence of the neglect to close the hatches. *Held*, that the master and crew were servants of the owners for the purpose of navigating the vessel, and that, as it was part of the duty of those in charge of the navigation to take usual and proper care of the cargo, the owners were liable to the charterers for the damage.

In Admiralty

John H. Thomas, for Henry Bros.

A. Stirling, Jr., for steam-ship.

MORRIS, J. The British steam-ship *Craigallion*, of 978 tons gross register, was, by charter-party dated September 12, 1883, chartered by the owners to Messrs. Henry Bros. & Co., of Baltimore, importers of fruit, to be placed at their disposal on arrival at New York; she to be then tight, staunch, and every way fitted for the service, with a full complement of officers, seamen, engineers, and firemen for a vessel of her tonnage; the vessel to be employed by the charterers in carrying lawful merchandise between the United States, the West Indies, and South America. The charterers were to pay for the use and hire of the vessel for two months at the rate of 610 pounds sterling per calendar month, payable monthly in advance, and to have the option of continuing the charter for a further period of 10 months; the hire to commence on the day of delivery, and to continue until redelivery of the vessel in like good order and condition to the owners, fair wear and tear excepted, (unless lost,) at a port in the United States north of Hatteras. The owners were to provide the captain, officers, engineers, firemen, and crew, and to pay their wages and provisions, also the insurance on the vessel, all engine-room stores, and to maintain the steamer in a thoroughly efficient state in hull and machinery during the service. It was agreed that the captain, although appointed by the owners, should be under the orders and direction of the charterers as regards employment, agency, or other arrangements, and charterers agreed to indemnify owners from consequences of captain signing bills of lading, or otherwise complying with the same. The captain was to prosecute his voyage with utmost dispatch, and render all customary assistance with ship's crew and boats. The master was to be furnished by charterers, from time to time, with all requisite instructions and sailing directions, and was to keep a full and correct log of the voyages, which was to be patent to the charterers or their agents. It was agreed that if the charterers should have reason to be dissatisfied with the conduct of the captain, officers, or engineers, the owners should, on receiving the particulars of the complaint, investigate the same, and, if necessary, make a change in the appointments.

The charterers were to have permission to appoint a supercargo to accompany the steamer and see that the voyages were prosecuted with utmost dispatch. All derelicts and salvage to be for owners' and charterers' equal benefit. In case of loss of time from deficiency of men or stores, break-down of machinery, or damage, preventing the working of the vessel for more than 48 hours, the payment of hire to cease until steamer should be again in an efficient state to resume her service; but, if steamer was driven into port or anchorage by stress of weather or from accident to cargo, the detention was to be at charterers' risk and expense. In case vessel was lost, freight paid in advance and not earned to date of loss to be returned. Charterers

were to have at their disposal the whole reach of the vessel's holds, decks, and usual places of loading, (not being more than she could reasonably stow and carry,) reserving proper space for officers, crew, tackle, stores, fuel, etc. The charterers agreed to pay for all coals, port charges, pilotages, agencies, and other charges except such as owners had agreed to pay. The owners were to have a lien upon all cargoes and all subfreights for any amounts due them, and the charterers to have a lien on the ship for all moneys paid in advance and not earned.

Under this charter-party the steamer was placed at charterer's disposal in New York on the nineteenth of September, 1882, and under their direction took on a cargo of locomotive machinery and delivered it at Aspinwall. Thence she went to several ports in Jamaica, taking in cocoa-nuts and oranges, and completed her return cargo at Kingston by taking on board 6,400 bunches of bananas. There was no supercargo put on board, and before leaving New York the charterers explained to the master that the bananas, which he was to bring back as part of the return cargo, would be injured if they became chilled, and instructed him to close the hatches if the temperature at any time on the voyage fell below 50 deg. Fahrenheit. Before the steamer left Kingston the charterers telegraphed their agents there to repeat this instruction to the master, which they did. The steamer arrived at the capes of the Chesapeake about the fifteenth of November. From the time of leaving Kingston until the steamer took a pilot inside Cape Henry the captain himself gave attention to the thermometer, and it stood at 60 outside the capes, but when the pilot took charge, the captain, being sick and suffering from a fever, went below, having given instructions to his first officer to observe the temperature and close the hatches if the thermometer fell below 50 deg. During that night on the Chesapeake bay the temperature fell to 38 deg., and the first officer neglected to have the hatches closed. When the steamer was ready to discharge on the 17th, it was found that the bananas, although otherwise in exceptionally fine condition, had been chilled. This was evidenced to observation by a slight brown discoloration on the green skins where the bananas touched each other, and was proved conclusively by the fact that the bananas did not ripen, but turned black and rotted, becoming so utterly worthless that quantities of them had to be carted outside of the city and thrown away. The actual net loss sustained by the charterers, from this damage to the bananas, was \$7,383.

These are cross-libs, the owners of the ship having sued for the hire of the ship, and the charterers for the damage sustained by the fruit. There is no difficulty whatever as to the facts of the case, and the only question is as to the legal liability. This is a charter by which the ship, fully equipped and manned, is let to hire, and it must be regarded as settled that under such an instrument as the present charter the possession and the responsibility for the naviga-

tion of the ship remains with the owners. *Leary v. U. S.* 14 Wall. 607; *Reed v. U. S.* 11 Wall. 600; Macl. 328; Abb. (12th Ed.) 36. The officers and crew were appointed and paid by the owners, and they were their servants to see to the navigation and direct the motions of the ship; the charterers were only to direct to what places she should go.

The case of *Onoa & Cleland Coal & Iron Co. v. Huntley*, L. R. 2 C. P. Div. 464, (1877,) arose upon a charter in substance identical with the present one. In that case, while upon a voyage, by the negligence of the master and crew, the vessel was stranded and went to pieces, and the cargo was totally lost. It was held that the master and crew were the servants of the owner for the purpose of navigating the vessel, and that he was liable to compensate the charterers for the loss of the cargo sustained by them. Mr. Justice DENMAN, in pronouncing judgment in the common pleas division, said:

"A person who contracts to provide workmen or seamen to perform a specified undertaking is bound to make good any injury which the other party to the contract may sustain from omission to perform their duty in a proper manner. Here, these who were employed by the defendant (the owner) have, by their negligence, inflicted an injury upon the plaintiffs, who are entitled to recover from him compensation for the loss."

Taking this to be the law applicable to such a charter-party, the only question is, was the duty with regard to this cargo of fruit which the master of the ship undertook to perform, and which his subordinates neglected, one of the usual and proper duties to be performed by those in charge of the navigation of the ship, in relation to such a cargo.

It is stated by Abbott, (12th Ed. p. 316, pt. 4, c. 5, § 4:)

"Moreover, the master must, during the voyage, take all possible care of the cargo. If it require to be aired or ventilated, as fruit and some other things do, he must take the usual and proper methods for this purpose."

It is urged that there is no express contract to carry safely, and that there is no breach of any clause of the charter-party, but almost every contract establishes duties which are not specifically mentioned, and the neglect of which gives an action. There was not in this case, it is true, the obligation of a common carrier to carry safely, but surely there was the obligation resting on those in charge of the navigation of the ship to use ordinary care and diligence in the care of the fruit. It was a well-known duty to open the hatches for ventilation, and how can it be contended that it was not equally a duty, and within the usual and necessary scope of their employment, to close the hatches when necessity arose. If the hatches had been negligently left open when the violence of the sea required them to be closed, that duty could not be said to be beyond the usual duties of those charged with the navigation of the ship; and in the present case, having been instructed that a certain and easily observable degree of cold would destroy the value of the bananas, and having un-

taken to give the necessary attention to guard against this danger by a timely closing of the hatches, how can it be said that this was not as much within the duty of protecting the cargo as to close the hatches to keep out the sea.

In *The Regulus*, 18 FED. REP. 380, under a charter-party in which it was provided that the ship should be "in every way fitted for the voyage, and that the hatches were to be taken off, whenever practicable, as usual for the ventilation of green fruit," it was held a breach of the charter for the owner to load the vessel with other cargo so deeply that in rough weather the hatches had to be kept on more than was fit or usual with such cargoes. If, then, it be the law, as I think clearly it is, that the owners were liable for the neglects of the officers and crew in any duty appertaining to the navigation of the ship, and the proper care of a fruit cargo is such a duty, I see no escape from the conclusion that in the present case the ship is liable.

A decree will be entered for the amount of the damage to the bananas, less the freight claimed in the cross-libel.

THE STERLING.

(District Court, D. Connecticut. June 5, 1884.)

1. SALVAGE—RELIEF OF GROUNDING VESSEL AT OWNER'S REQUEST, WITHOUT CONTRACT AS TO COMPENSATION FOR SERVICES.

The service of one in the steam-towing and wrecking business who is sought by the owner of a grounded schooner, and at his request relieves the vessel from its distress after three days' continuous effort, are salvage services, the work being successful, and no contract as to compensation having been made previously to the undertaking it.

2. SAME—LIEN NOT WAIVED THROUGH SALVOR'S INDULGENCE.

Abandonment or waiver of a salvage lien is not to be inferred from the fact of the owner being allowed the possession of the vessel. The mere forbearance of the libellant to distress the claimant, when nobody has been injured by the delay, is not to be considered as a waiver of the lien.

Libel in Rem for Salvage.

David F. Hollister, for libellant.

Morris W. Seymour, for claimant.

SHIPMAN, J. This is a libel *in rem* for salvage. On the night of May 10, 1883, or early in the morning of May 11, 1883, the schooner *Sterling*, of the value of \$1,200, went ashore on a sandy, pebbly beach near Point no Point, in Long Island sound, and about two miles from Bridgeport light-house, and lay parallel with the beach. The owner applied first to the agent of the libellant, who is the owner of steam-towing and wrecking tugs in Bridgeport harbor, and, being by the agent directed to the captain of one of the tugs owned by the libellant, asked him to go down and pull the schooner off, and how much he would charge. The captain said that he guessed he would go, but that he did not know what he would charge. No bargain was made. On the same day the agent of the libellant went with one of

his steam-tugs and tried unsuccessfully to pull the schooner off, and made two more unsuccessful attempts on the same and on the following day. On the third occasion he took also another tug owned by the libellant, and both tugs made the attempt. At this time a hawser of one of the tugs was broken, and her rail was broken, and she was thereby damaged from eight to ten dollars. On the third day one of the tugs went alone, and this fourth attempt was successful, and the schooner was towed within the harbor of Bridgeport. The agent of the libellant went with the tugs on each occasion for the purpose of doing the work. The attempts could only be made at high tide, and the work was, in effect, a continuous undertaking. The schooner was not in immediate peril when the help was furnished, but she was fast aground, and help was indispensable and was greatly wanted by the owner, who was anxious to get her off before a high south wind should drive her further on the beach. On the last day he was afraid that the tug was not coming, and sent for her, and also displayed in the schooner's rigging a signal for a tow-boat. The claimant promptly asked the libellant for his bill, and that it be made as low as could be, because he had had bad luck that season. A bill of \$50 for towing the schooner off the beach was rendered, was approved, and payment was promised. It was, and was considered by the owner to be, a reasonable bill for the service. Payment has been frequently demanded of the claimant, but he had no money, and could not pay. The libellant offered to let the claimant work out the bill, but he was unable to do the work that was wanted. He did, however, make some repairs for the libellant, which were worth \$2.25, and which both parties intended should be applied upon the salvage.

The services were salvage services. The schooner was in distress and must have help; the assistance of the libellant's boats was asked by the owner of the schooner, but the services were not rendered upon an agreement for payment for the use of the tug in any event. There is nothing in the case to show that the services of the libellant's tugs were to be paid for in case of non-success. The success of the service and the distress of the vessel are the ground of the libel.

There has been neither abandonment nor waiver of the lien. It was not lost by permitting the owner to be in possession of the schooner, (*The H. D. Bacon*, Newb. 274; *Cutler v. Rae*, 7 How. 729,) nor by the subsequent conduct of the salvor. Payment has been frequently demanded, and has been promised when the schooner should be sold. The mere forbearance of the libellant to distress the claimant, when nobody has been injured by the delay, is not to be considered as a waiver of the lien. The owner of the schooner appears alone as claimant, and no *bona fide* purchaser seems to have been injured by the delay in bringing the libel. Under the circumstances of the promise and the delay of payment, interest should be allowed from May 16, 1883, to May 31, 1884, from which \$2.25 and interest should be deducted.

Let there be a decree in favor of the libellant for \$50.80, and costs.

SMALL v. NORTHERN PAC. R. CO.

*(Circuit Court, D. Minnesota. June, 1884.)***1. REAL ESTATE—STATUTE OF FRAUDS—PAROL CONTRACT—PART PERFORMANCE.**

The statute of Minnesota providing that contracts as to real estate must be in writing continues: "Nothing in this chapter contained shall be construed to abridge the power of courts of equity to compel the specific performance of agreements in cases of part performance of such agreements." Whenever a parol contract for the sale of real property is shown to be within this exception, a court of equity will not hesitate to enforce and decree specific performance by a conveyance from the vendor.

2. SAME—SPECIFIC PERFORMANCE.

Whenever it appears that a vendee, who is seeking the enforcement of the agreement, has been permitted by the vendor to treat the agreement as binding, and to do positive acts, amounting to part performance, based upon the assumption that the agreement is binding, specific relief will be granted and the vendor compelled to perform his part.

3. SAME—SEPARATE PARCELS OF LAND.

When, under an arrangement between two parties, by which one is to convey land to the other, the payments for the land are not to be applied upon the contracts generally, but always to specific sections or parcels, then, when a payment is made, it is payment in full only to the extent of the land upon which the application is made. And where the lands within the parol contract are of many distinct parcels and each tract separate from all the remainder, and the purchase price is not a gross sum for the whole quantity of land, and all the tracts upon which valuable improvements were made, and all of which possession has been taken, is conveyed to the vendee, equity will not decree a specific performance.

In Equity.

J. M. Shaw, for complainant.

W. P. Clough, for defendant.

NELSON, J. This action was heard before the circuit judge and myself. It was removed from Hennepin county to this court, and the hearing is upon the testimony taken in the case.

This is an action brought by the plaintiff to compel specific performance of a parol contract for the sale of real property by the defendant. There were but two witnesses on the part of the plaintiff. The defendant introduced no testimony, but relied upon the settled equity doctrine to defeat the right of action on the part of the complainant. The facts of the case are these:

That in May, 1880, the plaintiff and the commissioner of the land department of the Northern Pacific Railroad Company entered into a contract by parol for the sale of about 50,000 acres of land; at least, for all the land owned by the railroad company in four government townships in the territory of Dakota, that were granted to the railroad company in its land grant by the general government. A large portion of this land was surveyed into sections and quarter sections, or government subdivisions. The price agreed upon for this land was \$2.50 per acre for all of the land in three of the townships, and \$2.75 for all of the land in the other township. The purchase price stipulated under the contract was that payments should be made in the preferred stock of the company at par, from time to time, as fast as the plaintiff could procure and tender it to the company; and the same should be payment for such portions of the land as the amount of said preferred stock would pay for

at the time of delivery of the stock. The defendant agreed to convey to plaintiff such portions of lands so paid for by said stock, provided the stock should be delivered within a reasonable time. It was also stipulated that the plaintiff should go upon this land and survey it, and make field-notes of such portions of the land as were not subdivided. It was further stipulated that this plaintiff should locate, at a point as near the center of that large tract of land as possible, a town, and that he should erect upon this town-site a hotel of sufficient capacity to accommodate 50 guests; also that he should erect a building for a grocery store, and one for a post-office, and procure a post-office to be established by the proper authorities. He was also to establish a stage-route from this place to some other point, which is immaterial. There is also a provision that there should be a hundred acres broken during the year 1881 on each of five sections of land, with a view of cultivation. Finally it was further stipulated that he should devote all his time to advertising this property, and the locality generally, and should devote his time to the sale of this land in parcels to actual settlers. This is the substance of the parol contract.

The plaintiff procured from time to time preferred stock and tendered it to the company, and as fast as it was tendered he received deeds for the land, until some time in 1881, when all the land had been deeded and paid for, except the land which eight or nine thousand dollars of preferred stock would pay for. He then made a tender of preferred stock to the amount of between eight or nine thousand dollars, but the land commissioner of the company refused to comply any further with the contract, claiming that it could not be enforced, and declined to do anything further in the matter. The plaintiff's evidence shows that he performed all that he alleges in his complaint, and all that he was required to perform. The land commissioner of the Northern Pacific Railroad Company, having refused to receive the eight thousand and odd dollars of stock tendered, and refusing to convey the land, the plaintiff brings this action to enforce the specific performance of the parol contract for the sale of the remaining portion of the land.

The case was very fully and exhaustively argued by plaintiff's counsel, who has gone over all of the authorities bearing upon the question of the specific performance of parol contracts for the sale of real estate, both in England and in this country. He relies to a large extent on the exception in our statute of frauds with reference to parol contracts for the sale of real estate, and claims that the provision of the statute which he cites tends, to a certain extent, to enlarge the doctrine with reference to such contracts.

The land which the plaintiff contracted to buy is not in a continuous solid tract, but is embraced within the odd-numbered sections of the townships described, and forms a portion of the land granted by the United States government to the Northern Pacific Railroad Company. The contract being by parol is invalid under the statute of frauds of the state of Minnesota, unless there has been part performance of the contract by the vendee, which would make it an exception to the statute, and bring it within the rule in equity governing such cases. The statute of Minnesota, after enacting the provision that contracts of this kind must be in writing, provides that "nothing in this chapter contained shall be construed to abridge the powers of courts of equity to compel the specific performance of agreements in cases of part performance of such agreements.".. Whenever a parol

contract for the sale of real property is shown to be within this exception, a court of equity will not hesitate to enforce and decree specific performance for a conveyance from the vendor; and why? The reason given by eminent jurists and text writers is that equity will interpose to prevent a fraud being practiced by one party upon another, and when the enforcement of the statute, which enacts that said contract must be in writing, would permit a vendor to obtain wrongfully something from the vendee, or wrongfully to withhold from him something already obtained without consideration, and in violation of good conscience, a court of equity will interpose and prevent the perpetration of such wrong, and the commission of a fraud. This is the rule which guides courts of equity, and the statute of Minnesota only enunciates that doctrine. Whenever it appears that a vendee who is seeking the enforcement of the agreement has been permitted by the vendor to treat the agreement as binding, and to do positive acts amounting to part performance, based upon the assumption that the agreement is binding, specific relief will be granted, and the vendor compelled to perform on his part. It would be manifest injustice to permit a vendor to escape from his engagement when the vendee has been put in a position which makes it against conscience in the vendor to say, "The contract is not in writing and signed by me, and the statute is a bar to your relief."

Whenever courts have been called upon to enforce parol agreements for the sale of real estate, on the ground of part performance, they have invariably declined to do so, unless the case is clearly within the principles of equity jurisprudence, as above defined. And it is only when the vendee has entered into possession of the property, and made valuable improvements thereon, upon the faith of the contract, that a court will usually enforce and decree specific performance of the contract. The struggle of the courts is to prevent wrong and injustice, and they will not, under such circumstances, permit the vendor to withdraw from the contract. But if the purchase price has been paid without taking possession, this is not generally deemed such a part performance of the parol contract as entitles the purchaser to specific performance. This principle or rule in equity has never been extended, and the statute of frauds held not to apply.

In this case, the lands embraced within the parol contract are of many distinct parcels. They are made up of the odd-numbered sections in four townships, designated by the government land laws. Each section is a tract separate from all the remainder of the land. The price was apportioned to the land by the acre in each township, and distributed between the various tracts. The price was not a gross sum for the whole quantity of land. The plaintiff has had all the land that he paid for, and deeds have been given him for all the tracts, as fast as he furnished the requisite quantity of preferred stock. Under the arrangement with the representative of the defendant company, payments were not applied upon the contract gener-

ally, but always to specific sections or parcels; and when the preferred stock was presented, and a payment made, it was payment in full only to the extent of the land upon which the application was made. All the lands upon which valuable improvements were made, and all of which possession has been taken by the plaintiff, have been conveyed by the defendant. Upon none of the tracts for which the plaintiff made his tender, and now seeks specific conveyance, has he made any improvements; neither has he taken possession of them.

It is urged that as the plaintiff has taken possession of, and made valuable improvements on, and made payments for, and received conveyances of, some of the tracts covered by the parol contract and agreement, that these acts constitute part performance, so as to take the case out of the statute of frauds. If the contract price had been a gross sum for the whole quantity, then, to prevent fraud, the following doctrine, adopted in some instances by courts of equity, might apply: that the possession of one of several tracts forming the subject-matter of a parol contract for the sale of lands will be regarded as sufficient part performance to take such contract of sale out of the statute of frauds, as to the other tracts of which possession has not been taken. In this case no necessity exists for applying such a rule; the exception to the statute does not require it, and we are not willing to enlarge the equity doctrine. No loss is inflicted upon the plaintiff, for he has received deeds for all the lands paid for.

Bill dismissed.

EDWARDS, Trustee, v. DAVENPORT and others.

(Circuit Court, S. D. Iowa. May, 1883.)

1. MORTGAGE—COVENANTS OF WARRANTY—AFTER-ACQUIRED TITLE—MARRIED WOMAN.

A mortgage containing covenants of general warranty will, as between the mortgagor and mortgagee, pass an after-acquired title; but this rule does not apply to covenants in the deed of a married woman, for they amount to nothing more than a release of dower, and do not estop her to claim an after-acquired interest.

2. DEED—MENTAL CAPACITY.

To constitute such unsoundness of mind as should avoid a deed at law, the person executing such deed must be incapable of understanding and acting in the ordinary affairs of life.

3. SUBROGATION—ADVANCES TO PAY LIEN.

A party who advances money to another that is used to discharge a valid pre-existing lien on real estate, if not a mere volunteer, is entitled by subrogation to all the remedies which the original lienholder possessed as against the property.

4. CONTRACT BY INSANE PARTY—NOTICE.

A contract made by an insane person is not merely voidable, but absolutely void; and a contract of surety by such a party will not bind him or his estate, even if the other party to the contract is ignorant of his incapacity and acts in good faith.

5. SAME—VALIDITY OF CONTRACT OF INSANE PARTY.

The decisions of a state supreme court as to the responsibility of a lunatic, or person *non compos mentis*, upon his contracts do not establish a rule relating to land titles within such state which the federal courts should follow, notwithstanding a contrary decision by the United States supreme court.

6. DECISIONS OF STATE COURTS—HOW FAR BINDING ON FEDERAL COURTS.

Where any principle of law establishing a rule of real property has been settled in the state courts, that rule will be applied by the federal courts within the same state; and it makes no difference whether such rule of property grows out of the constitution or statutes of the state, or out of the principles of the common law adapted and applied to such titles.

7. SAME—WHEN A RULE OF PROPERTY.

The decisions of the highest court of a state may be said to constitute a rule of property when they relate to and settle some principle of local law directly applicable to titles.

In Equity.

George L. Davenport and wife and George A. Davenport, their son, executed a mortgage to secure the payment of certain bonds on real estate in the city of Davenport, the debt to be apportioned upon the different pieces mortgaged. Jonathan Edwards, to whom the mortgage had been executed as trustee for the Equitable Trust Company of New London, Connecticut, from whom the money was borrowed, sought to foreclose the mortgage, and defendants claimed that the mortgage was void as to the property of George A. Davenport because he was *non compos mentis* at the time of the execution of the bonds and mortgage. Pending the suit, George A. Davenport died, and a bill of revivor was filed setting up that George L. Davenport and Sarah G. Davenport, the other defendants, were his heirs, and claiming that as they joined in the mortgage their after-acquired title by inheritance from him inured to the benefit of the mortgagees, and that they were estopped from setting up his want of mental capacity.

Brannon & Jayne and *J. Carskaddan*, for complainants.

George E. Hubbell, *Bills & Block*, and *Martin, Murphy & Lynch*, for respondents.

McCRAE, J. Upon the death of George A. Davenport, the title to his real estate included in the mortgage passed to his father and mother, George L. Davenport and Sarah G. Davenport, to each an undivided one-half; and as they both joined in the mortgage and in the covenants of general warranty therein, we are to determine, in the first place, how far either or both are estopped to set up the incapacity of George A. to make the contract sued on.

The title acquired by the respondent George L. Davenport through the death of his son, George A. Davenport, undoubtedly inures to the benefit of the mortgagee by virtue of the covenants embraced in the mortgage.

A mortgage containing covenants of general warranty will, as between the mortgagor and mortgagee, pass an after-acquired title. *Rice v. Kelso*, 7 N. W. Rep. 3; S. C. 10 N. W. Rep. 335; *Jones*, Mortg. §§ 561, 682, 825, and numerous cases cited. But at common

law this rule does not apply to covenants contained in the deed of a married woman. They amount to nothing more than a release of dower, and do not estop her to claim an after-acquired interest. Bishop, Mar. Wom. § 603; *Childs v. McChesney*, 20 Iowa, 431. And the same rule prevails under the statute of Iowa, which provides (Code, § 1937) as follows:

"In cases where either the husband or wife join in a conveyance of real property owned by the other, the husband or wife so joining shall not be bound by the covenants of such conveyance, unless it is expressly so stated on the face thereof."

There is upon the face of the mortgage no express statement that the wife shall be bound by the covenants contained therein. *O'Neil v. Vanderburg*, 25 Iowa, 104; *Thompson v. Merrill*, 10 N. W. Rep. 796.

It follows that, independently of any question as to the mental capacity of George A. Davenport, the complainants are entitled to decree as against all the property embraced in the mortgage and which belonged to George L. Davenport at the time that the mortgage was given, and as to the undivided one-half of that portion which belonged to George A. Davenport.

As to the remaining undivided half of said last-mentioned property, the right of complainant depends upon the determination of the question of the mental capacity of said George A. Davenport at the time that the bonds and mortgage were executed.

It is necessary in the first place to determine what is the test by which the question of the capacity to contract is to be decided. Some of the earlier cases, and a few comparatively recent ones, hold that, in order to set aside a contract upon this ground, it must appear that there was a total deprivation of reason. *Ex parte Barnsley*, 3 Atk. 168; *Stewart's Ex'r v. Lispenard*, 26 Wend. 255. The more modern rule is that it is only necessary to show that the party executing the contract was of such weak and feeble mind as to be incapable of comprehending its nature. The rule is sometimes stated in another form, thus:

"To constitute such unsoundness of mind as should avoid a deed at law, the person executing such deed must be incapable of understanding and acting in the ordinary affairs of life."

This statement of the rule is given in the opinion of the house of lords, in *Ball v. Manning*, 1 Dowl. & C. 254, and is quoted with apparent approval by the supreme court of the United States in *Dexter v. Hall*, 15 Wall. 9. In the former of these cases the court below refused to charge that the unsoundness of mind must amount to idiocy; and this ruling was sustained first by the court of king's bench in Ireland, afterwards by the exchequer chamber, and finally by the house of lords.

The rule is thus stated in *Dennett v. Dennett*, 44 N. H. 531:

"The question, then, in all cases where incapacity to contract from defect of mind is alleged, is not whether the person's mind is impaired, nor if he is

affected by any form of insanity, but whether the powers of his mind have been so far affected by his disease as to render him incapable of transacting business like that in question."

And again:

"Every person is to be deemed of unsound mind who has lost his memory and understanding by old age, sickness, or other accident, so as to render him incapable of transacting his business and of managing his property.

"When it appears that a grantor had not strength of mind and reason to understand the nature and consequences of his act in making a deed, it may be avoided on the ground of insanity." *Re Barker*, 2 Johns. Ch. 232.

In *Converse v. Converse*, 21 Vt. 168, it is said that a person is of unsound mind if "the mind is inert, the memory is unable to recall and the mind to retain in 'one view all the facts upon which the judgment is to be formed for so long a time as may be required for their due consideration."

I am constrained to hold that within the rule established by these authorities, George A. Davenport was not at the time of signing the bonds and mortgage in question of sound mind, or capable of making a valid contract. That he was not totally bereft of reason may be admitted; but that he was incapable of understanding the nature and consequences of his act in executing these instruments is, I think, equally clear. The powers of his mind had been so far affected by disease as to render him incapable of transacting business like that in question.

Without attempting a review of the evidence, an abstract of which covers nearly 900 printed pages, it must suffice to say that it shows that he was attacked by a violent disease when about 7 years of age, which produced convulsions and a state of unconsciousness, lasting several weeks, and which caused a suspension of mental development from that time, and obliterated from his memory all that he had learned at school prior thereto. The family physician who attended him testifies that this sickness left him in a state "comparatively idiotic." A few years later he was attacked with epileptic convulsions, which continued to afflict him and to constantly impair and further weaken his intellect until the day of his death, which occurred in 1881, while an inmate of the insane hospital at Mt. Pleasant, Iowa. At the time of the execution of the instruments in question he had suffered with this malady for about 20 years. The effect of epileptic convulsions is always to impair the intellect, and when it is remembered that, after the illness suffered in childhood, George A. Davenport never possessed at his best anything more than the intellect of a child of 7 years, it is apparent that this long process of impairment must have left him in a state of such imbecility as to render him utterly incapable of understanding the nature and consequences of his act in executing the bonds and mortgage sued upon.

It is in such cases, of course, impossible to fix the exact point where the disposing mind disappears, and incapacity to contract be-

gins; but here all the facts and circumstances, and the decided weight of the direct testimony, show that in the case of George A. Davenport this point had been reached and passed prior to the date of the instruments sued on. His conduct for years prior to the execution of said instruments—in fact, during all the period after his illness in childhood—was that of a mere child, or of a thoroughly imbecile man. He was never permitted to manage or care for his estate. All his business transactions of any importance were conducted by his father. He was often violent, sometimes dangerously so. Some 70 reputable witnesses who knew him well, testify to such habitual conduct and deportment on his part as would seem to demonstrate the want of capacity to contract; and nearly, if not quite, all of them declare that he was incapable of comprehending the nature and character of the contract embodied in the mortgage and notes sued upon in this case.

It follows that the defense interposed by the respondent Sarah G. Davenport, as to the undivided half of the south half of said block 59, must be sustained, except in so far as the money borrowed from the trust company was used to remove valid liens from said property. To the extent of any such liens actually paid off out of said money, the trust company is entitled to relief. The doctrine of subrogation may well be applied to such a case. If the money advanced by the trust company was used to discharge a valid pre-existing lien, to that extent the respondent has been benefited. The trust company was not a mere volunteer; and having discharged a valid lien, it is entitled by subrogation to all the remedies which the original holder of such lien possessed as against the property. *Cottrell's Appeal*, 23 Pa. St. 295; *Mosier's Appeal*, 56 Pa. St. 80.

It is alleged that the money advanced by the trust company was used to discharge (1) certain mortgages to Richardson, Mrs. Hilton, and John Littig; and (2) certain delinquent taxes. As to these mortgages, I find from the evidence that they were executed to secure the payment of debts of George L. Davenport, and that George A. received no benefit from them; and as they cannot be upheld as contracts binding upon him on account of his want of mental capacity, I cannot hold that they constituted valid liens. As to the taxes it is otherwise. They constituted a valid lien, which was removed with funds obtained from complainants. They were paid on the twenty-eighth day of June, 1875, and the sum paid was \$695.10. For one-half of this sum, with 6 per cent. per annum interest from the date of payment, complainant is entitled to decree against the said undivided half of the south half of block 59, the property of respondent Sarah G. Davenport.

Counsel for complainant have exhaustively argued the question whether it is necessary for the respondents to prove that the trust company had notice of the incapacity of George A. Davenport, and they cite numerous authorities to support the affirmative of this

question. Most of them are cases in which the estate of the lunatic has received the benefit of the contract which is assailed; and it is doubtful whether any well-considered case has gone so far as to hold that a contract of suretyship entered into by a person of unsound mind will bind him or his estate, even when the other party to the contract is ignorant of his incapacity and acts in good faith. However this may be, I must hold that the rule in a case like the present is settled, so far as this court is concerned, by the case of *Dexter v. Hall*, *supra*, which decides that such a contract is absolutely void and not merely voidable. In that case the facts were that Hall, while an inmate of a lunatic asylum in Philadelphia, had executed a power of attorney to one Harris, authorizing him to sell and convey certain real estate belonging to Hall, in San Francisco, California. By virtue of this power, Hall sold the real estate to persons under whom Dexter claimed title. After Hall's death his widow and heirs brought ejectment for the property, on the ground that the power of attorney to Harris was void for want of mental capacity of Hall to execute it. There was testimony for plaintiff tending to show that Hall was insane at the date of the power of attorney, and on the part of the defendant tending to show that he was sane. It appears from the statement of the case that "the defendant in rebuttal offered to prove that he had purchased the premises in good faith, for a full consideration, and without notice of the alleged insanity of Hall; but the court rejected the testimony." The court instructed the jury as follows:

"If at the time that Hall executed the power in question he was insane, and his insanity was general, the instrument was a nullity, and no title could be transferred under it.

"In that case the plaintiffs are entitled to a verdict.

"It matters not, if such were the case, what consideration may have been paid to the attorney, or with what good faith the parties may have purchased.

"The instrument, in such a case, is no more to be regarded as the act of Hall than if he was dead at the time of its execution."

The jury found for plaintiffs, and the judgment is affirmed by the supreme court in an elaborate opinion by Mr. Justice STRONG, in which the authorities are reviewed, and the conclusion reached that the ruling and instructions were correct. "The fundamental idea of a contract," says the court, "is that it requires the assent of two minds. But a lunatic, or person *non compos mentis*, has nothing which the law recognizes as a mind; and it would seem, therefore, upon principle, that he cannot make a contract which may have any efficacy as such."

It is suggested by counsel that a different rule prevails in equity, but I know of nothing in authority or reason upon which to base such a distinction. The rule as to the responsibility of a lunatic or person *non compos mentis*, upon his contracts, is the same in equity as in law; and if this court is bound to follow the ruling in *Dexter v. Hall*, it is conclusive of the question now under consideration. It is

insisted, however, that a different doctrine has been established in this state by several decisions of its supreme court, and that these decisions constitute a rule of property here, which this court should adhere to. It is true that the supreme court of this state has held that "equity will not interfere to set aside a conveyance, on the ground of the insanity of the grantor, to one who shall have purchased in good faith, and for value, in ignorance of the mental condition of the grantor." *Ashcraft v. De Armond*, 44 Iowa, 229. And also that "persons of unsound mind will be bound by their executed contracts, where such contracts are fair and reasonable, and were entered into by the other parties without knowledge of the mental unsoundness, in the ordinary course of business, and where the parties cannot be placed *in statu quo*." *Abbott v. Creal*, 56 Iowa, 175; S. C. 9 N.W. Rep. 115. And see, to the same effect, *Behrens v. McKenzie*, 23 Iowa, 333. These cases undoubtedly hold a different doctrine from that laid down in *Dexter v. Hall*; and the question is whether they establish a rule relating to land titles within the state of Iowa which this court should follow, notwithstanding a contrary decision by the supreme court of the United States. It is true that where any principle of law, establishing a rule of real property, has been settled in the state courts, that rule will be applied by the federal courts within the same state; and it makes no difference whether such rule of property grows out of the constitution or statutes of the state, or out of the principles of the common law adopted and applied to such titles. *Jackson v. Chew*, 12 Wheat. 153. It may be doubted whether the question here presented is not a question of equity law, and if it is, this court is not bound by the decision of the state court. *Nevens v. Scott*, 13 How. 268; *U. S. v. Howland*, 4 Wheat. 115; *Boyle v. Zacharie*, 6 Pet. 658. But, waiving the consideration of that question, I am of the opinion that the decisions of the supreme court of Iowa above cited do not establish a rule concerning land titles. They relate, not to land titles especially, but to a question of general jurisprudence, to-wit, the effect to be given to the contract of a lunatic, or person *non compos mentis*. It is true that the doctrine announced in these cases may, when applied to conveyances, affect titles to land in this state; but it is only necessary in the present case to determine the validity of the bonds executed by George A. Davenport. If these are held invalid as to him, the mortgage, which is a mere incident, falls with them. Can it be said that a rule respecting the validity, force, and effect of a contract entered into by a person of unsound mind is a rule of property? It is a rule which may indirectly, in a certain class of cases, affect title to property; but the same may be said of any ruling of the state courts respecting contracts. If the sum claimed as due upon a contract is sought to be fastened as a lien upon real estate, either by mortgage or attachment, a decision of the question of its validity will undoubtedly affect the title to such property. But it has never been claimed that for this reason the de-

cisions of state courts upon the validity of any class of contracts can be regarded as a rule of property. If the complainant had sued at law upon the bonds, it would not have been claimed that the state decisions in question were binding on this court.

It is difficult to see upon what principle we can apply one rule to the bonds when suit is brought upon them at law, and another when suit is brought upon them in equity. The decisions of the highest court of a state may be said to constitute a rule of property when they relate to and settle some principle of local law directly applicable to titles. A rule of property is one thing; a rule respecting the validity of a class of contracts which may or may not affect titles to property, is another and a different thing.

It has been held that the federal courts are not bound by the decisions of the state courts determining whether an instrument is a promissory note, (*Bradley v. Lill*, 4 Biss. 473,) and I suppose it would make no difference if such an instrument were secured by mortgage. The federal courts would still maintain the right to decide for themselves all questions as to its validity, and its force and effect, except such as are determined by local statute.

Again, let us suppose that the state courts establish a rule respecting the right of purchasers and assignees of negotiable paper, which is contrary to a rule upon the same subject established by the supreme court of the United States. It is well settled as a general proposition that this being a rule of general commercial law, the federal courts decide upon it for themselves. Would the rule be otherwise in a case where such an instrument happens to be secured by a mortgage?

The case of *Thomas v. Hatch*, 3 Sumn. 170, is instructive upon the question, what is to be understood by the phrase "rule of property?" The case turned largely upon the construction of a deed. The supreme court of the state (Maine) had in another case construed the same instrument; but Mr. Justice Story refused to adopt that construction, saying:

"If this were a question of purely local law, we should not hesitate to follow the decision of that learned court, for which we entertain the greatest respect. But the interpretation of a deed of this sort is in no just sense a part of the local law. It must be interpreted everywhere in the same manner; that is to say, according to the force of the language used by the grantor, and the apparent intentions of the parties deducible therefrom."

My conclusion upon this branch of the case is that the question whether a contract entered into by a lunatic or person of unsound mind is absolutely void, or only voidable, in case the other party can be charged with notice of the want of mental capacity, is a question of general jurisprudence, to be determined by general principles of law applicable alike to all the states; and that, therefore, this court is bound to follow the decision of the supreme court of the United States in deciding it. It follows, from these considerations, that

there must be decree for complainant against George L. Davenport for the whole amount of the bonds sued on, with interest and costs; and as against all of the respondents for the foreclosure of the mortgage sued on, as against all the property except the undivided half of the south half of block 59, in the city of Davenport, Iowa; and as against respondent Sarah G. Davenport, to be enforced as a lien upon said last-mentioned property, a decree for one-half of the sum paid to remove the tax lien upon said half block, and 6 per cent. interest thereon from the time of payment.

PARKS v. WATSON and others.

(Circuit Court, D. Nebraska. July 12, 1884.)

1. TAX TITLE — OPINION OF STATE SUPREME COURT—AUTHORITY IN FEDERAL COURT.

The opinion of the supreme court of Nebraska is a construction by the highest tribunal of the state of the effect of its statutes upon its tax proceedings, and as such should be followed by a federal court sitting in Nebraska.

2. SAME—EQUITY—STATE LIEN—OWNER—PARTY PAYING.

In actions in equity the courts will inquire, not simply into legal, but also into equitable rights. In such actions each party must be required to do equity. The state has a lien upon land until all taxes are paid. When paid by other than the owner of the land, the state must be considered as transferring its lien to such party, and the only way that equity should relieve the owner from the burden of such lien is by payment.

3. SAME—RIGHTS OF THE STATE—TRANSFER TO PARTY PAYING TAX.

If one, without stopping to question the validity of the proceedings, comes forward and pays the tax, he ought to be entitled, not merely to the benefit of the proceedings then already had, but also the full benefit of all the state's rights.

Exceptions to Master's Report.

G. M. Lambertson, for complainant.

W. T. Wodehouse, for defendants.

BREWER, J. This is an action to quiet title. Complainant shows a regular chain of title from the government. Defendants claim under four tax deeds. On February 15, 1884, the case came on for hearing upon the bill, answer, and replication and the testimony taken on behalf of the respective parties, when an interlocutory decree was entered finding for the complainant, quieting his title, decreeing the tax deeds null and void, and referring the case to a master to report the amount of legal taxes paid by defendants and their grantors. The report of the master was filed March 8, 1884. Exceptions were filed by both parties, and the case comes on now for the hearing of such exceptions, and final decree.

1. It is insisted that the statute of limitations had run in favor of the tax deeds, and therefore that the title of defendants should be

held perfect and the bill dismissed. It is conceded that, according to the opinion expressed by the supreme court of the state of Nebraska in a case lately decided, to-wit, *Taylor v. Courtney*, reported in 16 N. W. Rep. 842, the statute of limitations would not protect the deeds; but it is claimed by counsel for defendants that such decision is erroneous, and not binding on this court. I cannot agree with counsel in this. The decision is a construction by the highest tribunal of the state of the effect of its statutes upon its tax proceedings, and as such I think should be followed by this court. The interlocutory decree in this respect was right, and must be adhered to.

2. The master in his conclusions seems to have been of the opinion that the defendants were entitled to be reimbursed only such taxes paid by them as were supported by proceedings technically perfect, resting, perhaps, upon the language of the reference to him to report "the amount of legal taxes." In this I think he is mistaken. This is an equitable action, and in it each party must be required to do equity. The court will inquire, not simply as to the legal, but also as to the equitable, rights. Every owner of property owes the duty of contributing in taxes his just proportion of the expenses of maintaining the government. The complainant in this case neglected that duty, and the defendants discharged it for him. The state has a lien on the land for all taxes until they are paid. Comp. St. Neb. p. 426, § 138. When paid by other than the owner of the land, the state must be considered as transferring its lien to such party; and the only way in which equity should relieve the owner from the burden of such lien is by payment. It will not do to say that if, in consequence of the defects in the proceedings, the lien was in no condition to be enforced by the state, the purchaser at the tax sale took nothing; because it is within the undoubted power of the state, if tax proceedings are defective, to renew them again and again, and until they result in the payment of the tax. If one, without stopping to question the regularity of the proceedings, comes forward and pays the tax, he ought to be entitled, not merely to the benefit of the proceedings then already had, but also to the full benefit of all the state's rights. The inquiry, therefore, is not whether the taxes are legal in the sense that the proceedings are all regular and correct, and such that a full title to the land could be obtained by carrying them on to completion, but whether they are legal in the sense that they are just and equitable impositions upon the land. In other words, was the land subject to taxation? was the tax authorized by law and imposed by the proper tribunal? were the proceedings so far in substantial compliance with the statute that the court can see that, equitably, the lot-owner should have paid the taxes,—that they were simply his just contribution to the support of the government? If so, before the court will relieve him from the cloud of a tax deed, it should require payment by him of such taxes and interest.

For these reasons the exceptions of the defendants will be sustained

to the report of the master, so far as it disallows them any taxes on the ground of mere irregularity in the tax proceeding; in all other respects it will be confirmed. The account will then stand thus:

Amount of taxes paid and interest to February 25, 1884, -	\$1,182 03
Less \$12 of the tax of 1876, and interest thereon to February 25, 1884, \$7, -	19 00
	<hr/>
	\$1,163 03
Due complainant for rent and interest,	\$26 09
	<hr/>
Balance, - - - - -	\$836 94

The decree will therefore be entered quieting complainant's title, upon the payment of this balance, with interest at 7 per cent. from February 25, 1884, within 60 days; and, in default of such payment, the defendants will be entitled to an order of sale therefor. The costs of this case will be divided equally between the parties.

FITTON and Wife v. FIRE INSURANCE ASS'N and others.

(Circuit Court, D. Vermont. July 10, 1884.)

1. EQUITY—INCOMPLETE CONTRACT—CONSIDERATION—INSURANCE.

An agreement to pay the premium at the rate specified is a sufficient consideration to make the agreement a binding contract. Generally, whatever is agreed to be done is considered in equity as done. The agreement to insure may be considered in equity as insurance.

2. SAME—REMEDIES.

When a contract is made out in any mode to be a preliminary contract of insurance instead of a completed contract of insurance, the remedies upon it are the same, and may be enforced in the same way. The right to proceed in equity in such case cannot be denied.

3. SAME—INSURANCE AGENT—DELIVERY OF POLICY.

If the agents of five insurance companies make an agreement with a party to insure her premises in four of their companies, naming them, such party has not, after destruction of her premises by fire, and before any policies are delivered to her, a claim against the fifth company for the loss, even though each of the five companies had written out policies for her.

4. SAME—PARTIES DEFENDANT.

If the agents of five insurance companies make an agreement with a party to insure her premises in four of those companies, naming them, such party has, after destruction of her premises by fire, a claim against the four companies named for the loss, even though there have as yet no policies been delivered to her, and such companies are proper parties in a suit to recover the loss.

In Equity.

Martin H. Goddard, for orators.

Aldace F. Walker, for Fire Insurance Association.

W. S. B. Hopkins, for other defendants.

WHEELER, J. From the allegations in the bill, which, on these demurrers, are to be taken as true, it appears that the duly-author-

ized agents of all the defendants agreed to bind, from August 20, 1883, \$12,000 of insurance against loss by fire in the latter four of the defendant companies, at 3 per cent., on the property of the oratrix, and sent her a writing to that effect, without specifying anything about distribution of the risk among these companies. After a loss of the property the agents wrote policies in each of the defendant companies, dividing the amount into five equal parts among them, but, after learning of the loss, refused to deliver any of them, and all the defendants refuse to pay the loss.

On these facts the oratrix has not any claim, either at law or in equity, against the first defendant. The agents never entered into any preliminary contract to insure the oratrix in behalf of that company. If no companies had been named in the agreement with the oratrix, she probably might have held those which the agents intended to act for in that transaction, and the writing of the policies afterwards would be evidence of the intention. But here the companies bound are expressly named; and the contract of the oratrix was expressly with them, without leaving any room for implying any contract between her and other companies out of any intention or understanding of the agents, not known to or relied upon by her. And that company did not insure her, for the policy was not delivered to her, nor known of by her, until after the loss. She was not bound to receive it, and neither the agents or the company stood under any obligation to deliver it. Without delivery it was the act of but one party to it, which amounted to no contract at all as between the two, even if, with delivery, it would have been good after a loss not known at the time, without any contract providing for it previous to the loss. The contract with the other companies was an agreement to insure, not a contract of insurance.

The agreement to pay the premium at the rate specified was a sufficient consideration to make the agreement a binding contract. Generally, whatever is agreed to be done is, in equity, considered as done. The agreement to insure may in equity be treated as insurance. At law there could only be an action for the breach of the contract to effect the insurance. This might not be so full and complete a remedy as that which can be afforded in equity. The right to proceed in equity is well settled in such cases, in the courts of the United States, notwithstanding the statute establishing the boundaries of equity jurisdiction which has been in force from the beginning. *Rev. St. § 723; Tayloe v. Merchants' Ins Co.* 9 How. 390; *Commercial Ins. Co. v. Union Ins. Co.* 19 How. 321. The jurisdiction depends upon the nature of the contract, and not, as has been argued, upon the difficulty or nature of the proof.

In this case the evidence is, apparently, in writing, and easy of production, while in some cases it has been in correspondence and oral communications, not so readily at hand for the purpose. But when the contract is made out, in any mode, to be a preliminary con-

tract for insurance, instead of a completed contract of insurance, the remedies upon it are the same, and may be enforced in the same way. The right to proceed in equity in this case cannot be denied, without disregarding these decisions of the highest court.

The contract is an entire one with the authorized agents of all the companies. The meaning of it may turn out to be that each should insure for one-fourth; or that, as to the oratrix, all were bound *in solido* to the effecting of the insurance; or some other construction may prevail; but, whatever may be the ultimate result, all these defendants are liable upon it to the oratrix, and have a common interest in regard to it as between themselves, and all appear to be proper parties to this suit to enforce.

The demurrer is sustained, and the bill adjudged insufficient as to the Fire Insurance Association; and the demurrers are overruled as to the other defendants, with leave to answer over by the sixteenth day of August.

Dow and others, Trustees, v. MEMPHIS & L. R. R. Co., as reorganized.¹

(Circuit Court, E. D. Arkansas. April Term, 1884.)

1. MORTGAGOR AND MORTGAGEE—DEFAULT—POSSESSION AFTER—RENTS AND PROFITS—RIGHT TO—ACCOUNTING FOR.

When a mortgagee allows a mortgagor to remain in possession of the mortgaged property after default, the latter takes the rents and profits to his own use, and the former cannot require him to account therefor, nor recover them from him.

2. SAME—RAILROAD COMPANY—MORTGAGE DESCRIPTION—CONSTRUCTION OF.

When a railroad company mortgages its "income, earnings," etc., the words being prospective in their operation, the use of the word "moneys" in connection with them does not enlarge the rights of the mortgagee, so as to convey to him such moneys as are simply past income and earnings.

3. SAME—EQUITABLE ACTION TO FORECLOSE MORTGAGE—APPOINTMENT OF RECEIVER—RIGHTS OF MORTGAGOR.

Where certain provisions in the order of a court appointing a receiver of mortgaged property flow from the mere discretion of the chancellor, they cannot be made the basis of invading the absolute right of the mortgagor.

4. SAME—PREFERENCE OF CREDITORS—RIGHT OF CORPORATION—EFFECT OF ORDER OF COURT ON.

The right of a corporation to prefer its creditors cannot be defeated by the order of a court, in an equitable action to foreclose a mortgage, by taking into its possession property not covered by the mortgage, which ought to have been left in the hands of the company.

5. SAME—PRACTICE AND PROCEDURE—MOTION TO STRIKE OUT.

A motion to strike out from the order of a court, in an equitable action to foreclose a mortgage given by a railroad company, so much as requires the corporation to deliver to a receiver moneys on hand, being unexpended earnings of the mortgaged property not included in the mortgage, will be granted.

On Defendant's Motion to Modify the Order appointing the Receiver.

¹See S. O. *ante*, 260.

U. M. & G. B. Rose, for plaintiffs.

B. C. Brown, for defendant.

BREWER, J. The defendant's mortgage, in terms, conveyed "all the income, rents, issues, tolls, profits, receipts, *moneys*, rights, benefits, and advantages had, received, or derived by the said railroad company from its railroad or other property, or in any other way whatsoever." There was also in the mortgage a stipulation for the retention of possession by the mortgagor until default in the payment of interest. On April 15th a receiver was appointed, and the defendant was required by the order of this court to deliver to him all its property, including therein the moneys then on hand. At that time it had in its possession \$32,216.20. Thereafter, the defendant moved to strike from the order so much as required it to deliver to the receiver these moneys. It is admitted that these moneys were derived solely from the operation of the road and the use of the mortgaged property.

This, therefore, is the question presented: Could the mortgagor, having in his possession unexpended earnings of the mortgaged property, be compelled to turn those earnings over for the benefit of the mortgagee? The general proposition is, of course, beyond dispute, that when a mortgagee allows a mortgagor to remain in possession after default, the latter takes the rents and profits to his own use, and the former cannot require him to account therefor, nor recover them from him. It were mere affectation of learning to go into any extended investigation of this question. The doctrine is fully stated in *Jones, Mortg.*, as follows:

"So long as the mortgagor is allowed to remain in possession he is entitled to receive and apply to his own use the income and profits of the mortgaged estate. He is not liable for the rent. His contract is to pay interest, and not rent. Although the mortgagee may have the right to take possession upon a breach of the condition, if he does not exercise the right he cannot claim the profits. Upon a bill in equity to obtain foreclosure and sale, he may, in proper cases, apply for the appointment of a receiver, to take for his benefit the earnings of the property. If he neglect to do this, the final decree, if silent upon this subject, does not affect the mortgagor's possession or right to the earnings in the mean time. The sale under the decree, except where statutes provide otherwise, wholly divests him of title, and consequently of right to possession.

"These principles are the same whatever be the subject of the mortgage. Although the mortgage be given by a railroad company, and by its terms includes not only its property and franchises, but also 'the tolls, rents, and profits to be had, gained, or levied therefrom,' but it is implied from the mortgage that the company is to hold possession and receive the earnings of the road until the mortgagee takes it, or the proper judicial authority should interpose, the possession, so long as it is continuous, gives the right to receive the income of the road, and to apply it to the general purposes and debts of the company. So long as the company is allowed to receive the income of the road it is within its discretion to decide what shall be done with it. The mortgage does not affect the application of it. If the mortgagees want it they must take possession of the road; or, pending a bill to foreclose the mortgage, apply for the appointment of a receiver. Upon the appointment of a receiver

he cannot maintain a suit to recover earnings of the road in the hands of an agent which accrued before the receiver's appointment.

"In like manner, if the mortgage be of leasehold premises, and the mortgagor hold over after breach of the condition, the law does not imply an obligation on his part to pay rent previous to an entry by the mortgagee." Section 670.

"The mortgagor, while in possession, is entitled to the rents. So long as the mortgagor is allowed to remain in possession without an actual entry by the mortgagee, although there has been a breach of the condition of the mortgage, he is entitled to receive the rents and profits to his own use, and is not liable to account for them to the mortgagee. If the premises are under lease, the right of the mortgagor in possession to the rents is the same, whether the lease was made before or after the mortgage. He may lawfully receive the rents until the mortgagee interferes, and he receives them to his own absolute use, and not to the use of the mortgagee." Section 771.

See, also, the following authorities cited by counsel for the defendant: 2 Washb. Real Prop. 156; *Higgins v. Building Co.* 2 Atk. 107; *Mead v. Orrery*, 3 Atk. 244; *Colman v. St. Albans*, 3 Ves. Jr. 25; *Hughes v. Edwards*, 9 Wheat. 500; *Wilder v. Houghton*, 1 Pick. 87; *Bank v. Reed*, 8 Pick. 461; *Mayo v. Fletcher*, 14 Pick. 525; *Field v. Swan*, 10 Metc. 112; *Chase v. Palmer*, 25 Me. 341; *Long v. Wade*, 70 Me. 358.

This being the general doctrine, I do not think the use of the word "moneys" enlarges the rights of the mortgagee, and if a mortgage of the income and earnings does not convey past income and earnings, a mortgage of moneys will not convey such moneys as are simply income and earnings. Such words as these,—income, earnings, moneys—are prospective and not retrospective in their operation.

The case of *Noyes v. Rich*, 52 Me. 115, is in point. In that case the plaintiff had been appointed receiver of a railroad. The defendant had been superintendent, and had moneys in his possession which had accrued from running the road. The mortgage conveyed, among other things, the income. The plaintiff sought to recover this money. The court says:

"The right of the plaintiff cannot extend beyond the property mortgaged; and the right of the receiver must necessarily have the same limitation. * * * It will hardly be contended that, while mortgagors remain in possession, they can be compelled to pay the rents and profits of the property to the mortgagees. And yet that is just what is attempted in the case at bar. No one had ever rightfully taken possession under the mortgage until it was done by the receiver, in March, 1860. The money in the defendant's hands accrued from the earnings of the road prior to that time. The mortgage did not attach to it. Therefore, it was not embraced in the subject-matter of the suit in equity, and the receiver was not entitled to it." See, also, *Railroad Co. v. Cowdrey*, 11 Wall. 482.

In *Gilman v. The Telegraph Co.* 91 U. S. 615, the contest was between a general creditor of a railroad company and the mortgagee, as to moneys in possession derived from the operation of the road, and the rights of the creditor were held paramount. The court, by SWAYNE, J., thus states the law:

"A mortgagor of real estate is not liable for rent while in possession. 2 Kent, Comm. 172. He contracts to pay interest and not rent. In *Chinnery v. Blackman*, 3 Doug. 391, the mortgagor of a ship sued for freight earned the mortgage was given, but unpaid. Lord MANSFIELD said: 'Until the after mortgagee takes possession the mortgagor is owner to all the world, and is entitled to all the profit made.' It is clearly implied in these mortgages that the railroad company should hold possession and receive the earnings until the mortgagees should take possession, or the proper judicial authority should interpose. Possession draws after it the right to receive and apply the income. Without this the road could not be operated, and no profit could be made. Mere possession would have been useless to all concerned. The right to apply enough of the income to operate the road will not be questioned. The amount to be so applied was within the discretion of the company. The same discretion extended to the surplus. It was for the company to decide what should be done with it. In this condition of things the whole fund belonged to the company, and was subject to its control. It was therefore liable to the creditors of the company as if the mortgages did not exist. They in nowise affected it."

In *Bridge Co. v. Heidelberg*, 94 U. S. 800, there was a similar controversy with the same result, and in that case the court says:

"The mortgage could have no retrospective effect as to previous income and earnings. The bill of the trustees does not affect the rights of the parties. It is an attempt to extend the mortgage to what it cannot be made to reach. Such a proceeding does not create any new right. It can only enforce those which exist already. The bill of the trustees is as ineffectual as if the fund were any other property, real, personal, or mixed, acquired by the mortgagee *aliunde*, and never within the scope of the mortgage." See, also, *Kountze v. Omaha Hotel Co.* 107 U. S. 378; S. C. 2 Sup. Ct. Rep. 911.

It is true, in the cases from 91 and 94 U. S., *supra*, the contest was between a creditor of the mortgagor and the mortgagee; but if the income—the moneys—passed by the mortgage, then, of course, the rights of the mortgagee must have been adjudged paramount, for in both cases the lien of the mortgage was prior to that of the judgment; so, when the court held that the judgment had preference, it clearly affirmed that the mortgage did not cover the moneys.

In the case from 52 Me., *supra*, no rights of a creditor had intervened, and the question was solely between the mortgagee and the mortgagor.

Suppose, in this case, the mortgagor were an individual, instead of a corporation, and that he had in his pocket, at the time of the appointment of the receiver, moneys which he had received from the operation of the road; would it not seem a strange order to compel him to pay over such moneys to the receiver. Could such an order be entered without, in effect, making him responsible for profits, income, moneys received; and if he is liable for any of them, is that liability limited to the amount which he has failed to expend? If he is liable at all, why is he not liable for all the profits, income, and moneys received? It would seem that no just discrimination can be made, and that the addition of the word "moneys" in the mortgage does not mean anything beyond the words "income and profits,

tolls and rents," and must, like them, be adjudged to have simply a prospective operation. It is true that there is a large equity in favor of turning over this money to the receiver, because the court, by other provisions of its order, required the receiver to pay certain past indebtedness of the company; but such provisions flow from the mere discretion of the chancellor, and cannot be made the basis of invading the absolute right of the mortgagor. If the rents, the profits, the income, received by the mortgagor prior to the taking possession were his absolutely, and he not liable to account for what he has received, —and that such is the law seems to be settled by the authorities,—I cannot think the rights of the parties are at all changed by the addition of the word "moneys." Of course that term would have operation distinct from the word "income," if there should chance to be in the possession of the mortgagor moneys received from the sale of rolling stock, lands, or other tangible property.

My conclusion, therefore, is that, notwithstanding the term "moneys" is used in this mortgage, moneys which are in the possession of the mortgagor, and received solely from the prior operation of the road, belong absolutely to him, and cannot be appropriated by the mortgagee.

Again, it is insisted that, inasmuch as the application for a receiver was made some days before the appointment, and on application of the defendant, the hearing of the application was postponed and the *status quo* preserved by the following order:

"It is now ordered that both parties have leave until the seventh day of April next to file printed briefs on the motion for the appointment of a receiver herein; and it is further ordered that the defendant, until further order herein, hold the property mentioned in the bill herein subject to the order of the court; and the defendant has leave to plead, answer, or demur to the bill or complaint herein on the seventh day of April."

And as it further appears that on the day this order was made the defendant had on hand \$42,123.68, and had between that time and the appointment of the receiver paid out \$46,458.16, it is apparent that the money on hand was, in fact, money earned during the pendency of this motion, and while the directors of the defendant were, in effect, receivers of this court. I do not think this claim can be sustained, because the moneys paid out were paid out for operating expenses, and could more properly be charged to the earnings of the road during that time than to those funds accumulated at the time the first order was made. In fact, the mortgagee is benefited by the action of the company, for, at the time the application was first made, it had \$46,000 on hand which it could have used as it saw fit, and which, to the amount of \$14,000, it has expended in the payment of those debts, which, by the final order appointing the receiver, were chargeable on the future earnings of the road, and to to that extent postponed the mortgagees.

Still, again, it is insisted that certain judgment creditors have in-

tervened, and the court is asked to turn this money over to the intervenors instead of back to the company. I think not. Doubtless in the hands of the company it can be reached by creditors, but I think the right of the corporation to prefer its creditors should not be defeated by the action of the court in taking in the first instance moneys into its possession which ought properly to have been left with the company. In this equitable suit to foreclose a mortgage, it is not the province of the court to determine what creditors the company should pay with such moneys or property as do not fall within the terms of the mortgage, and which should have been left within the absolute dominion of the debtor, subject to its own appropriation, or to seizure by creditors in the ordinary processes of the law.

I think, therefore, the motion of the defendant should be sustained, and the moneys ordered returned to the company defendant; and it is so ordered.

TERRY and others v. PRESIDENT AND DIRECTORS OF THE BANK OF CAPE FEAR and others.

(Circuit Court, W. D. North Carolina. May Term, 1884.

1. EXECUTORS AND ADMINISTRATORS—EQUITY—TRUSTEE—RELATION TO CREDITORS.

In courts of equity, executors and administrators are considered in almost every respect as trustees, and the proper representatives of all persons interested in the personal estate. The duty is imposed upon them of protecting such estate from all improper demands, and persons interested cannot properly be made parties in a suit against such executors or administrators for an account of the personal estate, although such person may be greatly interested in contesting the demands which have occasioned the suit.

2. SAME—REFERENCE—WAIVER—FAILURE TO ANSWER—LEGAL INFERENCE.

The privilege of a reference allowed by law to an executor or administrator may be waived by him. If, upon the occasion presenting itself, such executor or administrator does not appear and answer, and avail himself of the privilege of a reference as to the condition of the assets in his hands after due service of process, the court may presume that his silence and inaction are equivalent to a waiver of a reference, and an admission of assets sufficient to satisfy the ascertained claims of the plaintiffs.

In Equity. Motion in the cause.

James E. Boyd, for motion.

J. H. Dillard and W. S. Ball, *contra*.

DICK, J. This is a motion made on behalf of a creditor of the estate of Talbot Selby, deceased,—now in the hands of his executors,—for an order of reference to ascertain whether there are assets in the hands of said executors sufficient to pay all the debts against said estate; and that execution in said cause be stayed until such fact is ascertained, and that the creditors of the estate be allowed to be heard before the master, and before the court, as to the application of assets to the satisfaction of the decree in this case.

Some of the facts and the general nature of the proceedings in this suit have been stated in an opinion delivered at this term, in determining a motion made by Thomas W. Strange, administrator, and I deem it unnecessary to restate them, as such opinion is on file and easily accessible. See *post*, 777.

The said Selby was duly constituted a defendant in this suit, and he made appearance and joined in the answer filed. At April term, 1877, a preliminary decree was made declaring the rights of the plaintiffs and the respective obligations of the defendants, and a reference was made to ascertain the necessary facts which would enable the court to adjust and determine the rights and liabilities of parties in a final decree. At April term, 1878, a report was made, exceptions were filed on both sides, and were set down for argument. During the pendency of these exceptions Selby died, and a bill of revivor was filed in September, 1881, and proper process was issued and served on his executors, W. S. Primrose and J. W. Crowder, and, as they filed no answer showing cause to the contrary, the suit stood revived as of course. Eq. Rule 56. At October term, 1882, after the revival of the suit as to the executors of Selby, the pending exceptions to the report of the master were disposed of, and a decree was made confirming said report, and adjudging that the plaintiffs do recover, respectively, from the defendants, including the executors of Selby, the sums severally assessed and reported against them, and execution was ordered as to all the defendants except the executors of Selby. The money was soon paid into court, and constitutes a large part of the fund for distribution among the creditors.

After due notice to the executors of Selby, a motion was made at April term, 1884, that execution issue against them for the sum stated in the decree. At that term James E. Boyd, as counsel of one of the creditors of the estate of Selby, made the motion set forth in the first part of this opinion. The motion of plaintiffs for an execution was continued until the adjourned term of this court, with leave for a written answer to be filed in the mean time, suggesting a want of assets to pay all the debts of the testator, or making any other defense to the pending motion for execution. As no answer has been filed, and no one appears to oppose the motion at this adjourned term, the court regards the failure of said executors to file an answer, suggesting a want of assets and asking for a reference to take an account, to be a waiver of the privilege allowed them by law, and equivalent to an admission of assets to meet the demand of the plaintiffs against the estate of their testator.

The plaintiffs had no other remedy for the relief which they seek except in a court of equity. *Pollard v. Bailey*, 20 Wall. 520. This court acquired jurisdiction to afford equitable relief against the defendant Selby by due service of process and his appearance during his life, and before his death had proceeded to a preliminary decree declaring his liability to the equitable claims of the plaintiffs. Such

jurisdiction thus acquired was only temporarily abated by the death of Selby, and this court was not prevented from administering full relief in the matter by the jurisdiction subsequently acquired by the state probate court over the estate of the testator. *Ellis v. Davis*, 109 U. S. 485; S. C. 3 Sup. Ct. Rep. 327.

When a non-resident creditor commences an action at law against an executor or administrator to recover a debt due from the estate of a deceased person, he may carry on such action to judgment for the purpose of ascertaining his debts; but the judgment must be collected in conformity with the local law of the domicile. He is on the same footing with a resident creditor. *Yonley v. Larender*, 21 Wall. 276.

This suit is in a court of equity, and is for strictly equitable relief, and was commenced before any of the rights of the executors were acquired. The bill of revivor was not a new suit against the executors, but it merely put in motion the proceedings which had been suspended by the death of the testator, and the executors were thus made parties to the original bill, and the suit was placed in the situation in which it stood at the time of the death of the testator. It has been settled by numerous decisions that the equity jurisdiction and remedies conferred by the constitution and statutes of the United States, cannot be limited or restrained by state legislation, so long as the equitable rights themselves remain. *Payre vs Hook*, 7 Wall. 425. As a general rule, courts of equity will not assume jurisdiction to adjust and enforce the rights of parties when they have a plain and adequate remedy at law; but when they rightfully acquire jurisdiction they afford complete relief, as to the subject-matter and the parties, over which they have obtained control, to the full extent of their power, and such power cannot be arrested or restricted by proceedings in another court. *Peck v. Jenness*, 7 How. 624.

The motion made by the creditor of Selby's estate for leave to intervene, and ask a reference to ascertain the debts and liabilities of such estate, and the condition of the assets, cannot be allowed. In courts of equity, executors and administrators are considered, in almost every respect, as trustees, and the proper representatives of all persons interested in the personal estate. The duty is imposed upon them of protecting such estate from all improper demands, and persons interested cannot properly be made parties in a suit against such executors or administrators for an account of the personal estate, although such persons may be greatly interested in contesting the demands which have occasioned the suit. The court would afford a remedy to such persons if it should be shown by satisfactory evidence that there was collusion between the executors and the parties claiming the demand, or that the executors are insolvent, and unable to meet the responsibility incurred by willful misconduct. 2 Will. Ex'rs, 1722.

I will now briefly state the reasons why a personal decree was made against the executors of Selby. When the bill of revivor was

filed, and process was served on them to show cause why the suits should not be revived, they could have appeared and filed an answer as to the condition of the assets in their hands, and thus have protected themselves from any personal loss. If they had made an appearance and filed an answer, and had not admitted assets, the court would have directed a reference to ascertain the extent of the assets. As they made no appearance, the plaintiffs could have compelled an answer making discovery as to the assets, by process of contempt, but they preferred to ask for a decree against them for the amount claimed.

In common-law actions commenced against an executor upon a contract of his testator, when a *devastavit* is not alleged and proved, a judgment *de bonis propriis* is erroneous. *Smith v. Chapman*, 93 U. S. 41. In such actions the rule is uniform that an executor or administrator shall be made liable only to the amount of the assets shown to be in his hands when he pleads the usual protecting pleas. If he fails to thus plead, or he admits assets, or is fixed with assets upon a trial, or he pleads a plea false within his own knowledge, which would, if true, be a bar to the action, and it is proved against him, judgment shall be in the alternative, *de bonis testatoris si, et si non de bonis propriis*. Where suits in equity are commenced against executors or administrators upon contracts of the deceased, the same rule should be observed, and decrees should be against them in their representative capacity.

In the case of *Mitchell v. Robards*, 2 Dev. Eq. 478, the supreme court of this state established a rule which I have observed in the case before me. The case referred to was a suit in equity which had been revived against the executor by *scire facias*, and not by bill, and Chief Justice RUFFIN, for the court, used the following language:

"The *sci. fa.* does not suggest assets in the hands of the executor, nor call for an answer; nor could it. Upon the hearing, a decree was made that Washington (the testator) was indebted to the plaintiffs in a certain sum, and that they might have execution therefor against the assets in the hands of the executor. Such decrees have crept into use of late, unadvisedly, owing to the manner of reviving by *scire facias*, which does not admit of an answer by the executor acknowledging assets, or stating an account. But they are against principle, and will not in future be passed. The primary jurisdiction of the court is *in personam*, and, although our statutes allow executions in equity, the nature of the decree is not altered, but only that process is substituted, at the election of the party, for that of contempt. The decree is against the defendant personally, regarding him as a trustee by reason of the fund in his hands applicable to the plaintiff's satisfaction. And no decree ought ever to be given for raising the money unless the assets be admitted by the defendant, or found upon a reference."

In subsequent cases the same court clearly intimate that the privilege of a reference allowed by law may be waived by the executor. *Dumas v. Powell*, 2 Dev. & B. Eq. 122; *Moody v. Sitton*, 2 Ired. Eq. 382.

As the executors in the case before us did not appear and file an answer, and avail themselves of the privilege of a reference as to the

condition of the assets in their hands, after due service of process I think the court was right in presuming that their inaction and silence in the matter was equivalent to a waiver of a reference, and an admission of assets sufficient to satisfy the ascertained claims of the plaintiffs. In order that no injustice or injury might be done to the executors, when this motion was made, after due notice, at April term, the motion was continued by the court to this adjourned term, with leave for the executors to file answer as to the assets in their hands, or show any other cause why the motion for execution should not issue. After such long indulgence, and frequent opportunities afforded, the executors can have no cause of complaint as to the granting of the motion of the plaintiffs.

Let an order for execution be drawn by plaintiffs' counsel.

TERRY and others v. PRESIDENT AND DIRECTORS OF THE BANK OF CAPE FEAR and others.

Circuit Court, W. D. North Carolina. June Term, 1884.)

1. CREDITORS—INSOLVENT BANK—CONTRIBUTION—CREDITOR STOCKHOLDERS.

In proceedings in the nature of a creditor's bill, to force certain accessible stockholders to contribute in order to satisfy creditors of an insolvent bank, in the court's decree was considered the amount of the whole indebtedness, the number of shares of stock, and the liability of all the stockholders, in effect reducing the *pro rata* amount of liability of each defendant. The stockholder creditors, although *quasi parties* in that their interests were represented by the defendants in resisting the demands of the plaintiffs, were not actual parties, and so cannot be included in the decree and made to contribute their part. But if, thereafter, they come as creditors to claim a part of the fund, the plain principles of equity and justice would deny their right.

2. SAME—PARTIES BEFORE MASTER.

In order to become a party to an action by simply proving a claim before the master, the person's rights must have existed at the commencement of the suit and been represented by the original plaintiff. He cannot be considered as thus represented, if, at the time of the filing the bill, he was a debtor, and his rights inconsistent with and adverse to the rights of the plaintiff.

3. SAME—HE WHO SEEKS EQUITY MUST DO EQUITY.

If one seeks equitable relief against another he must perform or offer to perform an equitable duty in relation to the subject-matter in controversy.

4. SAME—NOTE.

Stockholder creditors who have contributed, admitted to the benefit of the fund, and the bar of limitations removed as to them.

In Equity.

Thos. W. Strange, for motion.

J. H. Dillard and W. S. Ball, contra.

DICK, J. At the April term of this court a motion in this cause was made by Thomas W. Strange, administrator of Robert Strange, deceased, and of Thomas H. Wright, deceased, to be allowed to participate in the distribution of a fund in the hands of the court, for

the benefit of creditors, to the extent of bank-bills proved by him before the master as belonging to the estates of his intestates, who were reported as stockholders in the Bank of Cape Fear at the time of the filing of the bill.

In order that my opinion in this matter may be more readily intelligible, I deem it necessary to make a brief statement of some of the material facts and previous proceedings in this cause.

The Bank of Cape Fear was duly constituted and organized as a corporation under the laws of this state. In the course of business it became insolvent, and was duly declared a bankrupt, and the defendant N. H. D. Wilson was appointed assignee. It was soon ascertained, by the proceedings in the court of bankruptcy, that the assets of the corporation would pay only a very small part of its indebtedness. The plaintiff, in behalf of himself as a billholder, and all other creditors in like situation, brought this suit against the stockholders to subject them to their individual liability, under a provision in the charter of said bank. As the stockholders were liable to a common obligation, and were so numerous that a suit could not be brought and conducted against all of them without great inconvenience, expense, and vexatious delay, the bill was filed against about 25 of them, that number being deemed sufficient to represent the common interests of all against the demands of the plaintiff and other creditors. Process was duly served upon all the defendants named in the bill, and they entered an appearance and filed a joint answer. In due course of the court the cause was set for hearing, and was heard at the April term, 1877, when a preliminary decree was made, declaring and adjudging the right of the plaintiffs and other creditors to recover their debts, and that each stockholder was liable to pay such debts in the proportion of twice the amount of his stock. He must pay a sum which shall have the same proportion to the whole indebtedness of the corporation that twice his stock bears to the whole number of shares of stock. A reference was made to John N. Staples, as a commissioner, and he was directed, after giving due notice, to ascertain and report the names of the creditors and the amounts of their respective debts, the whole number of the shares of stock, and the names of the stockholders, and the number of shares owned by each of them at the time of the filing of the bill, and make a *pro rata* estimate of the indebtedness, and assess each defendant with the amount of his proportionate liability, as indicated in the decree.

At the April term, 1878, the commissioner made his report, when exceptions were filed on both sides and were set down for argument. Sometime during the course of these proceedings an order was granted, on motion of the plaintiffs' counsel, that a notice be issued to the stockholders mentioned in the commissioner's report, who were not already actual parties, to show cause why they should not be made parties defendant, and be bound by the orders and decrees made in the court. The counsel of plaintiff, after seeing and considering

the decision of the supreme court in the case of *Godfrey v. Terry*, 97 U. S. 171, concluded to abandon the proceeding, as such stockholders could avail themselves of the statute of limitations as a defense. Many of these stockholders had proved, and afterwards proved, claims as billholders before the master.

At the October term, 1882, the court, after hearing argument as to the exceptions filed, confirmed the report of the master, and made an appropriate decree for enforcing the rights of the plaintiff and other creditors. In obedience to this decree nearly all of the defendants paid the amount of their assessed indebtedness into court, and the sum thus realized was placed in the hands of R. H. Battle and Thomas Ruffin to make full distribution when some outstanding difficulties were adjusted. An order was made that a 3 per cent. dividend be paid to all the creditors before the court, except the stockholders who are not parties defendant and have not contributed their proportionate shares to the fund; and the question as to their rights to share in the distribution as creditors was reserved for future determination.

The motion made at the April term, 1884, by Thomas W. Strange, administrator of Robert Strange, and of Thomas H. Wright, who were stockholders and not parties defendant, presented the question which had been reserved in the first order of distribution. After hearing argument, the motion was continued to this adjourned term for decision, with the request that the counsel furnish briefs for the consideration of the court.

I will first consider the rights of billholders, who are also stockholders, to share in the distribution of a fund collected from their co-stockholders,—conceding that such billholders, by simply proving their claims before the master, are properly constituted as parties plaintiff under a bill filed by a creditor who had no connection with the corporation. As a general rule, a court of equity will not entertain a bill which requires it to ascertain and adjust conflicting claims between plaintiffs, for their rights must be consistent when the bill is filed. But in a creditor's bill, where the rights of the plaintiffs are consistent and similar as against defendants, and a common fund has been realized under a decree, and such fund is insufficient to pay all the debts, each creditor is allowed to dispute the claim of any other, and such disputed claim must be proved *de novo* before the master, for in such case the disputing creditor has a direct interest in the question of debt or no debt, inasmuch as its allowance will diminish the fund *pro tanto*. A disputing creditor may show that a claim previously proved is barred by the statute of limitations, even though the claiming creditor had filed the bill and obtained the decree for the administration of the fund. *Ad. Eq. 258; Wordsworth v. Davis*, 75 N. C. 159. In administering such a common fund a court of equity will also ascertain and adjust questions of priority of one creditor over another. In the case before us the general

creditors, at the time of filing the bill, were entitled to such relief against all the stockholders of the insolvent bank, to the extent of their liability under the charter, and if all had been made defendants by personal service of process, they might have been made liable by decree.

We will now consider the question whether the stockholder creditors have equal equities with the general creditors who filed the bill to enforce the individual liability of the stockholders under the provision of the charter of the insolvent corporation. The bill was filed against the defendants as the representatives of a numerous class, who were under a common but several liability, and equally interested in resisting the demands of the plaintiffs. In entertaining the bill the court departed from the general rule of courts of equity requiring the presence, as parties, of all persons materially interested in the subject-matter involved, as a sufficient number to meet the ends of justice were before the court to represent the rights of all who were liable to the demands of the plaintiffs. In framing the decree the court considered the amount of the whole indebtedness of the insolvent corporation, the number of the shares of stock, and the liability of all the stockholders, and decreed only a *pro rata* contribution by the defendants towards the payment of the entire indebtedness, in the proportion that the stock held by the defendants bore to the whole number of shares of stock. In adopting this ratio of proportionate liability the court indicated the rights of the general creditors and the several liabilities of all the stockholders. This rule operated against the general creditors, and in favor of the defendants, to the extent of the shares of the stockholders who were not actually before the court, as it reduced the *pro rata* amount of liability of each defendant. The stockholder creditors, although their common interests were represented by the defendants in resisting the demands of the plaintiffs,—and for that purpose they were *quasi* parties,—could not be included in the decree, and be compelled to pay their proportionate amount to the fund for the benefit of creditors, as they were not actual parties. Now, when they come to claim a part of such fund, which is wholly insufficient to pay all the debts of the general creditors, it seems to me that the plainest principles of equity and common justice require the court to disallow their claims. At the commencement of this suit they were liable to the general creditors to contribute to the fund for the payment of the outstanding bills of the insolvent bank, and that liability has not been discharged by payment, but the remedy of the creditors has been barred by the statute of limitations. "He who seeks equity must himself do equity," is a well-established maxim. The stockholders who are creditors must contribute their proportionate indebtedness to the common fund before they can equitably claim to participate, on equal terms, with the other creditors in the distribution of money obtained from their less fortunate co-stockholders. It is only when parties have equal

rights that a court of equity acts upon its favorite maxim, "Equality is equity. The object of courts of equity in devising the liberal and inexpensive rules of procedure in creditors' bills was to administer justice, and they will not suffer such rules, founded in their own sense of propriety and convenience, to become the means of working injustice to parties who have sought equitable relief. Story, Eq. Pl. 96.

We will now proceed to consider the question whether the stockholders who are billholders can properly be regarded as parties plaintiff, under the decree, by simply proving their claims before the master. It is a well-settled general rule in equity that all persons who have a material interest in the subject of the litigation should be joined as parties, either as plaintiff or defendant, so that the court may fully adjust and determine the matters in controversy. This rule has been modified where the interested parties are too numerous for all to be personally before the court without great expense and inconvenience. In such cases a court of equity will proceed to act when sufficient parties, either plaintiff or defendant, are before it to fairly represent all the interests involved. In the case of a creditor's bill some of the creditors may prosecute a suit in behalf of themselves, and all others standing in the same situation and having a common interest in all the objects of the bill, who may afterwards elect to come in and claim as parties, and bear their proportion of the expenses of the litigation. The legal and equitable rights and liabilities, as to the subject-matter of the suit, must be common to all before a part can represent the whole. *Smith v. Swormstedt*, 16 How. 288. The interests of the plaintiffs must be identical, similar, and in no way inconsistent. They must occupy the same relation to the controversy, and be alike interested in the relief sought. If such is not the case, but the suit be one that will bring into controversy their mutual rights, they must all be personally before the court, and be made parties under the rules and orders of the court, so that their adverse interests may be ascertained and adjusted. Ad. Eq. 321. In a creditor's bill all creditors who are entitled to be represented by the plaintiffs are, for some purposes, deemed *quasi* parties, and have an inchoate interest in the suit, which prevents the operation of the statute of limitations from the time of the filing of the bill, but they have no control of the suit until a decree is obtained, and in the United States courts any decree made shall be without prejudice to the rights and claims of the absent parties. Equity Rule 48. After the decree, the creditors who are entitled to prove their claims, and actually prove them before the master, have a direct interest and equal control in further proceedings. If the fund for distribution is sufficient to pay all claims, one creditor has no interest to dispute the debt of another; but if the fund is insufficient to meet all demands, one creditor can contest the claims of others in the same manner as if it were an adversary suit. 1 Story, Eq. Jur. § 548. Such contests between

creditors are primarily conducted before the master, and his findings are deemed *prima facie* correct. "Only such matters of law and of fact as are brought before the court by exceptions are to be considered, and the burden of sustaining the exception is on the objecting party." *Medsker v. Bonebrake*, 108 U. S. 66; S. C. 2 Sup. Ct. Rep. 351.

In the case before us the report of the master shows who were stockholders, which of them claim as creditors, and what was their proportionate liability with their co-stockholders who are defendants. As no exception is made to these findings, and the parties have had their day before the master, we may take the report as correct, for the purpose of determining the equities of the claimants. In order to afford to all creditors, properly represented by the plaintiffs in a creditor's bill, an opportunity of asserting their rights and participating in the benefits of a decree, the master is directed to give due notice, and to ascertain and report the claims of all persons interested; and reasonable time is allowed for all such claims to be presented and passed upon in the due course of the court before a distribution is ordered. So anxious are courts of equity to do full justice to all parties interested, that they will often reserve a portion of the common fund to satisfy the claims of persons who appear from the proceedings to be entitled to share, but who, by absence from the limits of the jurisdiction of the court, or for other good cause, have not had a convenient opportunity of presenting their claims. *Story, Eq. Pl.* 101.

Having briefly stated the nature of a creditor's bill, we will proceed further to consider the position of the stockholder creditors before the court, and their right to share in the common fund. I am of opinion that the stockholders who have proved their claims before the master are not entitled to be regarded as parties under the decree. To become parties by simply proving their claims before the master, their rights must have existed at the commencement of this suit, and have been represented by the original plaintiff. They cannot be considered as thus represented, as at the time of the filing of the bill they were debtors, and their rights were inconsistent with and adverse to the rights of the plaintiff. In every bill in equity parties having conflicting interests in the subject of litigation cannot rightfully be joined as plaintiffs in a suit.

We will consider the claims of these stockholder creditors from another point of view. In a creditor's bill, every creditor who claims to be represented by the plaintiff must have such an equitable right as would have entitled him to have commenced such suit at such time. A creditor who acquires an interest after the filing of the bill cannot, by right of representation, go before the master and prove his claim; but the court, upon special leave asked, may allow such creditor an opportunity of presenting and supporting his claim, and will adjust the equities that may be against him. The stockholders of

the bank entered into a common undertaking, with a view to a common benefit, and thereby incurred common liabilities in proportion to their several interests, and one cannot properly obtain from another an advantage, as each must fulfill his obligations before a benefit can be had. If one seeks equitable relief against another, he must perform, or offer to perform, an equitable duty in relation to the subject-matter in controversy. In this suit, in which they insist that they are entitled to be considered as parties, relief was demanded, not against their co-plaintiffs, but against the defendants, their co-stockholders, with whom they were under common and proportionate obligations to pay the outstanding bills of the insolvent bank. In a court of equity they cannot insist that the statute of limitations shall bar the remedy of their creditors, and claim that it shall not operate against their demands. In adjusting equitable rights, courts of equity will never allow the statute of limitations to have a manifestly inequitable and unjust operation. As these stockholders were not represented by the plaintiff, I am of opinion that their rights as creditors did not have relation to the commencement of this suit, and the statute of limitations was not prevented from operating as to their claims presented to the master, and proved since the decree. As I am desirous of administering complete and equal justice to all billholders, I will not regard the statute of limitations as a bar, but will allow all stockholders to share, in the distribution of the fund, where the amount of their proportionate liability has been paid, and where they hold bills they may claim as other creditors, after deducting the assessments made against them in the master's report.

The foregoing opinion as to the rights and liabilities of the stockholders who are creditors, disposes of the motion before us.

I have considered with care the able and elaborate brief of Thomas W. Strange in support of his motion, and now decide that he cannot share in the fund in the hands of the court as administrator of Col. Robert Strange, as the proportionate liability of the intestate's estate has not been contributed to such fund.

The claim in behalf of the estate of Thomas H. Wright, deceased, who was a stockholder, is allowed. The bills were not in the possession of the intestate at the time of his death, but were subsequently received, in discharge of a *bona fide* debt, by the administrator from the executor of W. A. Wright, deceased, who was a stockholder and defendant, and paid the amount of proportionate liability as ascertained by the master.

Let an order be drawn as above indicated.

SIBLEY and others v. SIMONTON, Ex'x.

Circuit Court, W. D. North Carolina. June Term, 1884.

1. ESTATES OF DECEDENTS—CREDITORS—DEVISEE.

It is well settled that the claims of creditors of a deceased person must be satisfied before a devisee can derive any benefit from the bounty of the devisor.

2. SAME—CREDITOR'S BILL.

A devisee can, by a creditor's bill, be charged with the rents and profits of the property taken under the will of a decedent.

In Equity.

Jones & Johnston, for plaintiffs.

Thos. S. Tucker, for defendant.

DICK, J. This is a creditor's bill filed against the defendant, as executrix and sole devisee under the will of R. F. Simonton, for the purpose of administering the assets of the estate of the testator. Under previous orders, decrees, and proceedings, the proceeds arising from the sale of the personal property and the lands have been inadequate to satisfy the claims of the plaintiffs. A motion is now made, after due notice, to charge the defendant, as devisee, with the rents and profits which she admits she has received since the death of her testator. The plaintiffs are entitled to the relief they seek, as it is well settled that the claims of creditors of a deceased person must be satisfied before a devisee can derive any benefit from the bounty of the devisor. 2 Story, Eq. 1216; Ad. Eq. 268. In the case of *Washington v. Sasser*, 6 Ired. Eq. 336, the state supreme court has decided that when the personal estate of a deceased debtor has been exhausted, and the lands have also been sold, creditors whose debts remain unsatisfied have a right in equity to have satisfaction decreed out of the rents and profits derived from the lands by the heirs; at least, of so much as remain in their hands unexpended by them for their maintenance. This decision is sustained by cited authorities in England and this country, and has been affirmed in *Moore v. Shields*, 68 N. C. 327, and other subsequent cases.

I am of opinion that the defendant is entitled to retain out of such rents and profits the costs which she has paid for proceedings in obtaining her dower, and for the sums expended for repairs, taxes, and other expenses mentioned in her answer in the motion before the court.

An order may be drawn in conformity with this opinion.

*In re FRANTZEN, Bankrupt.**(Circuit Court, N. D. Illinois. May 3, 1884.)***BANKRUPTCY—FRAUDULENT PREFERENCE—RETURN OF TRUST FUNDS.**

The motives of a bankrupt, as well as all the peculiar circumstances connected with the transaction, must be taken into consideration in order to determine whether he thereby gave a fraudulent preference to one creditor over others; and if he believed, and such was the fact, that money received by him from such creditor was in the nature of trust funds, so that it would not create the ordinary relation of debtor and creditor between the parties, but a claim upon which there was a peculiar and special obligation on his part in the nature of a trust to settle, a settlement thereof cannot be considered a fraudulent preference within the meaning of the bankrupt law.

Petition on Review from the District Court.

Miller, Lewis & Bergen, for petitioners.

DRUMMOND, J. On the application of the bankrupt for a discharge, objections were made by one of his creditors who had proved his debt, and thereupon the case was referred to the register in bankruptcy, with a stipulation that his finding should be entered up by the district court as its order in the case. On an examination by the register, he found that the objections were not sustained; and an order to that effect being made by the district court, and that the bankrupt was entitled to his discharge, the creditor filed a petition for review in this court.

There were various objections made in the district court, but they had been reduced simply to this: that he gave a fraudulent preference, contrary to the provisions of the bankrupt act, to one Julius Ahlefeldt, for the purpose of preventing his property from coming to the hands of his assignee, and being distributed according to law for the payment of his debts. This is the only allegation which this court can consider.

There is no doubt that the bankrupt, for some time before he filed his petition in bankruptcy, was in fact insolvent, but, having made a sale of some property sometime previous to the filing of his petition, the evidence shows that, in all probability, if the vendee had complied with the contract which he made with the bankrupt, the latter might not have been insolvent; in fact, the contract was never complied with. The circumstances connected with the alleged fraudulent preference seem to be, in substance, as follows:

Some considerable time before the bankrupt failed, Julius Ahlefeldt gave him a draft for collection, amounting to \$66.18. It seems that the bankrupt, and a partner with whom he was doing business sometime before, had been in the habit of receiving money as bankers, and that they issued pass-books to their depositors, among whom, at the time, Ahlefeldt was one. This business had all been closed up long before the failure; but, at the time this draft was given to the bankrupt, the amount was entered in an old pass-book which Ahlefeldt had. Some of the money was paid to Ahlefeldt at the time, and some afterwards. A day or two before the filing of this petition in bankruptcy, and after his failure, he gave Ahlefeldt orders on two of his debtors

v.20,no.12—50

for the balance of what was due to him on this draft that had thus been left for collection. He says that he had indulged a hope all along, up to a time immediately preceding the filing of his petition in bankruptcy, that the party to whom he had sold the property already mentioned would be able to meet the obligations of his contract; and when he ascertained that this could not be done, he at once filed a petition in bankruptcy. But it must be assumed, I think, that, at the time he gave these orders to Ahlefeldt, he knew, or had every reason to believe, that he was insolvent. He had told Ahlefeldt that he had failed.

The question is whether this was a fraudulent preference within the meaning of the bankrupt law. The claims proven up against the estate were over \$8,000. I think it must be assumed that, in order to so constitute it, there must have been an intention on the part of the bankrupt to give Ahlefeldt an illegal preference, or an unfair advantage over his other creditors. In other words, there must have been a wrongful intent on the part of the bankrupt. If, for example, he believed, and such was the fact, that this was money received by him in the nature of trust funds, so that it would not create the ordinary relation of debtor and creditor between them, but a claim upon which there was a peculiar and special obligation on his part, in the nature of a trust, to return the money which had thus been received on this draft, then it would not be, I apprehend, within the meaning of the bankrupt law, a fraudulent preference. The motives of the bankrupt, as well as all the peculiar circumstances connected with the transaction, must be taken into consideration in order to determine whether he was giving a fraudulent preference. Now, the bankrupt states expressly that he regarded this in the nature of a trust fund. While it may be admitted that a banker on receiving deposits becomes a debtor, in the ordinary sense of the word, of the depositor, still, this was a special and isolated case, where he was intrusted by Ahlefeldt with a draft, and thus became, in one sense, his agent for the collection of this money, and when he collected it, he seems to have so regarded himself, and to have believed that it was his duty, at all events, acting for Ahlefeldt, to return the money to him which he had collected on this draft, and therefore it was he felt it incumbent on him to give him these orders on persons who were his debtors. The money was paid on these orders, and so Ahlefeldt received what the bankrupt had collected for him.

The only portion of the evidence which seems to militate against this view of the facts is what is stated by Ahlefeldt, who, after saying he could not give the words Frantzen used, distinctly, because it was near five years since the statement was made, adds: "He said to me that I had better keep quiet about this business, because that might lead him and myself into trouble, and he wanted to do the best for me he could." Now, clearly, if the bankrupt meant at that time, by doing what he did, he was giving to Ahlefeldt an unjust and illegal advantage over his other creditors, then it might be said it would show a fraudulent intent; but this, I think, may be construed differently, ad-

mitting that the witness is not mistaken in the words used by the bankrupt. He may have thought and believed that it was all right and just, and something which he ought to do, and which was not giving an unfair advantage to Ahlefeldt; yet that it might be misconstrued by other creditors of his who might possibly hear of it, and therefore, on that account, he wanted nothing said about it. It must necessarily appear, I think, under the circumstances of this case, that the language used is susceptible only of the construction that he intended to do something that he believed to be wrong, and contrary to the principles of justice and equity. It may be admitted that the case is not free from difficulty, and while it is insisted that the amount involved ought not to make any difference, still it is impossible for the court to disregard the fact that the only creditor who files the petition reviewed in this case is one whose claim amounts to \$57.70, and that the only amount which was paid to Ahlefeldt, immediately preceding the filing of the petition in bankruptcy and after he had failed, was \$34.20.

On the whole, I feel inclined, I admit with some hesitation, to affirm the ruling of the district court.

DENDEL v. SUTTON, Assignee of Craig, Bankrupt.

(Circuit Court, S. D. Illinois. 1884.)

BANKRUPTCY—MORTGAGE—HOMESTEAD—FORECLOSURE—DEFENDANT.

If a mortgage is executed by one who afterwards becomes bankrupt, and in his schedule states the premises to be his homestead, the mortgagor must be made a party defendant in the foreclosure proceedings, and cannot be made to appear by his assignee unless the mortgage of the homestead was acknowledged according to the statute of Illinois providing for the acknowledgment of mortgages of homestead.

Appeal from District Court.

DRUMMOND J. The leading facts in this case are that the bankrupt mortgaged to Dendel a lot of land in Jacksonville, which was his homestead; that the acknowledgment did not contain a relinquishment of the homestead right, as was required by the statute. After having made this mortgage, he filed a voluntary petition in bankruptcy and was declared a bankrupt. In his schedule he said that he had a homestead right in this lot of land in Jacksonville. The bankrupt case went on in the usual manner, and an assignee was appointed. Dendel, the mortgagee, afterwards filed a bill in the district court to foreclose the mortgage, and made Sutton, the assignee, and the wife of Craig, who was also a party to the mortgage, parties to the bill, but did not make the bankrupt a party, unless he became such through his assignee. A default was rendered in the case

against the defendants, and a sale made of the property, and Dendel became a purchaser. There was nothing said in the bill or in the decree about the right of homestead of Craig in the property. The time for the redemption from the sale having expired, a deed was made to Dendel, the purchaser under the sale, and then he applied to the district court for a writ of assistance to dispossess Craig from the property, which the court refused to allow, and from the order refusing the writ Dendel has appealed to this court.

I think the decision of the district court was right. Under the conceded facts of the case, the bankrupt had a homestead in the property. The mortgage not being acknowledged in conformity with the statute, the foreclosure proceedings and sale did not divest him of this right. That was an independent proceeding not connected with the proceedings in bankruptcy. The bankrupt law did not destroy the homestead right. The fact that neither the bankrupt nor the assignee interposed to the proceedings of foreclosure the homestead right, did not deprive the bankrupt of the right. If the bankrupt as to that interest was independent, as he clearly was, of the assignee in bankruptcy, then he should have been made a party in order to affect his interest; and it can hardly be assumed that it was the duty of the assignee to bring before the court the right of the bankrupt in property with which he, the assignee, had no connection. It seems clear that the act of congress reserving the interest of the bankrupt in the property means, when it refers to 1871, the amount or value of that interest. So that I think the decree of the district court was correct, and it will be affirmed.

HALL and others *v.* STERN and others.

(*Circuit Court, S. D. New York. July 10, 1884.*)

PATENT MIRRORS—MEASURE OF DAMAGES.

The defendants, retail dealers in fancy articles, had supplied themselves, up to a certain time, with a style of mirror of which the complainants had a monopoly in the United States, by purchasing the mirrors of complainants; they then began to import a like sort from Europe and sell them at a figure below complainants' price. They sold them at a loss. *Held* that, in estimating complainants' damages, the measure should be the profits they would have made on the trade which defendants diverted. The sales made by defendants are not the criterion of complainants' loss, because it cannot be legitimately inferred, under the particular circumstances, that the complainants would have sold as many mirrors as the defendants sold.

In Equity.

Edmund Wetmore, for complainants.

Delos McCurdy, for defendants.

WALLACE, J. The proofs in this accounting do not show that the complainants lost the sale of their patented mirrors to the extent that

similar mirrors were sold by the defendants. Both parties were merchants in the city of New York. The complainants sold the mirrors mainly to retailers in that city. The defendants were retailers of general fancy goods. Up to the time when the defendants began to import mirrors and compete in the retail trade with complainants' customers, they had bought exclusively of the complainants, and their purchases were from \$1,000 to \$1,200 annually. They imported similar mirrors at a cost much below the price the complainants had charged for them, and sold them at greatly reduced prices to their customers, and sold three times as many as they had formerly sold during the same period of time. They made no profits on these sales, but sold at a loss. The proofs show that complainants would have had a monopoly of the sale of the mirrors in the United States during the period covered by the accounting if they had not been interfered with by the defendants; and that the defendants, by their conduct in importing similar mirrors and selling them at retail at a reduced price in the same market, prevented sales which complainants would otherwise have made to other retailers. The damages to which complainants are entitled is the loss which they sustained by the diversion of trade which they would have enjoyed if the defendants had not supplanted them in the market, and their consequent loss of profit on such trade. The master has awarded them damages on the theory that they lost the sale of all the mirrors imported and sold by the defendants during the period in question. The proofs do not justify this conclusion.

The question is not what speculatively the complainants may have lost, but what they actually did lose. If the defendants had not sold the patented mirrors to their customers, it does not follow that the complainants would have sold them to the same customers or to retail merchants. *Seymour v. McCormick*, 16 How. 480. If it had been shown that the ordinary sales of the complainants for the same market fell off during the period of the defendants' sales in an amount equal to, or even approximating reasonably to, the amount of the defendant's sales, the master's findings could be approved. *Hostetter v. Vowinkle*, 1 Dill. 329. But the proofs do not furnish satisfactory data from which to estimate the extent of the diversion of the complainants' trade in the mirrors, although enough appears to indicate that their sales fell off to the extent of the usual purchases of the defendants. The competition of the defendants had ceased so recently at the time of the accounting that the effect upon complainants' sales afterwards could not be satisfactorily established. For aught that appears, the defendants created a market by their own enterprise, and by selling the mirrors at a reduced price, that otherwise would not have existed.

It cannot be legitimately inferred that the defendants would have sold the same number of mirrors if they had maintained the higher price; on the contrary, it is fair to presume that the usual law of trade operated, and that the reduction in price attracted purchasers and in-

creased the number of sales. Especially is this so in view of the fact that the defendants sold two or three times as many mirrors annually after they reduced the price as they had sold before.

The remarks of JOHNSON, J., in *Burek v. Imphaueser*, 14 Blatchf. 21, are applicable:

"It was not made to appear that the plaintiff could have sold his watches to the persons who purchased from the defendants. * * * It cannot be known that those who bought the infringing article would have bought the plaintiff's watches under any circumstances. The difference in structure as well as the difference in price enters into that question, and no means are afforded for determining it."

It may be reasonably assumed, in view of the steady demand in the market for these mirrors at the original price, and in view of the exigencies of the defendants' trade as dealers in general articles of this description, that the defendants would have continued to deal in them as they had been accustomed to, and the amount of their annual purchases of the complainants in the past might stand as a fair criterion of their probable purchases in the future if they had not supplied themselves from other sources. Upon this basis, as the complainants' sales fell off to the extent substantially of the former purchases of the defendants, they are entitled to damages for the loss of profits which would have accrued to them upon sales which they would have made to the defendants. The sum allowed by the master is far in excess of such profits.

As a sufficient time has now elapsed to ascertain to what extent the ceasing of the defendants' competition increased the subsequent sales of the complainants, an element in the computation which was wanting at the time of the accounting may now be supplied. The case will be sent back to the master, with leave to the parties to reopen the proofs.

The exceptions are sustained.

SHAW v. SOULE and others.

(Circuit Court, D. Vermont. July 10, 1884.)

1. PATENT LAW—ASSIGNMENT—ALLEGED FRAUD.

An inventor wishing to assign and receive royalties upon a patent for improvements in window-curtain fixtures, for which he had applied, mentioned as an inducement a weighted stick to be a feature in the patent, without saying that a third party had a patent covering the same. The assignment being made, and the patent obtained, without covering the stick, however, except in combination, after the assignee has manufactured under the patent and paid royalties, and after the other man's patent of the stick has been adjudged invalid through the efforts of the assignor, the assignee cannot escape liability for arrears on the plea of fraud.

2. SAME—GUARANTY.

No guaranty of title is binding against the setting up of invalid claims.

Referee's Report.*Jas. D. Denison*, for plaintiff.*Guy C. Noble*, for defendant.

WHEELER, J. According to the referee's report, the plaintiff represented to the defendants that his invention of improvements in curtain fixtures, for which he had applied for a patent, covered a weighted stick, to induce them to take an assignment of the patent, manufacture under it, and pay him a royalty; and did not inform them that one Knapp had a patent purporting to cover the stick, which he knew, and which, if disclosed, would prevent the arrangement. The plaintiff's patent, when obtained, did not cover the weighted stick itself, but only the combination of it with other parts, and Knapp's patent appears to be, and has been adjudged to be, invalid as to that part. *Knapp v. Shaw*, 15 FED. REP. 115. The defendants took an assignment of the patent, covenanted to manufacture under it and pay a royalty to the plaintiff, did manufacture, and have been defended by the plaintiff against Knapp's patent, and have paid the royalties stipulated for, except an arrear for which this suit is brought.

The question now is whether the misrepresentation and concealment as to the weighted stick constitute a defense to this suit for this arrear. It is quite clear that the defendants could not, after manufacture and sale under the patent, rescind the contract, and treat it, and have it treated, as void, on any ground of fraud in its making. They had proceeded upon it so far as to affirm it; and it is not argued but that they had. The question is therefore narrowed down to whether they are entitled to damages arising out of the making of the contract which should be applied by way of recoupment to meet the sum due. The case does not show but that the defendants have enjoyed as much, nor but that the patent was worth as much, as if it had covered the weighted stick by itself. They have suffered nothing, so far as appears, except through Knapp's patent purporting to cover it, and Knapp's claim that his patent was valid to cover it. Had the plaintiff's patent covered it, Knapp's claim might not have been prevented; and whether it would or not, under his representation and the assignment of the patent he would have been bound to defend it only against lawful claims.

No guaranty of title is binding against the setting up of unfounded claims. *Underwood v. Birchard*, 47 Vt. 307. There is nothing, therefore, to show that the defendants have any claim for damages growing out of the transaction which could be applied if ascertained; and, further, no amount of damages is found, nor basis for ascertaining them is stated. The plaintiff is therefore entitled to judgment.

Judgment on report for plaintiff; damages, \$732.90.

DADD, as Trustee, etc., v. MILLS and others.*(Circuit Court, S. D. New York. July 6, 1884.)***1. PERPETUITIES—REALTY—PERSONALTY.**

The laws of New York prohibit the suspension of the power of alienation of both real and personal property by any limitation or condition whatever for a longer period than during the continuation and until the termination of not more than two lives in being.

2. SAME—"POWER OF ALIENATION"—"UNQUALIFIED OWNERSHIP."

The statutes of New York use the term "power of alienation" in reference to real estate, and "unqualified ownership" in reference to personal property, in prohibiting perpetuities, but the meaning of the terms is synonymous.

3. SAME—PERSONAL PROPERTY.

The prohibition upon suspending the absolute ownership of personal property for a longer period than during two lives in being is directed to the accumulation of interest and income upon trusts in expectancy, and does not apply where all the *cestui que trust* are in being and may lawfully join with the trustee in an alienation of the property.

4. SAME—PATENT—TRUSTEE—RESUME OF FACTS.

If two parties, one having exclusive patent-rights in certain territory, the other similar rights in certain other territory, and the two jointly as to still other territory, join in an instrument giving a third party the sole powers (1) to convey rights, etc., in states and territories, with certain exceptions; (2) to do likewise as to the excepted states and territories; (3) to collect money and royalties; and (4) to bring certain suits at request of either party,—all under certain restrictions and in trust for the benefit of the owners, the trust to continue for the unexpired term of the letters patent,—the legal effect of such an instrument is to make the assignee an agent to carry out the joint instructions of the makers, so that it may be out of the power of either of the two to injure or be injured by the other or his representatives after his death; and the statutes prohibiting perpetuities have no application, as no person has any interest in the trust, present or in expectancy, except the persons who create it for their own benefit.

In Equity.

Rodman & Adams, for complainant.

Bartlett, Wilson & Hayden, for defendants.

WALLACE, J. At the hearing of this cause the question was reserved for further consideration whether the complainant acquired title to the letters patent granted to Clements & Fowler under the trust assignment to him executed by the owners of the patents.

It is insisted for the defendants that the trust estate created by the assignment is void because the absolute ownership of the patent is suspended for a longer period than two lives in being, and as the main intent and object of the assignment is thus to suspend illegally the power of alienation, the assignment is inoperative. If no efficacy can be given to the assignment without sanctioning a prohibited trust, the complainant's title is null.

As the trust was created and its objects are to be carried out in this state, the defendants' position that the validity of the transfer is to be tested by the rules of the local law is correct. The laws of this state prohibit the suspension of the power of alienation of both real and personal property by any limitation or condition whatever for a

longer period than during the continuance and until the termination of not more than two lives in being. The statutes use the term "power of alienation" in reference to real estate, and "unqualified ownership" in reference to personal property, in prohibiting perpetuities, but the meaning of the terms is synonymous. *Gott v. Cook*, 7 Paige, 542; *Everitt v. Everitt*, 29 N. Y. 71.

The trust assignment by which the letters patent were transferred to the complainant is an indenture, by the terms of which Fowler & Burrows, as parties of the first part, sell and assign to the complainant, as party of the second part, all their interests in the patent, to be held and owned by him, not for his own benefit, but as trustee upon certain enumerated trusts. These trusts may be summarized as follows: (1) To sell rights and grant licenses in and under the patent for any state or territory, (excepting certain specified states,) upon any *bona fide* application made to him therefor, at a price equal to \$1.50 for each 1,000 inhabitants of the state or territory, according to the last official census of the United States; (2) to sell rights and grant licenses for all the excepted states upon the joint request of the parties of the first part, and upon such terms as they signify; (3) to collect all moneys and royalties accruing from sales and licenses, and at stated times divide the same, after paying disbursements and commissions, into two equal parts, and pay over one part to Fowler, or his executors, administrators, or assigns, and the other part to Burrows, or his executors, administrators, or assigns; (4) upon the request of either of the first parties, but not otherwise, to institute, carry on, and defend suits and proceedings to protect the patent and the interests vested in him, or to enforce or annul any license or sale. By further conditions of the instrument the parties provide for the selection of a successor in the trust to the complainant in case of his resignation or death; the first parties covenant to save the second party and his successors harmless from all loss and liability by reason of the execution of the trust; and the second party covenants to faithfully discharge the duties of the trust. The instrument also provides for the continuance of the trust during the unexpired term of the letters patent; and each of the parties of the first part covenants that before he sells the rights and interest which he has in the trust created by the instrument, he will offer the same to the other, his executors or administrators, upon the terms upon which he proposes to sell.

From the recitals in the instrument it appears that Fowler owned the exclusive interest in the patent for certain territory, and Burrows owned the exclusive interest for certain other territory, while as to still other territory they were joint owners; and, upon reading the whole instrument, it is quite apparent that it was designed to restrict the power of either to deal with his exclusive interests to the prejudice of the other, and to affect a community of interest in the whole property. With this view a third person was selected as trustee and invested with the title of each, for the joint use and benefit of both.

Each put it beyond his power to sell rights or grant licenses in his own territory, but authorized the trustee to do so on specified terms, while in the territory which they owned jointly the trustee was authorized to sell rights and grant licenses only upon their joint request. The legal effect of the instrument was to make complainant their agent, his powers being coupled with an interest to carry out their joint instructions. Some of these instructions were given in advance, so that neither one of the parties could revoke them, and as to these he had full power to act. Others were reserved, and as to these he was only to act upon their joint request. The instrument is undoubtedly effectual to prevent either of the parties of the first part from transferring any interest in the legal title to the patent during the unexpired term of the patent to third persons, and in the event of the death of either party to prevent his legal representatives from doing so; and to this extent it operates to suspend the power of alienation for a period longer than the two lives of the parties who created the trust.

Such a restriction upon the right of the joint owners to deal with their property is not objectionable, and the statutes prohibiting perpetuities have no application to the case. These statutes, which add some qualifications to the rule at common law, relate only to future estates. The prohibition upon suspending the absolute ownership of personal property for a longer period than during two lives in being is directed to the accumulation of interest and income upon trusts in expectancy. The power of alienation can only be suspended when there are no persons in being by whom an absolute title to the property can be transferred. It is suspended when it cannot be exercised. It may be suspended by the creation of future contingent estates, which are not to vest within the prescribed period, or by the creation of a trust for beneficiaries who cannot join with the trustee in a conveyance which will not be in contravention of the trust. But unless a future estate, contingent or in trust, is created, the power of alienation is not suspended, because an unqualified title can be transferred at any time when the parties in being choose to join in a conveyance of their several legal or equitable interests. No such estate was created here by the trust agreement, because no person had any interest in the trust, present or expectant, except the persons who created it for their own benefit. It is competent for them at any time to join with the trustee and make a valid transfer of the whole property in the patent. Moreover, the trustee is merely their agent to carry out their joint-instructions, and upon tendering him any commissions to which he may be entitled, Fowler & Burrows can at any time revoke his powers, so far as they have not been executed, and insist upon a transfer of the legal title to the patent.

A decree is ordered for complainant.

HUSSEY MANUF'G Co. v. DEERING and others.

(Circuit Court, W. D. Pennsylvania. June 23, 1884.)

1. FOREIGN CORPORATION—PENNSYLVANIA STATUTE—SERVICE OF PROCESS.

Under the statutes of Pennsylvania a foreign corporation which transacts business in that state through its authorized agents is amenable to suit there, and service of process upon said agents is good service upon it.

2. PATENTS FOR INVENTIONS—PUBLIC ACQUIESCENCE—INJUNCTION.

When an invention is both new and useful, the want of public acquiescence cannot avail infringing parties to defeat a motion for a preliminary injunction.

3. SAME—INFRINGEMENT—PATENTS NOS. 233,035 AND 293,249.

Letters patent Nos. 233,035 and 293,249, granted October 5, 1880, and May 6, 1884, to Ephraim Smith, construed, sustained, and held to be infringed.

In Equity. Sur motion for a preliminary injunction.

George Harding and Francis T. Chambers, for complainants.

West & Bond, for defendants.

ACHESON, J. Although the defendant William Deering & Co. is a corporation of the state of Illinois, it yet appears that it has established a business agency at Allegheny city, in the state of Pennsylvania, for the sale of its manufactures. The written contract between the corporation and White & Wallace, the resident defendants, expressly creates the latter the "agents" of the former. By the terms of their employment White & Wallace are not mere factors, but agents to represent and act for the corporation. It is quite plain that under the statutes of Pennsylvania, as authoritatively expounded, the corporation transacts business within this state and is amenable to suit here, and that service of process upon its said agents is a good service upon it. Act of April 8, 1851, § 6, Pamph. Laws, 354; Act of March 21, 1849, § 3, Pamph. Laws, 216; *Hagerman v. Empire Slate Co.* 97 Pa. St. 534; *Ex parte Schollenberger*, 96 U. S. 369.

The bill charges the defendants with the infringement of two letters patent for improvements in mowing-machines, issued to Ephraim Smith, respectively numbered 233,035 and 293,249, and dated October 5, 1880, and May 6, 1884, of which patents the plaintiffs are the assignees. The invention embraced in the second and third claims of the patent of 1880 consists in a lever mounted on the hinge-bar, arranged in combination with a finger-bar, the lifting-chain having a yielding support, and mechanism for adjusting the chain and securing it in any desired position, whereby the weight of the finger-bar is partly sustained, and its outer end counterbalanced when the machine is in operation; and the combination of the lifting-chain, a spring-sheave, lever, and finger-bar operating together, whereby the action of the spring-sheave is constant upon the finger-bar through the said lever. The invention covered by the Smith patent of 1884 (which is capable of conjoint use with the invention of 1880) is designed to promote the successful use of finger-bars and cutter-bars of extraordinary length, by making the finger-bar with a slight down-

ward curvature in the middle sufficient to make the finger-bar straight when it is sustained at its inner end ready for operation; thus obviating a difficulty which arose from the springing and curving upward of the finger-bar in the middle by its unsupported weight, and that of the cutter-bar mounted thereon, so that the cutter-bar would bend downward at the outer end, and not work freely in its guards or ways.

Now, it is certainly true, as appears from the numerous patents which the defendants produce, that many devices have been contrived to overcome the serious imperfection existing in mowing-machines, by reason of the cutter-bar and attached mechanism resting on the ground at the one side of the machine, thus causing side draught, and increasing the draught upon the team by the friction of the cutter-bar upon the ground. But the evidence adduced—a most important part of which is found in the defendants' own circular, extolling the excellencies of the Deering Giant mower, the machine complained of as infringing—satisfies me that no practical mechanism to overcome these evils, especially where the cutter-bar proposed to be used is six or seven feet long, was devised until Smith's invention of 1880. A patient study of the prior patents has brought me to the conclusion that neither of his inventions was anticipated by any of them. And while he was by no means a pioneer in this field of invention, he is fairly entitled to claim the merit of successfully overcoming a long-felt difficulty by operative devices securing the desired results.

It only remains, then, to determine whether the defendants' machine embodies Smith's invention. Undoubtedly, some differences of mechanism between the Deering Giant mower and the plaintiff's machine are observable. The Giant mower does not have a spring-sheave, but, in lieu thereof, and as a mechanical equivalent, it has a long, straight spring secured to the frame of the machine. Again, in the Smith machine there is but a single chain, which is connected at one end to the lifting lever, and at the other to the lever mounted on the hinge-bar, whereas, in the Giant mower, the defendants employ two independent chains. One of them is the lifting chain, which is attached directly to the hinge-bar, and has no yielding support nor mechanism for adjusting and securing it in any desired position. The other of these chains, however, is connected at one end with the lever mounted on the hinge-bar, and at the other end to the straight spring, and it possesses both a yielding support and provision for adjusting and securing it in the desired position. The differences in the devices above alluded to, in my judgment, are formal merely, and my conclusion is that, substantially and for all practical purposes, the Giant mower embodies Smith invention, as shown and claimed in the second and third claims of his patent of 1880.

That the finger-bar in the defendants' machine has the downward middle curvature described in Smith's patent of 1884, and embraced in the first three claims thereof, is not seriously controverted. As we have already seen, this invention is both new and useful. Therefore,

the want of public acquiescence cannot avail infringing parties; and, indeed, in such a case as this, it is a matter of no moment whatever.

A preliminary injunction, as moved for, must issue; and it is so ordered.

THE DELAWARE.

(Circuit Court, S. D. New York. July 1, 1884.)

1. ADMIRALTY—BOAT IN TOW—COLLISION—TUG—NEGLIGENCE—PRESUMPTION.

A boat in tow being powerless to help herself and wholly under the control of the tug, if it is brought into a collision, the occurrence presents an inference of negligence on the part of the tug.

2. SAME—FACTS OF THE CASE.

The facts in the case of a powerful tug with a tow of 29 canal-boats, endeavoring to meet the tide, and meantime passing between an island and a steam-boat at anchor, while doing which one of the boats in the tow is thrown by the tide against the anchored vessel and sunk, raise a presumption of negligence on the part of the tug which it must repel, when libeled.

3. SAME—TUG—DUTY—PERILS OF THE TIDE.

A tug with a tow of boats in charge is in duty bound to anticipate the time and place which are perilous from the ordinary action of the tide.

In Admiralty.

Beebe, Wilcox & Hobbs, for libellant.

Benedict Taft & Benedict, for claimant.

WALLACE, J. The libellant's canal-boat, while being towed by the Delaware on the afternoon of July 13, 1877, was brought into collision with the steamer Carolina, then lying at anchor off Governor's island, in the bay of New York. The Delaware was a large and powerful tug. Her tow was composed of 29 canal-boats in six tiers, five in each tier except the last, which had four. The libellant's boat was the port boat of the fourth tier. The tug and tow reached the bay after the ebb-tide from the East river had been running about an hour and a half, and in order to avoid the force of the tide as much as was practicable, the tug made for Governor's island and proceeded northerly along the west shore within a prudent distance of from 200 to 300 feet, with her tow straightened out behind her, covering a distance of about 1,200 feet. As she reached the north shore of the island she encountered the tide which was running strong to the westward, and put her wheel to port for the purpose of heading to the tide. The Carolina was lying at anchor at a point about 700 feet west of the line of the tow, and between the north-westerly end of the island and Ellis island. As soon as the forward tiers of the tow felt the force of the tide, the whole tow began to swing rapidly to the westward and towards the Carolina. The Delaware put her wheel hard port and endeavored to swing her tow clear of the Carolina, but ineffectually; and the libellant's boat struck the Carolina and soon after sunk.

Upon this state of facts it is incumbent upon the Delaware to repel the presumption that she was negligent. As the libellant's boat was wholly under control of the tug and powerless to help herself, and was brought into collision with a vessel at anchor, the occurrence suggests an inference of negligence on the part of the tug which it devolves on her to repel. The immediate cause of the collision was the ordinary action of the tide at a place and in the manner which it was the duty of the tug to anticipate.

No fault is attributed to any of the boats of the tow. If the Carolina was anchored too near Governor's island to permit the tug to take her tow safely between the island and the steamer, in view of the tide which was to be encountered, the tug was in fault: either because those in charge neglected to observe the steamer in due season, or, if they observed her, because they attempted to proceed when they should have known the danger to the tow. Obviously, the only reasonable excuse which could be made for the tug is the one which is made; that is, that the Carolina came up astern of the tow, passed by, and without warning dropped anchor suddenly in such near proximity to the tow as to render a collision not only imminent, but so inevitable that, although the tug performed her whole duty in the emergency, the collision could not be avoided. This theory is fortified by the testimony of a large number of witnesses on the part of the claimant, and is refuted by positive testimony on the part of the libellant, to the effect that the Carolina had cast her anchor half an hour before the tug came abreast Castle William.

It will not be useful to recapitulate or attempt to analyze the statements of the witnesses; it must suffice to say that the impression derived from a careful reading of the proofs is cogent that the Carolina had been anchored where she lay for some time before those in charge of the tug noticed her presence; that their attention was in part occupied by their preparations to encounter the tide; that when they first noticed her they did not realize that she was in dangerous proximity to the tow; and it was not until the boats began to feel the strong drift of the tide, and began to swing rapidly in the direction of the steamer, that they realized the danger of the situation. Then it may have been too late to avoid the collision.

Upon any view of the facts it cannot be held that the tug was not guilty of negligence which contributed to the collision.

The decree of the district court is affirmed, with interest and costs of appeal.

CLAYTON and others v. FOUR HUNDRED AND TEN TONS OF COAL.

(District Court, S. D. New York. June 17, 1884.)

DEMURRAGE—CONSIGNEE TO FIND BERTH—DUTY OF VESSEL.

Where a consignee is bound to provide a berth for the ship or pay demurrage for the delay, the vessel is not bound to enter upon a struggle with other vessels for the possession of the berth, or upon a race to obtain it. The consignee must find a berth accessible to the ship without difficulty or struggle, and in default thereof must pay for the delay.

In Admiralty.

Owen & Gray, for libelants.

William M. Hoes, for claimant.

BROWN, J. The libelant claims demurrage for the detention of his vessel during 11 working days, from the time of his arrival on the twenty-eighth of December to the time of completing his discharge on the fourteenth of January. The bill of lading provided for the delivery of the coal at the rate of 100 tons a day, commencing 24 hours after notice of arrival, excluding Sundays and holidays, and for demurrage at the rate of eight cents a day per ton for detention beyond such time. When the libelant's vessel arrived at the claimant's dock at Haverstraw, on the twenty-eighth of December, he gave notice to the consignee. There was a sunken wreck immediately in front of his wharf, which appeared to be in the way, but which, on measurement, was found to leave sufficient room for the libelant's boat to get in. The place was occupied, however, by another boat; and when that boat was ready to move away, the place was claimed for pontoons of the wrecking company to move the wreck. The pontoons were nearer than the libelant's boat, and the latter could not have obtained her place without a struggle for the possession. No such duty was obligatory upon the boat. It was the consignee's duty to provide a place for the discharge of the cargo peaceably, and without either a race or a struggle for a berth. The libelant offered to go to other places near by to discharge, but the respondent refused to receive the coal elsewhere. The pontoons having first got alongside his dock, the libelant's boat was not able to obtain a berth there until the fifth of January; one of the intervening days was Sunday, leaving six days' detention since the boat's arrival, exclusive of the first day.

The libelant also contends that there was delay on the part of the consignee in receiving the coal after the discharge was commenced. The evidence on this point is very conflicting. This was the first coal the libelant had undertaken to discharge. Changes were twice made in the means of discharging, which, I think, the weight of evidence shows was not as free from embarrassment as it should have been. On the whole, I cannot find that the three days' delay after the discharge was commenced was occasioned through any fault of the respondent. He is liable, however, for the six days' detention before

the discharge was commenced, which, at the rate provided by the bill of lading, amounts to \$196.80, making, with interest to date, \$237.51, for which the libelant is entitled to a decree, with costs.

THE BRISTOL.

(Circuit Court, S. D. New York. July 1, 1884.)

1. ADMIRALTY—COLLISION—LIBEL—INNOCENT PURCHASERS.

A vessel which has collided with another, and not been subjected to a libel therefor within two years, after which it passed into the hands of innocent purchasers, who, before the purchase, took every means to ascertain the existence of any liens, cannot be libeled on account of that collision, as against the new owners, four years after the damage was done.

2. SAME—LIEN—LACK OF DILIGENCE IN ENFORCING—INNOCENT THIRD PARTIES.

Admiralty denies the privilege of enforcing a lien which has been suffered to lie dormant, without excuse, until the rights of innocent third parties would be prejudiced if it should be recognized.

In Admiralty.

Beebe, Wilcox & Hobbs, for libelants.

Pritchard, Smith & Dougherty, for claimants.

WALLACE, J. The court below properly dismissed the libel in this case because of the laches of the libelant in not asserting its claim seasonably. The collision took place July 5, 1872. The Bristol at that time was owned by the Narragansett Steam-ship Company. June 9, 1874, that company sold the steamer to the Old Colony Steam-ship Company, the present owner. During this period of nearly two years that intervened between the time of the collision and the sale of the steamer, the Bristol could have been libeled at any time. The Old Colony Steam-ship Company was not only an innocent purchaser for a valuable consideration, but its officers took unusual precautions to ascertain whether there were any claims asserted against the steamer by examining the records of all the admiralty courts which might acquire jurisdiction *in rem*, and for several months after it took possession and exercised notoriously the rights of an owner, it retained control of a fund as security in its hands against any latent liens upon the vessel. The libelant did not assert any claim so as to reach the knowledge of the purchaser until more than four years had elapsed after the collision; and in the mean time, the Narragansett Steam-ship Company had become practically defunct, and was represented by its officers to be irresponsible.

Admiralty denies the privilege of enforcing a lien which has been suffered to lie dormant without excuse until the rights of innocent third persons would be prejudiced if it should be recognized. The application of the rule to this case is eminently just, and the opinion of the district judge is fully approved.

In this view, it is unnecessary to consider whether the Bristol was culpable in the collision.

HAHN v. SALMON and others.

(Circuit Court, D. Oregon. July 18, 1884.)

1. ATTACHING CREDITOR.

The lien of an attachment is sufficient to enable a creditor to maintain a suit in equity to set aside a fraudulent assignment of the property attached; particularly under section 148 of the Oregon Code of Civil Procedure, which makes an attaching creditor a *bona fide* purchaser for a valuable consideration.

2. ASSIGNEE, POWER OF.

The assignee in a voluntary assignment is the mere instrument of the debtor for the distribution of his property, and unless the power is conferred upon him specially by statute, he cannot maintain any action or suit concerning the same, that the debtor could not, in case no assignment had been made.

3. CONSTRUCTION OF ACT—TITLE AND PREAMBLE.

In the construction of a statute, both the title and preamble may be considered in doubtful cases.

4. ACT TO PREVENT FRAUD AND INJUSTICE—CONSTRUCTION OF.

An act to prevent fraud and injustice, as the assignment act of 1878, (Or. Sess. Laws, 36,) should be liberally construed to that end.

5. CASE IN JUDGMENT.

The Oregon assignment act of 1878 (Sess. Laws, 36) declares a general assignment by an insolvent debtor invalid, unless made for the equal benefit of all the creditors of the debtor; but when so made, it shall have the effect to dissolve a prior attachment in an action in which judgment is not then taken, but does not affect a prior judgment against the debtor or an execution thereon. S., an insolvent debtor, whose debts equaled \$38,000, and assets did not exceed \$30,000, confessed judgment in favor of his Portland creditors for \$6,690, and had execution issued thereon and levied on his stock of goods, worth \$27,000, and sold thereby \$25,000 worth of them to said Portland creditors, with the intent to prefer them to his San Francisco ones, and with the understanding that they would return the same to him as soon as he was able to settle with the latter on terms sufficiently favorable to himself. The day after this judgment was confessed an action was commenced against S. on the claims of the San Francisco creditors, amounting to \$29,205.40, and an attachment issued therein and levied on said stock of goods then in the hands of the sheriff on said execution. Soon after, and before judgment could be had in the latter action, S. made a general assignment, for the benefit of his creditors, in pursuance of which the assignee therein claimed the possession of the remainder of the goods—about \$2,000 in value—still held under the attachment, on the ground that the same was dissolved by the assignment, and threatened to take the same and dispose of them thereunder; thereupon the attaching creditor filed a bill to restrain the assignee, and have the assignment set aside as fraudulent, to which there was a demurrer. *Held*, (1) that the attaching creditor could maintain the suit; and (2) that the confession of judgment and assignment being parts of one common purpose and transaction, by which the Portland creditors were preferred to the San Francisco ones, in the distribution of the insolvent debtor's property, the assignment was fraudulent and void.

Suit to Set Aside a Fraudulent Assignment.

M. W. Fechheimer, for plaintiff.

Joseph Simon, for defendants.

DEADY, J. This suit is brought by the plaintiff, a citizen of California, against the defendants A. Salmon and L. Bettman, citizens of Oregon, to have declared void and set aside an assignment made by the former to the latter, on March 1, 1884, with intent to hinder and delay, cheat and defraud, the plaintiff and others, his San Fran-

cisco creditors. By section 1 of the act of October 18, 1878, (Sess. Laws, 36,) entitled "An act to secure creditors a just division of the estates of debtors who convey to assignees for the benefit of creditors," it is provided that "no assignment of property by an insolvent, or in contemplation of insolvency, for the benefit of creditors, shall be valid, unless it be made for the benefit of all his creditors in proportion to the amount of their respective claims; and such assignment shall have the effect to discharge any and all attachments on which judgment shall not have been taken at the date of such assignment." Provision is made in the act for the administration of the debtor's estate by the assignee, and the distribution of the proceeds ratably among his creditors. And, in the discharge of this duty, section 13 provides that he "shall have as full power and authority to dispose of all estate, real and personal, assigned, as the debtor had at the time of assignment, and to sue for and recover, in the name of such assignee, everything belonging or pertaining to said estate, and generally do whatever the debtor might have done in the premises." The act also provides that the assignment must be in writing, and acknowledged and recorded as a conveyance of real property, and have annexed to it a sworn inventory of the debtor's assets and liabilities; but the same shall not be declared fraudulent or void for want of such inventory. The assent of the creditors to the assignment is to be presumed; and the same "shall vest in the assignee the title to any other property belonging to the debtor at the time of making the assignment." Section 15 declares "there is urgent need" of a law for "the equal distribution of assets among creditors," and therefore the act shall go into effect at once.

From the bill it appears that on and before February 14, 1884, the defendant Salmon was indebted to sundry firms and partnerships, composed of citizens of California, doing business in San Francisco, in divers sums amounting in the aggregate to \$29,205.40, for goods, wares, and merchandise sold and delivered to said defendant between January 1, 1882, and February 1, 1884, among which firms was Kahn Bros. & Co., composed of the plaintiff and E. Kahn, to whom \$8,098.20 of said sum was due, which debts were, on February 14, 1884, duly sold and assigned by said several firms and partnerships to the plaintiff, who is now the owner of the same; that on said last-mentioned day the defendant Salmon was the owner and in the possession of a stock of dry and fancy goods in the store numbered 69 and 71 Morrison street, Portland, of the value of \$27,000, and the fixtures therein, of the value of \$500, and was indebted to Fleischner, Mayer & Co., and others, doing business in Portland, in the sum of \$6,690.37, and was insolvent; that being so indebted and insolvent, and intending and contriving to prevent an "equal" and "just" division of his property among his creditors, and to cheat and defraud, hinder and delay, his creditors not doing business in Portland, and to perpetrate and commit a fraud upon the act aforesaid, the defendant caused and

procured the debts due said Fleischner, Mayer & Co., and other Portland creditors, as aforesaid, to be assigned to Ivan R. Dawson, and an action to be brought thereon by said Dawson, wherein he at once voluntarily appeared and confessed judgment for the amount claimed, and also caused and procured an execution to issue thereon, and the same to be levied on the stock of goods aforesaid, and about \$25,000 worth thereof to be sold thereon to said Portland creditors in satisfaction of said judgment and execution,—the said sale being made in pursuance of an understanding between the said defendant Salmon and said Portland creditors, to the effect that the latter would bid in said goods and take them into and retain them in their possession, so as to aid said defendant in compelling the plaintiff to compromise his demands for a sum much less than their face, and then return them to said defendant and allow him to commence business therewith.

On February 15, 1884, the plaintiff commenced an action in this court against the defendant Salmon and one E. Salmon, as partners, under the name of "A. Salmon," to recover said sum of \$29,205.40, and on the same day caused a summons and writ of attachment to issue therein, the former of which was then duly served on the defendant Salmon, while the latter was duly levied on said stock of goods and fixtures, which attachment is still in force, and prior in time and right to any other lien on said goods or fixtures, except the attachment lien on said goods in the action of *Alex. Mayer v. A. Salmon*, to recover \$1,300.30, commenced on said February 15th, and levied on said goods prior to the attachment of the plaintiff. On March 1, 1884, said defendant Salmon, in furtherance of the unlawful and fraudulent scheme aforesaid, executed, and caused to be recorded and delivered to the defendant Bettman, a writing purporting to be an assignment under the act aforesaid, for the benefit of his creditors, which assignment, for the reasons stated, is alleged to be fraudulent, and to have been made and accepted in violation thereof. It is also alleged in the bill that the defendant Salmon, in furtherance of this scheme to hinder and delay, cheat and defraud, his San Francisco creditors, filed a false and frivolous answer to the complaint in the action brought by the plaintiff against him, in which he denied the indebtedness alleged therein, although he has since admitted the same in said assignment, and offered to pay it at the rate of 25 cents on the dollar; and that about the time said judgment was confessed, he assigned and transferred to one Bowman, without any consideration therefor, a horse and buggy, and all his "good and collectible" accounts and choses in action.

A supplemental bill was filed, making said Alex. Mayer a party defendant to the suit, and alleging that since the filing of the original bill the "attachment lien" in favor of said Mayer upon said goods has been "extinguished," but that he still claims some interest or right therein, wherefore he is made a party defendant; that since the

commencement of this suit the plaintiff has become the assignee and owner of the claims and demands of sundry other creditors of the defendant, citizens of California, amounting to the sum of \$117.52; and that he is now the owner and holder of all the unsatisfied claims and demands against said defendant Salmon, except the sum of \$2,255.79, of which amount \$1,300.38 is the claim of the defendant Mayer.

The bill prays for a final decree that the assignment to the defendant Bettman is fraudulent and void as to the plaintiff, and that in the mean time said defendant be restrained by injunction from interfering with or disposing of any of the property attached in the action at law.

The case was argued orally upon an application for a provisional injunction, as upon a demurrer to the bill which has since been filed by the defendants Salmon and Bettman, with an understanding that the briefs subsequently prepared and submitted should be considered as equally applicable to the motion and demurrer. And as it is admitted that if the demurrer is not sustained the injunction must issue, the case will be considered in this opinion as standing upon the demurrer to the bill. On the argument of the demurrer counsel for the defendants made the following points: (1) A creditor cannot maintain a suit to control the disposition of his debtor's property until he has reduced his claim to judgment; and (2) the assignee, under the act of 1878, has the sole right to impeach a conveyance made by the debtor which is fraudulent and void as to creditors.

Upon the first point, Pomeroy (3 Eq. Jur. § 1415) says, "the American courts have given directly conflicting answers;" and in a note to this section he collates these authorities *pro* and *con* as follows:

The decisions in New Jersey, New Hampshire, Texas, and California affirm the right of a creditor who has a lien by attachment to maintain a suit in equity to set aside a fraudulent judgment or conveyance affecting the property attached, and those in Maine, Kansas, Illinois, and Missouri deny the same; while the decisions in New York, as usual in such cases, are on all sides of the question. See *Thurber v. Blanck*, 50 N. Y. 80; *M. & T. Bank of Jersey City v. Dakin*, 51 N. Y. 519.

In case the creditor's claim has passed into judgment, it is admitted that equity will give him relief against a fraudulent conveyance or transaction of the debtor which hinders or impairs his right to enforce the same by subjecting the property of the latter to sale on execution; but if the relief is sought with reference to property not subject to levy and sale on execution, the creditor must also show that an execution issued and was returned *nulla bona*. *Wiggins v. Armstrong*, 2 Johns. Ch. 144; *Brinckerhoff v. Brown*, 4 Johns. Ch. 671; *William v. Brown*, Id. 682; *McDermutt v. Strong*, Id. 687.

The rule requiring the claim of the creditor to be established by judgment is based on the idea that a court of equity having no juris-

diction of the simple question whether A. owes B. or not, that fact must first be established in a court of law, where such matters are properly cognizable, before A. can invoke the aid of a court of equity, as the creditor of B. The power of equity to investigate the alleged fraudulent impediment to the application of the debtor's property in satisfaction of the creditor's claim, and to relieve against it, is admitted; but the fact—the indebtedness—upon which rests the plaintiff's right to sue in the character of a creditor, must be first and elsewhere established. The rule is a technical and arbitrary one, and has not always been regarded as inflexible, or its maintenance of more importance than the ends of justice. In *Scott v. McMillen*, 1 Litt. 302, the Kentucky court of appeals disregarded it in favor of a creditor whose debtor's absence from the state prevented a judgment at law from being obtained against him. And in *Russell v. Clark's Ex'rs*, 7 Cranch, 89, Mr. Chief Justice MARSHALL said:

"If a claim is to be satisfied out of a fund which is accessible only by the aid of a court of chancery, application may be made in the first instance to that court, which will not require that the claim should be first established in a court of law."

But the right of the plaintiff to sue in equity as the creditor of the defendant may be established at law, otherwise than by a final judgment in an action at law brought to recover the amount of his claim. It may be thus established in the proceeding for an attachment in such an action. Under the law of this state, an attachment can only issue upon due proof of the defendant's claim. Code Civil Proc, § 143. As between the parties to the action the fact of the indebtedness is thereby established, until the attachment is vacated or discharged. Upon the strength of it, the plaintiff is authorized to seize the property of the defendant and hold it to satisfy the judgment it is presumed he will obtain in the action. And in the mean time he has a specific lien on the property, and is "deemed" by the law of this state, as against third persons, to be "a purchaser in good faith and for a valuable consideration" of the same. Id. § 148. Undoubtedly, such a purchaser might maintain a suit to relieve the property purchased from the effect of a fraudulent conveyance by the grantor.

The argument against the right of an attaching creditor to be considered on the same footing in this respect as a judgment creditor, is in a measure applicable to the latter as well as the former. It is, that the attachment being only provisional, the fact established in the process of obtaining it, and the lien acquired by it, may be annulled and lost by its discharge. But whenever a judgment is subject to review on error or appeal, as are most judgments for which this aid is likely to be invoked, there is a possibility, and even more, that it may be reversed and annulled. But this circumstance or contingency does not affect the right of the judgment creditor to maintain a suit in the mean time to aid in its enforcement. In either case, and in one as much as the other, the fact that the plaintiff is a

creditor of the defendant being established in due course of law, it is taken for true, until the evidence thereof is annulled by the discharge of the attachment or the reversal of the judgment.

In support of the demurrer, the defendant cites on this point, High, Inj. §§ 26, 27, 94, 150; *Martin v. Michael*, 23 Mo. 50; and *Shufeldt v. Boehm*, 96 Ill. 560. But in my judgment the argument and weight of authority support the right of the attaching creditor to maintain this suit. It is so held in the following cases: *Tappan v. Evans*, 11 N. H. 311; *Williams v. Michenor*, 11 N. J. Eq. 520; *Robert v. Hodges*, 16 N. J. Eq. 299; *Curry v. Glass*, 25 N. J. Eq. 108; *Davis v. Dean*, 26 N. J. Eq. 436; *Heyneman v. Dannenberg*, 6 Cal. 376; *Scales v. Scott*, 13 Cal. 76.

In *Tappan v. Evans*, *supra*, 327, the rule deducible from the authorities was stated as follows:

"Where property is subject to execution, and a creditor seeks to have a fraudulent conveyance or obstruction to a levy or sale removed, he may file a bill as soon as he has obtained a specific lien upon the property, whether the lien be obtained by attachment, judgment, or the issuing of an execution. But if the property is not subject to levy or sale, or if the creditor has obtained no lien, he must show his remedy at law exhausted, by an actual return upon his execution that no goods or estate can be found, (which is pursuing his remedy at law to every available extent,) before he can file a bill to reach the equitable property of the debtor."

And in *Robert v. Hodges*, *supra*, 304, the chancellor, after stating the rule to be that before a creditor can interfere with the debtor's disposition of his property he must establish his title to or lien upon the same, says:

"Such lien the creditor does acquire under our law by the service of the writ of attachment. The law recognizes the claim of the attaching creditor, after it has been verified by affidavit, as prescribed by statute, as a subsisting debt, for the purpose of creating the lien. Having that lien by the authority of the statute, prior to the recovery of judgment, he is entitled to the aid of a court of equity to enforce his legal right."

But in this case the claim of the plaintiff is also established by the formal admission of the defendants. It is admitted by the demurrer, for the time being, of course, but it is also explicitly acknowledged in the assignment,—the deliberate and formal act of the defendant Salmon, and the very instrument under which the defendant Bettman claims. Upon these authorities and this admission as to the defendant's claim, as well as his right as a purchaser in good faith and for a valuable consideration, and upon every argument of convenience and right applicable to the question, the plaintiff must be considered as a creditor of the defendant Salmon, with a specific lien upon the property in question, for the protection of which he is entitled to the aid of a court of equity.

Upon the second point, counsel for the plaintiff denies the right of the assignee to impeach, for fraud, a conveyance or assignment made by his assignor to the exclusion of a creditor, or at all; and also con-

tends that there is no such question in this case, because the contention here is solely as to the validity of the assignment itself, the very instrument under which the assignee claims. The Oregon statute of frauds (Gen. Laws, p. 523, § 51) is substantially the same as chapter 5, 13 Eliz. Among other things, it provides that every assignment of "goods * * * made with the intent to hinder, delay, or defraud creditors or other persons of their lawful suits, * * * debts, or demands, and every * * * judgment suffered with the like intent, as against the persons so hindered, delayed, or defrauded, shall be void." But such an assignment is only void as against creditors, and is binding on the assignor and his representatives. As between the parties, the title passes and vests in the assignee, subject only to the right of the injured creditor to have it set aside. 4 Bac. Abr. "Fraud," c. 412; *In re Estes*, 6 Sawy. 467; S. C. 3 FED. REP. 134.

The act of 1878 is not coercive. An assignment by a debtor is still his voluntary act, and its validity and effect must be determined by the common law, except as the act otherwise provides. It declares that a general assignment in contemplation of insolvency shall not be valid unless made for the benefit of all the assignor's creditors, and that it shall have the effect to discharge an attachment in an action against the assignor, if made prior to judgment therein. The power of the assignee over and concerning the estate of the assignor is limited to such acts as the debtor himself might have done if there had been no assignment.

In *Jacobs v. Ervin*, 9 Or. 57, the supreme court of the state held that "when a mere lien or incumbrance, fraudulent and void as to creditors, but valid as between the parties, has been created by the assignor upon property remaining in his possession, and the title to which passes to and vests in the assignee for the benefit of creditors," the assignee, as the representative of such creditors, may resist the assertion or enforcement of such fraudulent lien or incumbrance. But neither the opinion nor the case goes further than this, and in the former it is plainly implied that this power of the assignee only extends to the defense or protection of property of which he has both the possession and title, from the effect of a fraudulent lien or incumbrance.

In the case of an assignee or representative of a debtor, who claims title by a paramount act of the law, as an assignee in bankruptcy, or when by law such power is expressly conferred upon an assignee created by the voluntary act of the debtor, then such representative or assignee may, on behalf of the creditors, contest and impeach the fraudulent acts of the debtor in respect to his property, to the same extent they could if there had been no assignment. But in this case the assignment is the voluntary act of the debtor, and confers no other power upon the assignee than that possessed by the assignor. An insolvent debtor, who has made a fraudulent transfer of his property for the purpose of defrauding his creditors, cannot reclaim it;

nor can he confer a right in this respect upon another which he does not himself possess. As was said by Chief Justice Gibson in *Vandyke v. Christ*, 7 Watts & S. 374, in speaking of an assignment at common law:

"The assignee is the debtor's instrument for distribution, and stands in relation to the property as stood the debtor himself. It has been transferred to him as it would have been transferred to the debtor's right hand, had it pleased him to exercise his common-law right. As he stands in no privity to the creditors, he cannot arrogate to himself any of their attributes and rights."

It follows that the creditors of Salmon have the same right to attack and impeach any fraudulent disposition of his property as if the act of 1878 had not been passed. It does not undertake, in any particular, to limit their right in this respect, nor to enlarge that of the assignee. On the contrary, it expressly states that he shall have the same power over the property assigned "as the debtor had at the time of the assignment," and may do concerning it "whatever the debtor might have done in the premises."

These conclusions are fully supported by the following authorities: *Haggerty v. Palmer*, 6 Johns. Ch. 437; *Van Husen v. Radcliff*, 17 N. Y. 582; *Pillsbury v. Kingon*, 31 N. J. Eq. 619.

On the other hand, this assignment could not be impeached by the defendant Bettman, as the assignee, under any circumstances. It is the title under which he claims, and he is estopped to deny its validity. He has no standing in court or elsewhere in relation to this property, except as the creature of this instrument; and were he to undertake to contest its validity he would be cutting the ground from under his feet,—denying his own existence. But this suit is brought upon the theory that there is no valid assignment or assignee in this case, and that the instrument under which the defendant Bettman claims to act as such, is fraudulent and void. Of course, if the plaintiff cannot maintain a suit to set this instrument aside on this ground, no one can for him, and, least of all, the person named therein as assignee. It is really immaterial whether the assignee, in a valid assignment under this act, has the right to maintain a suit to impeach a prior fraudulent conveyance of his assignor or not. For that is not this case. But this is a controversy as to whether there is any assignment or assignee of the defendant Salmon or not, and the plaintiff, who is threatened with injury to his legal rights by the claim of the defendant Bettman that he is such assignee, is the proper party to bring a suit for its determination.

Is the assignment valid, is the only other question in the case. On February 14, 1884, the defendant Salmon was insolvent. His assets, consisting mainly of a stock of goods in Portland, were not worth to exceed \$30,000, while his indebtedness amounted to \$38,000, of which \$6,690 was due to Portland creditors, and the remainder to those of San Francisco. On that day the Portland demands were as-

signed to one person, put in suit, judgment confessed for the amount, execution issued thereon and levied upon the stock of goods. On the following day the plaintiff and the defendant Mayer, as assignees of the claims of San Francisco creditors, commenced action thereon, and caused attachments to issue therein and be levied on said goods. Soon after, and before the plaintiff could take judgment in his action, \$25,000 of said goods were sold upon said execution to satisfy the judgment of the Portland creditors,—they being the purchasers of the same, in effect, for the benefit of the defendant Salmon. The latter, having now succeeded in putting the bulk of his assets beyond the reach of the bulk of his creditors, proceeds on March 1st to assign what little remained for the benefit of his creditors generally, under the act of 1878. And if this assignment is valid, it has the effect under that act to dissolve the plaintiff's attachment, and thus deprive him of the lawful advantage which by his diligence he had obtained. At the passage of this act an insolvent debtor might dispose of his property so as to prefer one creditor over another of equal or even more merit. To prevent this injustice, this act was doubtless passed. This plainly appears from the title and emergency clause of the act—the latter being equivalent to a preamble—as well as the body of it.

According to the English rule, the title of an act, being affixed by the clerk after its passage by the parliament, is not regarded as a part of it, and therefore cannot be considered in its construction. But this rule does not apply in the United States, where the title of an act is the language of the legislature as well as the preamble or body of it. Being, however, in the nature of things, a mere brief epitome or short description of the act, the title is very liable to be incorrect or incomplete, and therefore it can never be used to control the operation of any plain provision of the body of the act. Yet it may, in doubtful cases, aid in the construction of the act by throwing light on the cause and purpose of its passage. *Pumpelly v. Owego*, 45 How. Pr. 257; *Cumines v. Jefferson Co.* 63 Barb. 293; *Ogden v. Strong*, 2 Paine, C. C. 587; *U. S. v. Fisher*, 2 Cranch, 358; *U. S. v. Palmer*, 3 Wheat. 631; *Hadden v. The Collector*, 5 Wall. 110; *U. S. v. M. Ardle*, 2 Sawy. 370; Smith, Comm. §§ 556–559. And so of the preamble. It may be resorted to in cases of doubt to show the intention of the legislature; and particularly to ascertain the causes which led to the passage of the act, and the mischiefs intended to be remedied by it. *Jackson v. Gilchrist*, 15 Johns. 116; *Holbrook v. Holbrook*, 1 Pick. 250; Smith, Comm. §§ 560–573.

The body of the act plainly forbids a preference in case of a general assignment by an insolvent debtor, when it declares that the same shall be invalid unless made for the benefit of all the creditors in proportion to the amount of their respective claims. In the title the same purpose is manifest. It describes the act as one to secure a "just division of the estates of debtors" who assign for the benefit of creditors. The emergency clause, or section 15, which is in effect

a preamble, states that there is no law providing "for the equal distribution of assets among creditors;" and, as "there is urgent need" of one, provides that the act shall take effect at once. The prevention of preferences by an insolvent debtor making an assignment being the purpose of the act, it also very properly undertook to prevent any creditor from obtaining a preference in such cases, against the will of the debtor, and to that end provided that such an assignment shall have the effect to dissolve a prior attachment on the same property. But the act should have gone further in the same direction. In this respect it is very lame and incomplete, and if a mere literal compliance with its terms is held sufficient, it may be used as a convenient contrivance by an insolvent debtor to distribute his property among his creditors unequally and unjustly. To all such creditors as he wishes to prefer he may make payments or confess judgments, and if the unfavored creditor seeks to protect himself in the only way he can, by an attachment, in most cases the lien of the judgment will be found prior thereto, and hold the real property; and, if necessary, an execution may issue thereon and be levied on the personal property before the attaching creditor can obtain judgment in his action. And now, the debtor having by this means put his property practically into the control of those whom he wishes to prefer, he may in their interest make an assignment, and thereby free the property from the attachment of the unfavored creditor, even if the same was prior in time to the judgment and execution of the favored one.

A party cannot obtain judgment in an action, even where there is no defense made, under 10 days. In the mean time his debtor may confess judgment, with or without action, in favor of any or all of his other creditors, and have his property taken on execution, and then make a formal assignment in time to dissolve the attachment in the first action and defeat the claim of the plaintiff therein altogether. The act should provide that, in case of an assignment for the benefit of creditors, all payments or mortgages made or judgments confessed by the debtor, or taken against him for want of an answer, on account of a pre-existing debt or liability, within some reasonable time prior thereto, should be null and void. It should also provide for the appointment of an assignee by the creditors, or, failing this, by the county court. As it is, the debtor names his assignee, and thereby puts his estate into the hands of some serviceable friend, to be administered in his own interest or that of some favored creditor.

The experience of the business community with this act has verified, I think, what was predicted by this court concerning its practical working in *Mayer v. Cahalin*, 5 Sawy. 357. "The object of the act was to prohibit insolvent debtors from preferring one creditor to another. * * * But it must be admitted that in practice it will not accomplish such purpose, and that, most probably, it will operate, as counsel contend, to secure an unequal, and therefore an unjust, distribution of a debtor's property." But, defective as it may be in

these respects, its purpose is plain and just; and I do not think it ought to be so construed as to uphold an assignment, which, while it may conform to the mere letter of the law, was deliberately made with the intention of circumventing it, and does in effect actually contravene its spirit and purpose, and grossly defeat the good intention of the law-maker. If an insolvent debtor undertakes to make an assignment under this law, and in so doing does any act with the intent to circumvent the law or thwart its purpose in that respect, he commits a fraud upon the law, and the assignment is void. *Harrison v. Sterry*, 5 Cranch, 301; *The William King*, 2 Wheat. 153; *Lee v. Lee*, 8 Pet. 50; *Keiffer v. Ehler*, 18 Pa. St. 391; *Receivers, etc., v. Paterson S. Bank*, 10 N. J. Eq. 16; Kerr, Fraud, 288. The purpose and intent of the act is to prevent preferences in assignments by insolvents. Preferences are generally fraudulent and unjust, and are now regarded with disfavor, even in states where they have not been actually prohibited by statute; and the determination of the courts is to support them no further than a respect for adjudged cases requires. *Ogden v. Jackson*, 1 Johns. 370; *Receivers, etc., v. Paterson S. Bank*, *supra*; *Nicholson v. Leavitt*, 4 Sandf. 279; *Broadman v. Halliday*, 10 Paige, 229; 1 Amer. Lead. Cas. 75. To prevent these preferences in the case of a general assignment of an insolvent debtor's property, the act of 1878 declares invalid any such assignment which does not in effect provide for a "just" and "equal" distribution of such debtor's property among his creditors. In *Jacobs v. Ervin*, *supra*, 59, the supreme court, in considering this act, said: "Its whole design clearly shows that it was the intention of the framers to provide a simple and effectual mode of making an equitable distribution of the insolvent debtor's estate among all his creditors; and such construction should be given it, if consistent with established legal principles, as will make it effectual for that purpose." In short, the act is remedial in its character. It is intended to prevent fraud and injustice, and in all cases of doubt should be liberally construed to that end. *Sharp v. New York*, 31 Barb. 577; *White v. Steam-tug*, 6 Cal. 470.

The allegation of the bill is that the confession of judgment and the assignment, together with the transfer of the book-accounts and the horse and buggy, were parts of one fraudulent scheme to prefer the Portland creditors over the San Francisco ones, and such appears to have been the result. The confession of judgment, as such, the law permitted. But the assignment, considering the judgment and transfer of the accounts as a part of it, was prohibited by the law, and therefore void. The scheme, as a whole, was intended to produce, and resulted in, an unequal distribution of the debtor's property among his creditors.

Under an act regulating assignments and forbidding preferences thereby, the supreme court of Massachusetts, in *Perry v. Holden*, 22 Pick. 275, held that a mortgage of his property by a debtor to secure

certain creditors, followed by a general assignment for the benefit of creditors,—the two instruments being in contemplation at the same time and made in furtherance of one scheme,—constituted one transaction; and as, taken together, they gave the creditors named in the mortgage a preference, the assignment was void. See, also, on this point, *Mackie v. Cairns*, 5 Cow. 547.

In conclusion, this assignment, in my judgment, is void, because (1) it was not made or intended for the benefit of all the assignor's creditors in proportion to their claims, and does not so operate, but the contrary; (2) it is and was intended to be a fraud on the assignment act; and (3) it was made with intent to hinder, delay, and defraud the plaintiff of his lawful suit and demand, contrary to the statute of frauds.

The bill does not seek to have the confession of judgment set aside, but only the assignment. The judgment was permitted by the law, and, considered by itself, is valid; and so was the plaintiff's attachment. But this assignment, if allowed to stand, will dissolve the attachment, and leave the judgment, which was really used to distribute the defendant Salmon's property, to stand.

There being no valid assignment or assignee in this case, the plaintiff is entitled, on the case made in the bill, to the relief prayed for.

The demurrer is overruled.

In re Extradition of TULLY.

(Circuit Court, S. D. New York. June 18, 1884.)

1. EXTRADITION—FORGERY

Checks or drafts drawn by an agent, and signed with the name of the principal, and by the agent, "per procuration," are not forgeries, whether the agent has or has not authority to draw them, since in either case they are nothing different from what they purport to be.

2. SAME—EMBEZZLEMENT—FALSE ACCOUNTS.

False entries made in the usual books of account, or *memoranda* on slips directing such entries by others, made by an officer or employee of a bank for the purpose of concealing his embezzlements, do not constitute forgery, as defined and recognized by the courts of England; and where a person is held for extradition to England for forgery on such proofs only of acts committed in England, he should be discharged on *habeas corpus*.

3. SAME—LEX LOCI CONTRACTUS.

Falsification of written evidence against another is forgery at common law: and where, by the law of the place, a clerk's or paying teller's daily entries in the course of his duty, supplemented by his own oath, in the absence of his recollection on the subject, are admissible in evidence in his own discharge, in respect to moneys received by him, *semble*, that the falsification of such entries for the fraudulent purpose of concealing embezzlements should be deemed forgery.

Extradition. *Habeas corpus* and *certiorari*.

F. F. Marbury, for the British government.

A. P. Whitehead, for the Preston bank.

C. S. Luscomb, for the accused.

Brown, J. Gerald Thomas Tully having been held by a United States commissioner for extradition to England on a charge of forgery, the accused has been brought before this court, together with the proceedings upon which he was held, upon writs of *habeas corpus* and *certiorari*. There is no dispute about the facts. The only question presented is whether the offense constitutes the crime of forgery under the treaty with Great Britain. The record shows that Tully was the submanager of the Preston Banking Company, (Limited,) a banking company in Preston, England; that the bank had various banking agencies in the vicinity accustomed to have funds on its account; that it was the duty of Tully, as submanager, to regulate the balances standing to the bank's credit with its various agents, and when the amount of any particular agent was considered too high it was his duty to make some withdrawal of funds and apply them for other bank purposes; that the bank had been accustomed to make advances of money on security to Messrs. Railton, Sons & Leedham, of Manchester; that Tully "had a general authority from the Preston Bank to draw checks upon its agents in reducing their balances;" the practice on doing so was for Tully to fill out a printed memorandum, termed a "blue-slip," showing the amount drawn, and from whom, and how the proceeds were disposed of. These printed blanks were in the following form:

"PRESTON, ———.

"*Preston Banking Co.*

"Debit, ———.

"Credit, ———."

When such slips were filled out Tully signed them with the letter P. simply, which stood as his signature and authentication of the transaction stated in the memorandum. The blue-slips were then handed to the accountant's department, from which the proper entries were made in the books of the bank, and the slips were preserved as vouchers.

The complaint charges, and the proof shows, that Tully, upon three occasions, drew checks upon the bank's agents, received the money from them, and rendered to the bank blue-slips crediting the drafts to the agents, and directing the debit of the amounts to certain customers of the bank. The proof warrants the inference, however, that the money was appropriated by Tully to his own use, and not invested with the persons against whom it was charged. Three transactions of this kind are mentioned in the complaint, all similar, one of which is as follows: On the twenty-third of October, 1882, Tully drew a check upon the Manchester & Salford Bank, (Limited,) for £1,000, payable to selves or bearer signed per pro. the Preston Bank Company; G. T. Tully, submanager." The drawee was one of the agents of

the Preston Bank. Tully received the money in person, and on the fourth of November following rendered to the accountant's bureau of the Preston Bank the following blue-slip:

"PRESTON, 4-11-1882.

"The Preston Banking Company.

"Debit, investment ac. to Railtons.

"Credit, M. & S. Bk. Man. do.

"£1,000.00.

In October, 1883, Tully absconded. On examination of the books and accounts several leaves of the investment ledger were found missing, and Railtons' account was missing. Evidence from the Railtons shows that no such moneys were received by them.

The complaint charges forgery in respect to the drafts, and also forgery in respect to the blue-slips, in uttering a "certain written instrument purporting to be an accountable receipt, acquittance, and receipt for money, dated on the fourth day of November, 1882, for the sum of £1,000, purporting to be invested with Railton, Sons & Leedham."

The commissioner held that the crime of forgery was not made out in respect to the checks or drafts upon which the money was procured by Tully; but he has held the prisoner for forgery on the ground that the blue-slips were accountable receipts.

Forgery is defined by Blackstone as "the fraudulent making or alteration of a writing to the prejudice of another man's right." 4 Bl. Comm. 247. I have not found any more succinct or accurate definition than this. Greenleaf adds: "It may be committed of any writing which, if genuine, would operate as the foundation of another man's liability, or the evidence of his right." 3 Greenl. Ev. § 103. In one of the latest English cases (*The Queen v. Ritson*, L. R. 1 Cr. Cas. 200) it is defined as including "every instrument which fraudulently purports to be that which it is not;" and in that case it was held that a false date inserted in a deed by the grantor, prior to the time of its execution, for the fraudulent purpose of overreaching an intervening incumbrance, was forgery on the part of the grantor, because it was a false deed purporting to be what it was not; namely, a deed of the date stated, designed to cut off, by means of a false date, an existing right.

As respects the checks, the evidence shows that Tully had authority to draw them upon the bank's agents in the precise form in which these were drawn; and there is no proof that the circumstances of the agent's accounts were not such as warranted the drafts. The act was done in his ordinary course of business; it was an act which he was authorized to do; and there was nothing false or irregular about the checks themselves; his acts in drawing these checks were therefore rightly held not to constitute forgery. Even if Tully had had no authority to draw these checks, they would not, according to the

English law, have constituted forgery, as was held by the 15 judges in *Regina v. White*, 2 Car. & K. 404, because the signature by him in his own name "per procuration," etc., showed on its face all that it purported to be, and was not a false making.

As respects the blue-slips, if I were at liberty to consider the question presented as an original one, in connection with the law of evidence prevailing in this state, I should be inclined to hold that they might possibly constitute forgery at common law; on the ground that, under the usage of the bank and the course of dealing, these blue-slips, as between Tully and the bank, when supplemented by his own oath, as correct entries made at the time of the transaction and in the course of his official duty, might, in the absence of his own recollection, become evidence in his favor, admissible under our rules of evidence, to show an investment by him of the moneys he had received as stated in the slips, and hence tending to show an acquittance to him therefor as against the bank; that these slips were precisely equivalent to entries in the books of the bank by Tully, and of the same effect as if it had been the practice for Tully to make entries in the books of the bank instead of rendering the blue-slips for the purpose of such entries by others. Such entries in the books of the bank, in the course of his daily duties, would, in connection with his own oath, I think, afford some corroborative evidence in themselves, as against the bank, in favor of the person making them as parts of the *res gesta*. Whart. Crim. Law, §§ 663-668; 1 Greenl. Ev. § 118m; *McGoldrick v. Traphagen*, 88 N. Y. 334; *Chaffee v. U. S.* 18 Wall. 516, 541; *Bank of Monroe v. Culver*, 2 Hill, 531; *Conklin v. Stamler*, 2 Hilt. 423, 428; *Burke v. Wolfe*, 38 N. Y. Super. 263; *Biles v. Com.* 32 Pa. St. 529; 1 Tay. Ev. §§ 697-712. When such entries are made falsely and fraudulently in order to conceal embezzlements, they might well, I think, under our law, be held to be forgeries at common law, as papers falsely made to the prejudice of the bank; because capable of being made use of, in connection with his own oath, as evidence against it: and the false manufacture of written evidence against another is clearly forgery. Herein, as it seems to me, lies the distinction between papers or documents capable of such a use, and others which are merely false statements and can have no such legal effect to another's prejudice. A letter written by an agent to his principal containing a false and fraudulent account of a business transaction is not forgery, because it has not, and cannot be made to have, any legal force or validity in itself against any other person than the writer. However false its statements, it is precisely what it purports to be, and nothing else, and not capable of any other use. *State v. Young*, 46 N. H. 266. But if the principal should insert in the letter an alteration injurious to the agent, the alteration would be forgery on his part, because false, and because the letter would be *prima facie* evidence against the agent. So if a check delivered in payment of goods purchased be drawn fraudulently against a bank where the drawer has no funds, and has

no reason to expect payment, such a check is not forgery, since it binds nobody but the drawer, and is precisely such as he made it and intended it to be; but if the holder fraudulently increase the amount payable after the check has been signed, that is forgery on his part, because the check is evidence and apparent authority for drawing an amount of money which the maker never authorized. In all these cases the distinction seems to me to turn upon the question whether the instrument has, or can be made to have, any legal force or effect, in itself considered, against any other person than him who makes the false statement or alteration. If it has, and is designed and calculated to deceive, it is forgery; otherwise not. This distinction, I think, is well shown in the case of *Regina v. White*, above referred to. 2 Car. & K. 404. There the accused was held, at *nisi prius*, guilty of forgery for indorsing a check "per procuration Thomas Tomlinson," adding his own name; upon which he drew the amount of the check, stating at the time that he was authorized to sign in that manner. He had in fact no authority to sign in that manner. On appeal before the 15 judges, the verdict was set aside as erroneous, on the ground, as I understand, that there was nothing in the signature that purported to be anything different than what it was; and though the indorsement "per pro.," etc., was false, that signature was no evidence whatever against Tomlinson of any authority from him, and could not be made such; but was merely a naked false statement in writing. Entries in pass-books, on the other hand, purport to bind the parties, and are evidence of accountability for the amounts entered, and hence a subject of forgery. *Regina v. Moody*, 9 Cox, Cr. Cas. 166, 168.

In this case, if the blue-slip were nothing more than a mere direction to the accountants to credit the agent and charge Railton, although it contained by implication a representation of the investment of the amount named with the Railtons, that would not have constituted forgery, but merely a false representation in writing. It could only become forgery by virtue of some quality as evidence which it might possibly acquire in Tully's favor, under the usage and practice of the bank and the law of the place, tending to acquit him for the money which he had drawn from the agent.

For the purposes of this hearing, however, on a claim of extradition by the British government, I am precluded from passing upon this as an original question, in connection with the rules of evidence prevailing here, because this transaction was in England, where a different rule of evidence seems to prevail, (3 Bl. Comm. 368; 3 Barn. & Ald. 142;) and also because, in a case identical with the present, as it seems to me, in all essential particulars, the court of appeal in England has held this offense not to be forgery. I refer to the case of *Charles Windsor*, 6 Best & S. 522, who, in 1865, was arrested in London on the charge of forgery upon the Mercantile Bank of this city, in making false and fraudulent entries in the books of the bank.

Windsor, the paying teller of the bank, had embezzled upwards of \$200,000, and concealed his crimes by entering upon the bank's books some \$200,000 as coin and cash in vault, which was not there. By these fictitious entries, carried along for a period of two years, he concealed his embezzlements. In the argument before the court of appeal, on *habeas corpus*, counsel called the attention of the court to the claim that such an entry "is virtually a statement by the bank, and would be evidence against them." The point was overruled, although the rules of evidence prevailing here were not considered. Opinions were delivered by COCKBURN, C. J., and BLACKBURN, J., with SHEE, J., concurring. COCKBURN, C. J., says:

"No doubt this was a false entry, and made for fraudulent purposes; but it is clear that the offense did not amount to forgery. We must take the term 'forgery' in the extradition act to mean that which by universal acceptance it is understood to mean, namely, the making or altering a writing so as to make the writing or alteration purport to be the act of some other person, which it is not."

BLACKBURN, J., says:

"Forgery is the falsely making or altering a document to the prejudice of another, by making it appear as the document of that person; telling a lie does not become forgery because it is reduced to writing."

The statute of the state of New York, making the offense forgery in the third degree, was held, and no doubt rightly, not to extend the force of the treaty to offenses not embraced within the definition of forgery at the time when the treaty was executed. The prisoner was accordingly discharged. There has been no change in the laws or statutes of either country, in this respect, so far as I know, since this decision.

It is immaterial what my own judgment might be, whether as an original question the *Case of Windsor* or that of Tully constitutes forgery at common law, so long as the point has been adjudicated to the contrary in England, in whose behalf the extradition is here sought. The blue-slips in this case cannot by possibility have any greater effect than Tully's own entries in the books of the bank, according to the usages of the bank, would have had. It is only as some possible evidence in Tully's favor that such entries, or these blue-slips as the equivalent of such entries, could be anything more or different than they purport to be. The attention of the English court of appeal being called to this point, they overruled it as insufficient. This adjudication must be deemed to be the settled law of England until in some way modified or reversed, and I have not found any contrary or inconsistent adjudication. While the definitions of forgery there given are in some respects, I think, too limited, the *Case of Windsor*, as an authority, determines the English law as regards forgery in this particular. By that adjudication Tully could not be convicted or lawfully charged with the offense of forgery in respect to the transactions here complained of; and it would evidently

be improper to order his extradition upon a charge which the law of that country declares cannot be maintained as constituting forgery under the treaty.

The prisoner should therefore be discharged.

PETERS v. ROBERTSON.

(Circuit Court, S. D. New York. July 5, 1884.

CUSTOMS DUTIES—BONE-BLACK.

The article known as bone-black is subject to a duty of 25 per cent.

At Law.

William W. McFarland, for Plaintiff.

Elihu Root, U. S. Dist. Atty., and *S. B. Clarke*, Asst. U. S. Dist. Atty., for defendant.

WHEELER, J. The importation in question was made in September, 1881. The article is well known as bone-black. By section 2504, Rev. St., "black of bone, or ivory-drop black," is made subject to a duty of 25 per cent. The duty was assessed at this rate. The plaintiff made protest that this article was free under the provision of section 2505, exempting "bones crude and not manufactured, burned, calcined, ground, or steamed." "Animal carbon (bone-black)" was made free by the act of March 2, 1861. 12 St. at Large, p. 178, § 23. A duty of 25 per cent. was laid upon "bone or ivory-drop black" by the act of June 30, 1864, (13 St. at Large, p. 202, § 10,) an "Act to increase duties." Animal carbon and bone-black, by name, disappeared from the free-list. Ivory-drop black is a pigment, and derives its name of drop from the mode of manufacture. Bone-black is not shown, nor known, to be anything like a pigment. There is no such thing as bone-drop black, as there is ivory-drop black; nor is ivory-drop black ever known as bone-black. The expression in the act of 1864 of bone or ivory-drop black could hardly mean bone, or in other words, ivory-drop black. The more natural meaning under the circumstances would seem to be that either bone-black or ivory-drop black should be subject to a duty of 25 per cent. Still more would the expression of "black of bone, or ivory-drop black," in the Revised Statutes, seem to have that meaning. Black of bone could, so far as shown, be nothing but bone-black. The expression is the equivalent of "bone-black or ivory-drop black, 25 per centum." In this view the assessment was correct.

The protest raised the question whether this article came under the description of bones crude and not manufactured, burned, ground, calcined, or steamed. It was shown not to be bones ground or steamed. The question whether the description of bones crude and not man-

ufactured, or burned or calcined, would cover it, was submitted to the jury and found for the defendant. That was the question to be tried. *Davies v. Arthur*, 96 U. S. 148. The verdict should stand unless it is without evidence to support it, or is against the substantial weight and effect of the evidence.

In *Schriefer v. Wood*, 5 Blatchf. 215, it is held that bone-black is a manufacture of bones. That decision is decisive of this question, unless bone-black is specifically burned or calcined-bone. Bones are exposed to heat in close vessels, and charred to make bone-black. The process is a distillation, and not a combustion. The bones are heated, but are not burned. The product is ground and assorted for use. Bones are calcined by being burned or heated accessible to air. There was some conflict on the evidence as to how these terms were understood in commerce. The whole was submitted to the jury to find whether this article was included in the terms "burned or calcined bone." The finding was well founded upon evidence, the effect of which was for the jury.

Under the circumstances, the verdict cannot be set aside without an arbitrary exercise of the power of the court. The motion must therefore be denied.

PRENTICE v. STEARNS and others.

(Circuit Court, D. Minnesota. June 24, 1884.)

1. LAND—TREATY WITH INDIANS—CONVEYANCE—TITLE.

A treaty between the United States and an Indian tribe having been fulfilled by a conveyance of land, no question can arise as to the character of the conveyance,—whether a gift, donation, or grant for value.

2. SAME—DESCRIPTION—MISTAKE.

An appointment by an Indian chief of a party to receive title to certain land intended to be conveyed under treaty, may be valid; but, unless the conveyance describes the land as it really lies, no title to it can pass to the appointee, whatever may have been the Indian's impression as to what its situation was.

3. SAME—RIGHT OF APPOINTEE TO SELL—ACCURACY OF DESCRIPTION.

The appointee of an Indian chief to receive title to certain land may afterwards absorb the interests of his co-beneficiaries; but, in a subsequent conveyance by him, he must use language appropriate to his purpose, or no title will pass.

At Law.

Rea, Kitchell & Shaw, C. K. Davis, and J. W. Willis, for plaintiff.

O. P. Stearns, per se; Gordon E. Cole, John M. Gilman, and W. W. Bilson, for defendants.

MILLER, Justice. This is an action of ejectment for land in the city of Duluth. The contest arises out of the reservation or stipulation in the treaty of the thirtieth of September, 1854, between the Chippewa Indians and the United States. That stipulation declares that Buffalo, one of the chiefs of the tribe, should be authorized to

designate some of his relatives who had supported him, who should receive a section of land. It seems that Buffalo, on the day of the making of the treaty, and, of course, before it was ratified by the United States, made an attempt, both to appoint persons who should receive the land, who should be beneficiaries of the donation, if you should call it a donation, or of the reservation, if you should call it a reservation, (I do not think it is material which,) and to designate the land which he assigned to them, which was as follows:

"I hereby select a tract of land one mile square, the exact boundary of which may be defined when the surveys are made, lying on the west shore of St. Louis bay, Minnesota territory, immediately above and adjoining Minnesota point; and I direct that patents be issued for the same, according to the above-recited provisions, to Shaw-bwaw-shung, or Benjamin G. Armstrong, my adopted son, 'and then to the nephew, whose name is given, and to his two sons,'—one quarter section to each."

One of the questions that arises is whether that was a valid selection,—a valid exercise of the power of selection and appointment by Buffalo under that treaty. The treaty was afterwards ratified without qualification in regard to this particular. We are of opinion that, so far as the appointment of the persons to receive this land is concerned, it was a valid appointment; and the right, so far as it could then vest, was vested by that paper in Benjamin Armstrong, and in the other beneficiaries who have conveyed their interest in said land to Benjamin Armstrong, and he has received the patent from the United States for the land under that treaty. Buffalo died before anything was done in the matter. Armstrong undertook to convey to Frederick Prentice, the plaintiff in the action, an undivided one-half of the section of land which had been selected by Buffalo. The United States afterwards, coming through the land-office and interior department, to execute this treaty by making a deed of a section of land, found a difficulty in locating it under Buffalo's directions. I do not know whether the difficulty was insuperable; probably it was. It was easy to see that a large discretion was left in the officers of the United States, because both the treaty and Buffalo's directions say, "the boundary of which may be defined when the surveys are made." It was therefore dependent upon future surveys, whether that meant regular congressional surveys of land for public purposes, or whether it meant a special survey of the land of Buffalo's selection. And the same question goes back to the treaty, whether Buffalo was to select a section after these surveys were made, or whether he was to select the amount of a section, which is a square mile. These are questions which are not easy to solve, neither is it necessary to do so. In either event we think that the treaty was valid, and we think that the patent which the United States, after encountering these difficulties, made to Armstrong of certain parts of sections regularly surveyed, as found in the congressional plats and surveys of the United States, was a valid execution of the treaty. And as the patent issued to Arm-

strong under that selection of the United States, and as appears by the correspondence accepted by Armstrong, we are of the opinion that the treaty was fully executed between Armstrong and the United States, and was valid as to them.

Now, that presents the main question in this case; and that question is, whether Armstrong made such a conveyance to Prentice of the undivided one-half of any particular piece of land, or of the interest which he had acquired by what had taken place, so that Prentice could recover this specific piece of land in ejectment. That is the main question; and the one upon which we feel ourselves compelled to decide this case.

It will be remembered that the deed from Armstrong to Prentice was made on the eleventh of September, 1856, two years after the treaty was made,—after Buffalo had made Armstrong the appointee of what he was to receive from the government, and after he had made his attempt at the selection of the land; which selection was described as “a section one mile square, the exact boundary of which may be defined when the surveys are made, lying on the west shore of St. Louis bay, Minnesota territory, immediately above and adjoining Minnesota point.” Now, Armstrong conveys to him “the undivided half of the following described piece or parcel of land,” which language itself is important; he conveys to him the undivided one-half of the following described piece or parcel of land, situated in the county of St. Louis and territory of Minnesota, described as follows:

“Beginning at a large stone or rock at the head of St. Louis river bay, nearly adjoining Minnesota point; commencing at said rock, and running east one mile, north one mile, west one mile, south one mile, to the place of beginning; and being the land set off to the Indian chief, Buffalo, at the Indian treaty of September 30, 1854, and was afterwards disposed of by said Buffalo to said Armstrong, and is now recorded in the government documents.”

The main question to be decided here is whether this is an attempt to convey the specific piece of land one mile square, definitely located, and supposed to have come to Armstrong through means of the treaty and the appointment of Buffalo, or whether the true meaning of it was that it was intended to convey such interest as Buffalo had acquired and had transmitted to Armstrong, whatever that interest might be, and wherever it might be found, whether it was one square mile *in solido*, or whether it was one square mile taken in different sections and subdivisions. Because if it was the purpose of Armstrong to convey to Prentice this specific piece of land by metes and bounds, of which the location was known and understood, or supposed to be known and understood, then the plaintiff, suing upon this deed, and nothing else,—which does not describe the land in controversy between the parties to the suit,—cannot recover, because the deed does not describe the particular land,—the specific land, or piece or parcel of land,—now held by defendant. It is not the piece or parcel

of land which this plaintiff is suing for, and which this defendant is charged with being in possession of. On the other hand, if it was an attempt to convey the interest, whatever it was, that had come to Armstrong by reason of the treaty, and by reason of the action of Buffalo under it, then another consideration prevailed, and we can inquire whether the plaintiff is in a position to question the title to that unascertained piece of land. The consideration, outside of the language of the deed, is very strongly in favor of the first view, and is repelled by nothing in it, that the parties intended to convey, and understood the deed described a piece of land, so that it could be identified. The presumptions are very strong, and the language is in favor of this view. The deed describes a mile square, with a given starting point, which can be identified, and which has been identified in this proof. And then, taking-into consideration the language, "Commencing at said rock, and running east one mile, north one mile, west one mile, south one mile, to the place of beginning." This is a specific description of a described piece or parcel of land. This is a piece of land that a surveyor can go to to-morrow and lay off easily, by showing him the rock which was proved to be at an ascertained point. He can go there and lay it off easily, (except that it runs into the water,) and he can make that selection of the section of land described there, and make a survey of it, and it will not touch the land in controversy by half a mile. It therefore requires the entire rejection of that first part of the description as so much surplusage, and as inconsistent with what the plaintiffs now claim, in order that we may find the sufficiency of that deed. The language following does not fairly negative that; it merely implies that this section of land which we have above described,—this mile square,—it is "the lands set off to the Indian chief Buffalo, at the Indian treaty of September 30, 1854, which was afterwards disposed of by said Buffalo to said Armstrong, and is now recorded in the government documents." If we read that, as it seems to me it should be read, that on that date, Buffalo having first made the treaty, and made the selection of the mile square, according to the description of his selection which we have read,—which does not mention the rock, nor does it mention the lines east and west, but undertakes to describe where it is by saying, "that it is lying on the west shore of St. Louis bay, Minnesota territory, immediately above and adjoining Minnesota point,"—now, if we suppose that when Armstrong undertook to convey the undivided half of his property to Prentice that no government surveys had been made, no attempt made to identify the land, that Armstrong as well as Buffalo were satisfied at the time of making the designation that he had designated a mile square of land within that treaty limits, which could be easily ascertained and laid off by the surveyors when they come to make the United States surveys, and that Armstrong was undertaking to convey that piece of land so selected, and you have all that is necessary to fill every requirement

of the descriptive part of this grant. But there is no description of the land, except the implication which may arise from the language in the deed, which conveys to Prentice whatever may be coming to Armstrong by reason of this transaction. This is the meaning of the language, and to put any other construction upon it is to strain a point, and to suppose it possible to strike out that first portion of the deed which gives a clear description of the land and its location and boundaries.

Without elaborating this view of the subject, we are of the opinion that that deed from Armstrong to Prentice conveys no interest in the land in controversy here upon which the action of ejectment can be sustained. We further find that this deed to Prentice, which we find did not convey the land, is otherwise a good deed. There is an objection to the want of two witnesses, but that is cured by a subsequent act of the Minnesota legislature. And we are of opinion that it was sufficiently acknowledged to have admitted it to record, and was so acknowledged and recorded, so that, with regard to the deed, its only defect was its want of description.

We are of the opinion that, under the statutes of Minnesota, the deed made by Mr. Gilman, under which the defendants claim, is merely a quitclaim deed. It is equivalent to the conveyance of such interests as Armstrong had when he made it. Secondly, if Armstrong, as we find, had conveyed the other undivided one-half by a valid deed for the land now in controversy, Mr. Gilman and his grantee would take nothing under his conveyance, because Armstrong had nothing to convey. But since the grantees under Gilman, the defendants, are in possession, it is for the plaintiff to show that he himself has a good title. He has not made out any title to this particular piece of land, and he is in no condition to inquire into defects in the defendant's title.

We are of opinion, in the first place, as to the law of the case, that the treaty, having been fulfilled by the United States by the conveyance of the land, that no question arises about there being a donation, or gift, or grant for value, or anything of that kind. Secondly, we are of opinion that Buffalo's attempt in the designation and appointment, as to the appointment was valid. In point of fact, that the United States never granted, and never pointed out, that particular piece of land which it seems he supposed he had selected. In the third place, we are of opinion that Armstrong, by this conveyance, after he had become entitled to the interest which Buffalo had appointed to all four of them,—that being a quarter section to each,—that that conveyance he made to Prentice might have been a valid deed assigning the undivided one-half of Armstrong's interest, under the treaty, had he used language appropriate to that purpose, but that he did not do so. We also find that the undivided half of this property is worth the sum of \$10,000.

Judgment is ordered for the defendants.

*In re Cross.**(District Court, D. Maryland. June 28, 1884.)***HABEAS CORPUS—REMOVAL OF PRISONER—TRIAL BY JURY—POLICE COURT OF THE DISTRICT OF COLUMBIA.**

The petitioner, a citizen of Maryland, having been committed by a commissioner of the Maryland district for an offense against the law to prevent the sale of lottery tickets in the District of Columbia, an order for his removal to be tried in the police court of that district was refused, and the commissioner directed to take bail requiring him to answer the charge in the supreme court of that district, being a court in which he would be tried by jury. The fact, that the accused has to be brought from another district to be tried, *held* almost conclusive that the offense charged cannot be of that class to which the constitutional guaranty of trial by jury has been held not to apply.

Habeas Corpus.

A. B. Williams and Joseph White, for petitioner.

A. Stirling, Jr., for the United States.

MORRIS, J. This is an application to stay the passing of an order of removal, and for a writ of *habeas corpus*. The petitioner, Cross, a citizen of Maryland, having been charged with being a person who has kept, set up, promoted, and been concerned in a policy lottery or policy shop within the district of Columbia, contrary to the act of April 29, 1878, to prevent the sale of policy or lottery tickets in the District of Columbia, was arrested and brought before Commissioner Rogers, in this district, and, after an examination of witnesses and a hearing before him, was, in default of \$1,000 bail to answer the charge before the police court of the District of Columbia, committed to jail by the commissioner.

The petitioner now asks that no order may be passed for his removal to the District of Columbia to answer the charge in the police court, and that he be released. It is urged on his behalf (1) that the act of congress authorizing the removal of persons charged with crime against the United States provides for their removal for trial before such court of the United States as by law has cognizance of the offense; and it is contended that the police court of the District of Columbia is not a court of the United States, but is a local municipal court of that district for the trial of petty offenses. (2) That the trial of the petitioner before the police court of that district will be in a manner forbidden by the federal constitution, because the court is held by a judge without a jury, and the offenses are tried therein upon information merely, and that although a right of appeal and retrial is provided in a superior court with a jury, the constitutional right of the petitioner to a trial by jury is not thereby preserved.

These are substantially the grounds urged by the learned counsel for the petitioner. In support of them, he relies upon *Dana's Case*,

7 Ben. 1, and I am asked to pass upon the important constitutional question with regard to the right of the police court of the District of Columbia to try any person for the offense charged against this petitioner. But this general question is one of such importance and delicacy, that, upon an application for a writ of *habeas corpus*, a single judge should be reluctant to pass upon it, and I do not think this case presents to me that duty.

There is a court of the District of Columbia having cognizance of this offense, with regard to the jurisdiction and constitutionality of which there is no doubt. *The supreme court of that district, sitting in special term for the trial of crimes*, has jurisdiction of all crimes and offenses within that district. It has a grand jury and a petit jury; and none of the objections urged against the constitutionality of a trial of the petitioner in the police court are applicable to it.

Under section 1014 of the Revised Statutes, the removal of the prisoner can be ordered, in default of bail, to any court within the district which, by law, has cognizance of the offense. I shall therefore direct the commissioner to accept bail from the petitioner for his appearance before the supreme court of the District of Columbia, and, in default of bail, to commit him to answer in that court.

I should, perhaps, briefly indicate my reason for refusing to order the petitioner's removal, to be tried by the police court. The declaration of the constitution that the accused shall have a speedy trial by jury is imperative. The only exceptions are crimes and accusations of that class, which, at the time of the adoption of the constitution, were, by the regular course of the law and the established modes of procedure, not the subjects of jury trial. *State v. Glenn*, 54 Md. 600. These are found to have been those offenses against police regulations for the protection of society against the vicious, idle, vagrant, and disorderly portion of its members. Such offenses of necessity must be speedily and summarily disposed of, as well for the relief of the offender as of the community. The object to be accomplished is the immediate suppression of the offense, that decency, good order, and morality may be maintained. The police court of the District of Columbia is primarily a court for this purpose. It is held, without a jury, by one judge, learned in the law, but in case of his sickness, absence, or disability either of the justices of the supreme court of the district may designate a justice of the peace to discharge his duties.

Looking, then, to the reason for the exceptions to the constitutional guaranty of trial by jury, it seems to me an almost conclusive presumption that when the alleged offender is not arrested in the community where the offense was committed, when he has to be brought back from another jurisdiction to be tried, or when the charge against him is that, without ever having been present, he has from a distance been concerned in or promoted the offense complained of, then the reason fails, and it is apparent that the offense, at least so far as that

offender is concerned, cannot be one which comes within the above-mentioned class of petty offenses, for the summary suppression of which police regulations are invoked, and to which the constitutional declaration has been held not to apply.

BRUSH and another v. CONDIT and others.

(*Circuit Court, S. D. New York.* July 12, 1884.)

PATENT—ELECTRIC LIGHT—ANNULAR CLAMP—INVENTION ANTICIPATED.

The invention, in the first, third, fifth, and sixth claims of the patent to Charles F. Brush known as "the clamp patent," and which consisted in the described means of moving the carbon rod, holding it by the angular impingement of the clamp, and continuously regulating the distance between the carbons by a continuous and gradual feed through the annular clamp, was anticipated by the invention of Charles H. Hayes.

In Equity.

Geo. H. Cristy, Causten Browne, and E. N. Dickerson, for plaintiffs.

Edmund Wetmore and Chauncey Smith, for defendants.

SHIPMAN, J. This is a bill in equity, brought by the owner and the exclusive licensee of two letters patent to Charles F. Brush,—one, granted October 23, 1877, for an improvement in illuminating points for electric lights, and known as the carbon patent; and the other, reissued May 20, 1879, having been originally granted May 7, 1878, for an improvement in electric lamps, and known as the clamp patent,—charging the defendants with the infringement of each patent. The bill was filed December 3, 1880. The defendants were charged with infringing the second claim of the carbon patent, and the eight claims of the clamp patent, except the fourth and the eighth. Testimony was taken and closed, on both sides, in respect to the carbon patent, but the plaintiffs, after the cause was set down for hearing, gave notice to the defendants that they would move for leave to discontinue so much of the bill as relates thereto. The decree should be for a dismissal, upon the plaintiff's motion, of so much of the bill as relates to said patent, with costs. As this does not amount, under the practice in the federal courts, to a dismissal upon the merits, (*Badger v. Badger*, 1 Cliff. 237,) the decree should contain the condition that the evidence taken by the defendants in relation to the patent may be stipulated into any future suit upon the same patent by the plaintiffs against the defendants, or the company which has defended this suit.

The preparation of the case relating to the clamp patent was made on both sides with great and exhaustive care and learning, and at large expense, and as a result the issues were much simplified by

the disclaimers which the plaintiffs filed during the process of the testimony, and which will be hereafter recited.

An automatic electric arc lamp first establishes an electric arc, and then, as the electrodes are consumed, regulates the arc by automatically controlling the distance between the carbons, or rather by enabling the strength of the current and the length of the arc to mutually control each other. The automatic lamps which contain this principle of the mutual control of the length of the arc and the strength of the current are divided, says Mr. Pope, one of the defendants' experts, into two classes:

"In the first class, a positive motion of one or both of the electrodes, causing them to approach or recede from each other, as the case may be, is derived from clock-work mechanism, impelled by a spring, or its equivalent; the direction of the motion to be communicated to the electrodes being determined by the greater or less attractive force of an electro-magnetic apparatus included in the electric circuit of which the luminous arc forms a part. In the second class, the clock-work, or other extraneous power, is dispensed with, and the necessary movements are effected solely by the action of the electric current itself. The electrodes tend to move towards each other at all times under the influence of a constant force, usually that of gravity, although a spring is employed in some cases. This tendency is opposed by the electro-magnetic action, which tends to resist the movement of the electrodes towards each other, and to separate them. These opposing forces are designed to be in equilibrium when the electrodes are at a proper distance from each other to produce the maximum development of light with a given electric current."

Is this general state of the art, Mr. Brush was an original inventor of mechanism belonging to the second of these two classes, and thought that his invention was exhibited in two forms, which are described in the original and reissued patents, and are respectively shown in the drawings 1 and 6.

So much of figure 1 as is important in this connection was constructed as follows:

A helix of insulated wire, the helix being in the form of a tube or hollow cylinder, rests upon an insulated plate. An iron core and the carbon holder, which passes loosely through the core, are within the cavity of the helix. The core is made to move very freely within this cavity, and is partially supported by springs. Just below the core is a ring of metal surrounding the carbon holder, and resting upon a floor or support. One edge of the ring is over a finger or lifter which is attached to the core, while the opposite edge of the ring is a short distance below the crown of an adjustable set-screw.

Quoting now from the descriptive part of the specification of the reissued patent, which is substantially identical with the corresponding portion of the original, and omitting only the letters where they can be omitted,—

"The core, by the force of the axial magnetism thus created, is drawn up within the cavity of the helix, and, by means of the finger, it lifts one edge of the ring, until, by its angular impingement against the rod, it clamps said rod, and also lifts it up to a distance limited by the adjustable stop.

"While the ring retains this angular relation with and impingement against the rod, said rod will be firmly retained and prevented from moving through

said ring. The adjustable stop is fixed so that it shall arrest the lifting of the rod when the carbons are sufficiently separated from each other. While the electric current is not passing, the rod can slide readily through the loose ring and the core, and it will be readily seen that in this condition the simple force of gravity will cause the carbon, F, to rest down upon the carbon, F', thus bringing the various parts of the device into the position of closed circuit. Now, if a current of electricity is passed through the apparatus it will instantly operate, as just explained, to lift the rod and thus separate the carbons and produce the electric light. * * * As the carbons burn away, thus increasing the length of the voltaic arc, the electric current diminishes in strength, owing to the increased resistance. This weakens the magnetism of the helix, and accordingly the core, rod, and carbon move downward by the force of gravity until the consequent shortening of the voltaic arc increases the strength of the current and stops this downward movement. After a time, however, the clutch-ring will reach its floor or support, and its downward movement will be arrested. Now, any further downward movement of the core, however slight, will at once release the rod, allowing it to slide through the ring until it is arrested by the upward movement of the core, due to the increased magnetism.

"In continued operation the normal position of the ring is in contact with its lower supports, the office of the core being to regulate the sliding of the rod through it. If, however, the rod accidentally slides too far, it will instantly and automatically be raised again, as at first, and the carbon points thus continued in proper relation to each other. * * *

"[I do not limit myself narrowly to the ring, D, as other devices may be employed which would accomplish the same result. Any device may be used which, while a current of electricity is not passing through the helix, A, will permit the rod, B, to move freely up and down, but which, when a current of electricity is passed through the helix, will, by the raising of the core, C, operate both to clamp and to raise the rod, B, and thereby separate the carbon points, F, F', and retain them in proper relation to each other.]"

The paragraph which is inclosed in brackets was subsequently disclaimed. The patentee then described another form of his device, shown in figure 6 of the drawings, and which was applicable to a lamp which moves both carbons. This form, he said, contained his invention, and was substantially like figure 1 in construction and operation. In figure 6 the core is rigidly connected with and directly communicates its motion to the carbon rod. The clamp surrounds the carbon rod and is lifted as the rod is lifted, while it is tilted or held in its angular clamping position by a spring which is not attached to the core:

The application for the original patent contained five claims, as follows:

"(1) In an electric lamp, the clamp, D, or its equivalent, by means of which the carbon holder, B, is firmly held, and permitted to gradually feed the carbon point, as the same is consumed, substantially as specified.

"(2) In an electric lamp, the combination of the clamp, D, and adjustable stop, D', or their equivalents, by means of which the carbon points are prevented from becoming so far separated as to break the electric current and extinguish the light, substantially as specified.

"(3) In an electric lamp, the combination of the core or armature, C, and the clamp, D, by means of which the carbon points are separated from each other as soon as an electrical current is established, and held asunder during

the continuance of the current, and then permitted to come together as soon as the current ceases, substantially as and for the purposes specified.

"3 (4) In an electric lamp, the combination of the core or armature, C, the clamp, D, and adjustable stop, D¹, or their equivalents, whereby the points of the carbons are separated from each other when an electrical current is established, prevented from separating so far as to break the current, and gradually fed together as the carbons are consumed, substantially as described.

"4 (5) In combination with the core, C, one or more sustaining springs, c, substantially as and for the purpose shown.

The first and third claims were rejected by the examiner upon the ground that they were anticipated by the English patent of Slater and Watson, of 1852. The application was thereupon amended by the erasure of these two claims, and by the insertion of the following, which became the first claim of the original patent, and, as amended, the patent was granted.

"(1) In an electric lamp, the combination with the carbon holder and core of a clamp surrounding the carbon holder, said clamp being independent of the core, but adapted to be raised by a lifter secured thereto, substantially as set forth."

The first four claims of the reissued patent are identical with the four claims of the original patent.

The fifth and sixth claims of the reissue are as follows:

"(5) In an electric lamp, the combination with a carbon holder of an annular clamp surrounding the carbon holder, said clamp adapted to be moved, and thereby to separate the carbon points by electrical or magnetic action, substantially as herein set forth.

"(6) In an electric lamp, an annular clamp adapted to grasp and move a carbon holder, substantially as shown."

It is not necessary to quote the seventh and eighth claims, as they relate to a different part of the invention and have been disclaimed.

On October 14, 1881, the patentee disclaimed the paragraph in the descriptive part of the specification which has been quoted and inclosed in brackets. On April 6, 1883, the patentee disclaimed "so much or such part of the invention described in said letters patent, and coming within the general language of the third claim thereof, as may cover or include as elements thereof the core or armature, C, and the clamp, D, excepting when the core or armature raises the clamp by a lifter secured to such core or armature, substantially as described in said patent." The specific combinations forming the subject-matter of the second, seventh, and eighth claims were also at the same time disclaimed.

The second disclaimer, so far as it relates to the second and third claims, was filed in consequence of the testimony which was introduced by the defendants respecting the lamps invented by Leroy S. White in 1874 and 1875, and manufactured by Wallace & Sons, of Ansonia, and which anticipated figure 6. The second claim manifestly related to figure 6, and the third claim might have been construed to include a lamp in which the clamp was raised by the rod, as well as by a lifter secured to the armature.

The question next arises whether the disclaimer, having attempted to disclaim figure 6 and to retain figure 1, had left an invention in the patent; in other words, whether the difference between the two figures are those merely of detail, not involving any principle. The important thing in each lamp is the office of the clamp in connection with the carbon holder and the core. In figure 6 the clamp, when it comes in contact with the stop, arrests the upward movement of the rod, and thereby limits the distance between the carbons. But, says Mr. Pope, "it does not produce any material effect in connection with the downward or forward movement of the core or carbon." The clamp in figure 1 acts, "first, to permit a descent of the carbon rod, and then to check such descent," or to control the intermittent forward motion; but in figure 6 there is no "such alternate permission and descent of the carbon rod by any action of the clamp." The clamp in figure 6 does not regulate the descent of the rod, whereas in figure 1 it keeps a continuous, intermittent feeding or forward motion of the rod. The experts upon the opposite side do not differ in regard to this feeding motion.

Mr. Pope says:

"It is accomplished by the contact of the clamping ring with the floor, which tilts the former into a position which permits the carbon holder to slip through it a sufficient distance to accomplish the object."

Mr. Hicks says:

"When the carbon rod, the clamp, and the core have settled enough to bring the lower portion of the angular clamp in contact with the upper surface of the lower portion of the frame at the top of the lamp, which is its normal position in continued action, any further lengthening or tendency to the lengthening of the electric arc will cause the side of the clamp which is held by the lifter of the core to fall an almost imperceptible amount by the minute weakening of current. As the end of the clamp which is in contact with the frame cannot descend any further, the other end of the clamp descends and the angular grip is slightly relaxed, which, no longer able to sustain the weight of the rod and carbon, allows the rod and the carbon to descend a trifle, which brings the carbon points slightly nearer together, shortening the arc a trifle, which gives a proportionate increase to the strength of the current passing through the helix, causes the core slightly to rise, carrying the lifter and one side of the ring instantly upward, which checks the further descent of the carbon holder through the clamp, and brings the annular clamp into the same angular position in regard to the carbon holder and the floor which it had before the last feeding adjustment."

The invention of figure 1 consisted in the described means of moving the rod, holding it by the angular impingement of the clamp, and continuously regulating the distance between the carbons by a continuous and gradual feed through the annular clamp. The means by which the effect is produced are the lifting of the clamp, which is not fixed to the core and which surrounds the rod, by a lifter secured to the core, so that the clamp will angularly impinge against, bite, and arrest the upward movement of the rod, and then, as the current diminishes and the core drops, the consequent descent of the clamp

and the loosening of its grasp upon the rod by its contact with the floor.

It is next claimed by the defendants that if this was the invention of the patentee, it was not described nor claimed in his patent prior to the disclaimer, and that, neither having been described nor claimed, it is an invention which was not shown in the patent, and therefore cannot be introduced into it by means of a disclaimer. The law upon this subject is clearly stated in *Hailes v. Stove Co.* 16 FED. REP. 240.

The doctrine of the *Hailes Case* is not applicable here, because the effect of the disclaimer is to disclaim figure 6 from the patent and to retain figure 1, which was clearly described, and all whose mechanical features were pointed out, although the distinctive principle of the invention was neither known nor stated. The object of the disclaimer was to limit the patent to clamp D of figure 1, with the elements necessarily connected therewith or specified as in combination therewith; and, as will hereafter be stated, the natural construction of the first claim is and was that it relates to figure 1, and does not include figure 6.

The next point to be considered is the construction of the various claims.

The defendants strongly insist that the first claim refers to figure 6, and that the clauses "said clamp being independent of the core, but adapted to be raised by a lifter secured thereto," mean that the clamp is independent of and not in any way dependent for its motion upon the core, but is adapted to be raised by a lifter secured to itself. The plaintiffs insist that this language was intended to describe a clamp independent of, *i. e.*, not fixed to, the core, but adapted to be raised by a lifter secured to the core. The latter construction is in accordance with the natural meaning of the words used, and the claim, as thus construed, includes the invention which the patentee made, and what he desires to hold, while the defendant's construction describes an invention which he admits that he was not the first to make, and which he has endeavored to disclaim. The natural construction is the one which should be adopted.

It is next insisted by the defendants that the first claim includes the adjustable stop, D, of the third claim, because it is said that the clamp will be inoperative without a stop. The first claim includes the combination of the clamp, core, and rod, and the described elements which are necessary to cause an angular impingement upon the rod, and an intermittent downward feeding of the rod. The stop is not one of those elements, but its office was to arrest the upward motion of the clamp. This claim is not limited to the described solenoid and core, and to no other motor, but by the words "solenoid" and "core" are meant an armature, or "any magnetically moving part whose property or law of motion is substantially that of a core in a solenoid."

The construction of the third claim does not require examination.

The clamp of the sixth claim is not any annular clamp adapted to grasp and move a carbon holder. If it was, the claim would be larger than the invention, and larger than the patent with the disclaimers. On the contrary, the claim means to describe, in general terms, the clamp of the first claim, which raises, clamps, and feeds downwardly the rod, preserving a practically uniform length of arc by the described means, or an annular clamp surrounding the carbon holder, independent of the core, but adapted to be raised by a lifter secured to the core or magnetic motor, and some suitable agency to allow the clamp to be tripped.

The fifth claim includes the clamp of the first and sixth claims, the carbon holder, the motor, and the tripping device.

The next question is that of novelty. Neither one of the Slater and Watson lamps anticipated either claim as thus construed. Their clamps raise, bite, and release the rod, but do not have the gradual, intermittent feeding motion produced by the contact of clamp with floor. The clamp, in combination with the other necessary elements, which was made by Charles H. Hayes, of Ansonia, Connecticut, and was a part of a lamp which he constructed, about the end of June, 1876, as an improvement upon the White lamp, is the combination of the first and third claims of the Brush patent. The carbon rod was square or rectangular, and therefore was surrounded by a rectangular clamp, which was independent of the core. It is not denied that this clamp is the equivalent of an annular clamp. It was raised by a lifter secured to the core, and was tripped by coming in contact with a floor, while the ascent of the rod was checked by the contact of the clamp with an adjustable stop. The plaintiffs' answer to the anticipatory character of this clamp is that it was an abandoned experiment, and never was a perfected invention. The facts in regard to its character and position as an invention are as follows:

Mr. Hayes was in 1876, and has been continuously since, in the employ of Wallace & Sons, who are large manufacturers of brass goods in Ansonia. In 1876 this firm was trying to find a successful electric lamp to manufacture. Mr. White furnished them with his device, which they sent, as a part of their exhibit, to the centennial exposition at Philadelphia. Mr. Hayes testified as follows: "Experiments with the White lamp showed its defects so strongly or plainly that I designed this (the Hayes) lamp to overcome those defects. I made rough drawings in the middle or latter part of May, 1876, commenced building the lamp at once, and finished it about the end of June following; tested it, tried it, and made some minor alterations, and run it from time to time, when a lamp was needed, until the sixteenth of September following." At this time he was in Philadelphia, and a fellow-employee by the name of King, thinking that he could improve upon the clutch, and make the feeding of the carbons answer more promptly to changes of the current, or make the feeding less "jerky," obtained permission from Wallace & Sons, who owned the lamp, to make an alteration. The "King clutch," constructed upon a different principle from that of the Hayes or the Brush clamp, was put into the lamp, which has remained in use in the mill, and, since the end of 1876, has been "used in the electrical room for testing machines, car-

bons, etc., and has been used for that purpose more or less ever since." But one Hayes lamp was made, until a duplicate specimen was made for use in this case. The Hayes clamp, it will be observed, was used in the lamp only until September 16th. Prior to that date, the use of the lamp with the original clamp is thus described by Mr. Hayes upon cross-examination: "It (the lamp) was moved about and burned in different places, in the mill and outside, and it was also burned in our other shop occasionally." This shop was known as the skirt-shop, the third floor of which was used for electrical work. The mill and skirt-shop were ordinarily lighted by gas. *Question.* "On what occasions did you use the lamp out of doors?" *Answer.* The lamp was used out of doors on several occasions, when gangs of men required light unloading freight from railway cars, digging for some work connected with the water-power. I am unable to specify positively any particular date, but have a general recollection of being frequently called upon to make a light for some such purposes. *Q.* Did you use it sometimes to test dynamos with in June—September, 1876? *A.* I think not during that time. *Q.* What other use did you put it to during those months, except the occasions out of doors which you have mentioned? *A.* It was used about the mill, more particularly around the muffles, on occasions when it was necessary to work during the evening."

The use was a public one, in the presence of the employes of the factory. The Hayes clamp has been preserved, and was an exhibit in the case. Wallace & Sons thereafter, after much experimenting, went to a limited extent into the manufacture of what were known in the case as "plate lamps," or lamps having two carbon plates instead of rods, but did not continue the business long. They say that the discontinuance was due to the fact that they did not have a satisfactory generator. The Hayes clamp was used upon the plate lamps, but, as has been said, was used upon but one carbon pencil electric lamp.

The plaintiffs vigorously insist that the Hayes clamp was not a completed and successful invention, but that its use was merely tentative and experimental, and was permanently abandoned because the device did not promise to be successful. Two facts are manifest: (1) That the Hayes clamp was the clamp of the Brush patent; and (2) that it became, after September 16th, a disused piece of mechanism in connection with carbon points. The question then is, was it a perfected and publicly known invention, the use of which was abandoned prior to the date of the Brush invention, or was its use merely experimental, which ended in an abandoned experiment on September 16th?

The plaintiffs, in support of their view, say that Wallace & Sons were searching for a successful lamp, and were exhibitors of an electric lamp at the centennial exhibition; that inventors were in their employ, who were encouraged to make experiments and trials, in the hope that something good might be produced, and, under this stimulus, one Hayes lamp was made; that improvements in the location of the spring were made. Then it gave a "jerky" light, and when the inventor was away another clamp was put on, by the permission of the owners, to remedy this irregular feeding, but that afterwards no other lamp was ever constructed, and the Hayes clutch was left among

other "odds and ends," and that the indifference with which it was received, its confessed faults, the attempted improvements, and its disuse, show that the Hayes clamp never was anything more than an attempt to invent something which proved to be a failure.

The question of fact in this part of the case must turn upon the character of the use of the lamp prior to September 16th, because it is established that the Hayes clamp and the Brush clamp, in its patented features, were substantially alike, and that the point in which they differ, viz., the length of the arms, is not a part of the principle of the device. Was the lamp with this clutch used merely to gratify curiosity, or for purposes of experiment, to see whether the feeding device was successful, or whether anything more was to be done to perfect it? or was it put to use in the ordinary business of the mill as a thing which was completed, and was for use, and was neither upon trial nor for show?

Hayes made the lamp for Wallace & Sons as an improvement upon the White lamp, and apparently turned it over to them to be used when they chose. An alteration was subsequently made in the location of the spring. The lamp was used at different times in the work of the mill at night, in doors and out of doors. Its use at these times does not seem to have been for the purpose of testing the machine, or of calling attention to its qualities, or of gratifying curiosity, but it was used to furnish light to the workmen at their work. I have queried whether this use was not that of a thing which might be of help in an emergency, and which was thought to be better than nothing, though not of much advantage. But it was apparently used to accomplish the ordinary purposes of an electric light in a mill, to enable the workmen to see at night, although it was not uniformly used, because the mill was lighted by gas.

But the plaintiffs press the question, why, then, was the further use of the Hayes clamp and lamp discontinued? This question is significant, because the abandonment of a thing which is greatly wanted is, ordinarily, a very suggestive circumstance to show that it was defective, and that, before the invention could be completed, something was to be done which never was done.

I think that Wallace & Sons did not push the electric-lamp business because they had no generator, and I also think that the Hayes lamp, either with or without the Hayes clutch, did not impress them favorably, for they contented themselves with making only one specimen, whereas they made six White lamps, and after much experimenting, and after the invention of the Hayes lamp, they made 50 or 60 plate lamps. For some reason they did not manufacture the Hayes lamp, but turned away to the plate lamps. But the facts that the anticipatory device was the device of the patent, and did do practical work and was put to ordinary use, and that it does not appear that the Hayes clamp was the cause of the neglect with which Wallace & Sons treated the Hayes lamp, seem to me to outweigh the

doubts which arise from the shortness of its existence, and its permanent disappearance from a carbon pencil lamp. The case is that of the public, well-known practical use in ordinary work, with as much success as was reasonable to expect at that stage in the development of the mechanism belonging to electric arc lighting, of the exact invention which was subsequently made by the patentee; and although only one clamp and one lamp were ever made, which were used together two and one-half months only, and the invention was then taken from the lamp and was not afterwards used with carbon pencils, it was an anticipation of the patented device under the established rules upon the subject. With a strong disinclination to permit the remains of old experiments to destroy the pecuniary value of a patent for a useful and successful invention, and remembering that the defendants must assume a weighty burden of proof, I am of the opinion that the patentee's invention has been clearly proved to have been anticipated by that of Hayes. *Coffin v. Ogden*, 18 Wall. 120; *Reed v. Cutter*, 1 Story, 590; *Pickering v. McCullough*, 18 O. G. 818; Curt. Pat. §§ 89-92.

The bill, so far as it relates to the clamp patent, is dismissed.

CURRAN and others v. BURDSALL.

(District Court, N. D. Illinois. July 16, 1883.)

1. PATENT LAW—ASSIGNOR AND ASSIGNEE—OTHER PARTIES.

The assignee of a patent is clothed with the right, as against the assignor, to make articles covered by the patent, although the patent may be void for want of novelty as against the rest of the world.

2. SAME—ESTOPPEL—LICENSE—JOINT PATENTEES—RIGHTS INTER SESE.

If one of several joint patentees assigns to a third party, the estoppel upon the assignor must work a license to the assignee to use the patent, and the joint owners of the patent must look to the one who assigns for an accounting.

3. SAME—WARRANTY—AFTER-ACQUIRED RIGHTS.

The warranty of a title, or right to it, draws to it any after-acquired right or title of the warrantor, and carries it to the benefit of the person to whom the warranty runs.

4. SAME—WARRANTY GENERALLY AS TO RIGHTS SUBSEQUENTLY ACQUIRED.

A patentee cannot sell his right to another, and then buy or obtain control of an older patent, and through such older patent dispossess his assignee of the full benefit of what he purchased.

In Equity.

G. L. Chipin and Elbridge Hanecy, for complainant.

West & Bond, for defendant.

BLODGETT, J. This is a bill to restrain the alleged infringement by defendant of letters patent No. 76,661, dated July 7, 1868, issued to Richard P. Johnson and Eli J. Sumner, for an improvement in lumber-driers, which it is claimed has been assigned to complainants.

The bill also charges the infringement of three other patents, claimed to be owned by complainants, but as no proof in regard to them has been put into the record no further notice will be taken of them. No question is made as to complainants' title to the Johnson and Sumner patent.

The main matter of defense relied upon by defendant is that two patents,—one numbered 161,490, dated March 30, 1875, which is reissued as No. 8,846, and the other numbered 189,432, dated April 10, 1877, which is reissued as No. 8,840,—were duly issued to complainant John J. Curran for improvements in lumber-driers, and that the right, title, and interest in and to said patents in and for the state of Wisconsin has been duly assigned and transferred to and vested in defendant, and that all the lumber-driers built by defendant in the state of Wisconsin have been constructed in accordance with said two letters patent so as aforesaid issued to complainant Curran.

Defendant further insists that all of complainants' interest in the patents set out in the bill of complaint has been acquired since the issue of said two patents to Curran, and since Curran assigned his interest in his said two patents in and for the state of Wisconsin, and that defendant acquired and holds his title to said two patents under assignments from complainant Curran and one Wilcox, who was interested with Curran as owner thereof.

One element of the Johnson and Sumner patent, No. 79,661, was a series of curtains suspended from the stanchions of the car on which the lumber was held in the drying-room, the function of these curtains being to arrest and turn down the flow of the hot-air current, so as to compel the passage of the hot air upon and about the lumber on the cars, while it passes through from the rear to the front of the kiln; and the second claim is:

"(2) The providing the cars with curtains, or like device, in the manner and for the purposes set forth."

The Curran patent, No. 189,432, being reissue No. 8,840, the right of which, for Wisconsin, is held by defendant, contains, as one of its elements or features, provision for curtains to be suspended from the ceiling of the drying-room, the description of which in the specification is as follows:

"I also place curtains, *h h*, of canvas, or equivalent material, at intervals along the ceiling of the drying chamber, to hang loosely down about eighteen inches, to rest upon the top of the cars of lumber, thus preventing the hot air from rushing along the ceiling, and forcing it downward to pass through the lumber and under the same."

The curtain or sliding door, *N*, at the front end of the kiln and extending down, as described, to form the lower draught, causes the air in its passage through the kiln to move along the floor and through the lower courses of the lumber. To further facilitate this movement, the smaller curtains, *h*, are also hung from the ceiling at intervals of about 12 feet, extending about 18 inches down to and resting

upon the ears or lumber, thus preventing the hot air from rushing along the ceiling and out the chimney, and forcing it, by a lower draught, to pass through and underneath the lumber. Nearly over the inner edge of the opening, *e*, by which the hot air is admitted to the kiln, the longer curtain, *h*¹, is suspended, hanging free from, but near, the adjacent lumber-pile, as shown in the drawings. This curtain receives the hot air and directs it horizontally against the lower portion of the nearest lumber-pile. Once given a horizontal direction, and finding egress only beneath the lowered curtain or door, *N*, with the strong draught that usually prevails through the kiln, the air has much less tendency to rise to the ceiling in its passage to the chimney. Such tendency being, however, still sufficient for the purpose of the distribution of the air and its action upon the lumber, is essentially uniform throughout the height and breadth of the drying chamber. And this feature is covered by claim No. 7, which is in these words:

"(7) The combination with the drying chamber, *A*, curtain, *N*, forming a downward extension of the chimney, and the opening, *e*, for the admission of the hot air from below, of the curtain, *h*¹, depending from the ceiling at a point nearly over the inner edge of the opening, *e*, and reaching from side to side of the kiln, substantially as and for the purpose set forth."

The only lumber-driers built by defendant were so built in the state of Wisconsin, and are provided, as the proof shows, with curtains suspended from the roof in the manner called for by the Curran patent. The proof shows that the Johnson and Sumner patent was acquired by complainants after the issues of the Curran patents, and after Curran had assigned his interest therein for the state of Wisconsin.

Complainant Curran, having set forth in his patent No. 189,432 the curtain suspended from the ceiling, is now estopped from defeating the right of defendant to construct lumber-driers in accordance with the terms of the patent by the purchase of the older patent of Johnson and Sumner. Curran has held himself out to the world as the inventor of this peculiar curtain device, and it would be grossly unjust and inequitable to allow him to defeat his assignee's rights to the full enjoyment of this patent by acquiring the ownership of this older patent, even if the older patent clearly anticipated the Curran device. By becoming the owner of this Curran patent defendant is clothed with the right as against Curran to make driers as directed in that patent, although the patent may be void for want of novelty, against the rest of the world. It is true, two other persons are associated with Curran in the ownership of the Johnson and Sumner patent, but it seems to me the estoppel upon Curran must operate as a license from Curran to defendant to use the Johnson and Sumner patent in the state of Wisconsin, and Curran's co-owners must look to him for an accounting as to this territory.

It would hardly seem necessary to cite authorities in support of this palpable equity of defendant against Curran and his co-com-

plainants, but reference to a few cases where questions analogous to this have arisen may not be out of place.

In *Faulks v. Kamp*, 3 FED. REP. 898, the court said:

"It is argued for the defendants that as the conveyances were of the right, title, and interest of the grantors, the warranty would only extend to whatever right they might have which did pass, and that the warranty was kept, but the conveyances were made to carry out the sale in the manner required by law for passing the title, and the warranty grew out of the sale, and not out of the form of the conveyance, and the patent subsequently purchased by the defendants may be better than this for covering this invention, but, if it is, it cannot help the defendants as against the orators. It is a familiar law, and has been for a long time, that a warranty of title or right to it draws to it any after-acquired right or title of the warrantor, and carries it to the benefit of the person to whom the warranty runs. So, whatever right, if any, the defendants acquired to the invention covered by this patent, inured to the benefit of the orators. It is also urged that the purchasers knew of the defects, and were not deceived, and that, therefore, the defendants are not estopped. But the rights of the orators do not rest on estoppel merely; they rest upon the purchase, which must operate so that the orators may have what they bought, and so that the defendants shall not both sell and keep the same thing."

In *Gottfried v. Miller*, 104 U. S. 521, the court says:

"It remains to consider whether the sale by Stromberg to the defendant, Miller, of one of the pitching-machines containing the improvement described in the patent, protects him from liability for its use in this suit. By the contract of sale Stromberg warranted, not only the title to the machine itself, but of the right to use it. If, at the time of the sale, he had been the owner of the patent, the sale would have constituted a license to Miller to use the machine as long as it lasted; but Stromberg did not acquire any interest in the patent until long after the date of his sale to Miller. If he had subsequently become the sole owner of the patent, his previous sale to Miller of a machine embodying his patented invention would have estopped him from prosecuting Miller for an infringement of the patent by the use of the machine."

The rule deducible from these authorities is that a patentee cannot sell his rights to another and then buy or obtain control of an older patent, and through such older patent dispossess his assign of the full benefit of what he purchased. Therefore, without discussing the question whether, by the suspension of the curtains from the ceiling of the drying-room, defendant infringes the second claim of the Johnson and Sumner patent, which specifically provides for suspending the curtains from the stanchions of the car, I am of opinion that complainants cannot enforce the Johnson and Sumner patent against defendant, because defendant, as owner of the Curran patent, has the right to use the Curran curtains in the state of Wisconsin.

The bill is therefore dismissed for want of equity.

BURDSALL v. CURRAN and others.

*(Circuit Court, N. D. Illinois. July 16, 1883)***PATENT LUMBER DRIERS—INFRINGEMENT.**

Comparison made of the patent used by the complainant with that previously assigned by him to Burdsall, as to the state of Wisconsin. Infringement found as to the first, second, fifth, sixth, and seventh claims of the reissue patent No. 8,846, and the first, second, third, fifth, sixth, and seventh claims of reissue No. 8,840, including the projecting platform for loading and unloading; flexible self-adjusting car; partition located for the purpose of confining passing air close to the pipes; dead-air chamber; horizontal and vertical partitions in the 8,846; and the steam-pipes arranged upon the inclined ground floor; the steam-pipe in "gate form," with expansion joints and headers; the broad chimney, with the two small chimneys, separated by inclined deflecting boards; the curtain or sliding door; and the curtain depending from the top of the drying chamber to the lumber in the drying-room.

In Equity.

West & Bond, for complainant.

G. L. Chapin and *E. G. Hanecy*, for defendants.

BLODGETT, J. This suit is brought for infringement of letters patent No. 161,490, dated March 30, 1875, issued to John J. Curran and Carlos Wilcox, which was reissued August 12, 1879, to John J. Curran and Carlos Wilcox, being reissue No. 8,846, and of letters patent No. 189,432, dated April 10, 1877, issued to John J. Curran and Carlos Wilcox, assignor, and reissued August 12, 1879, to the same parties, reissue No. 8,840. Both of these patents are for devices applicable to lumber-driers. Complainant claims ownership of all the rights, title, and interest in and to these patents, by mesne assignments from Curran and Wilcox to himself, for the state of Wisconsin and other states; but the infringement claimed in this suit is only for the state of Wisconsin. The validity of the patents and of the reissue is admitted by the defendants' answer, although it would probably not lie in the mouth of Curran, the defendant, who was the original patentee, to whom the original patents and reissues were issued, to deny their validity. The only issues in the case, therefore, are as to the complainant's title, and the question of infringement. The complainant's title, as shown by the proof, comes through a series of mesne assignments, and seems to me clearly to clothe the complainant with the entire title for the state of Wisconsin. I have not deemed it necessary, for the purposes of this suit, to examine the chain of title as to the other states claimed by complainant.

Complainant claims an infringement of the first, second, fifth, sixth, and seventh claims of reissue No. 8,846, and of the first, second, third, fifth, sixth, and seventh claims of reissue No. 8,840. The proof upon the question of infringement consists in the production of a model which the proof shows correctly represents three lumber-driers built by defendants,—two at Oshkosh and one at Neenah, Wisconsin.

The first claim of reissue No. 8,846 is—

"(1) In a kiln for drying lumber, the inclined floor, B, extending beyond the ends of the kiln to form the loading and unloading platform, and provided with the openings, *e*, and sheet-metal part, *f*, substantially as and for the purpose herein set forth."

An inspection of the model certainly exhibits the inclined floor, B, as described in the original and reissued Curran patent, with the extensions beyond the end of the kiln, so as to form a loading and unloading platform, with the opening, *e*, and sheet-metal part, *f*.

As to the second and third claims, which refer to the flexible self-adjusting car for lumber-driers, particularly described in the specifications, the infringement of these claims is not specifically alleged in the bill, nor does the model produced show the form of car used by the defendant; but I find in the proofs, as I read them, evidence showing that the defendants have used substantially the same car which is described in the complainant's patent.

The fifth claim of the patent is as follows:

"(5) In a hot-air lumber-drier, the combination, with the inclined car-track, and heating-pipes located beneath the track, of a partition, *a*¹, placed below the track-bed, and proximate to the heating-pipes, for the purpose of confining the passing air close to the pipes, substantially as set forth."

The model in evidence certainly shows this partition, *a*¹, almost in precisely the locality and performing necessarily the function that is provided for in the fifth claim.

The sixth claim is as follows:

"(6) In a hot-air lumber-drier, the combination, with the drying-chamber, located above the floor, B, and the heating-chambers, located below said floor, of the dead-air chamber, I, substantially as shown and described."

This dead-air chamber is the space between the track floor and the partition, *a*¹, and is found in the model in evidence before me, there performing the function of the dead-air chamber in the patent.

The seventh claim is:

"(7) In a hot-air lumber-drier, the combination, with inclined bottom, B, and steam-pipes, E, E, of the horizontal partition, *a*¹, and the vertical partitions, *w*, arranged alternately above and below the pipes, substantially as and for the purpose herein set forth."

The pipes shown in the drawings of the complainant's patent are arranged longitudinally, while the defendants, in the construction of their driers, as shown by their model in evidence, set their pipes transversely across the heating chamber, so that they form gates or obstructions to the passage of the air, thereby compelling the air to pass around and between each bank of pipes, so that in its passage from its point of entrance to the exit from the heating chamber the air comes in contact with all the pipes, and therefore becomes thoroughly heated. In the arrangement shown in the patent, the pipes running lengthwise of the heating chamber, it was deemed necessary to force the air into contact with the pipes by means of these partitions. I do not construe this patent as requiring the heating-pipes to run lengthwise of the heating chamber; but they may be arranged

in the heating chamber in any way so as to secure the largest amount of radiation upon the air which it is designed to heat in its passage through the chamber from its point of introduction to its exit; and, undoubtedly, the defendant, by the transverse coils of pipes, has avoided the necessity for the partitions, *w*. They have used all the other parts of the combination described in the seventh claim; but, there being no necessity for the specific use of the partitions, *w*, they have used in place thereof the transverse coils of pipes, which perform the same function in the organization, and therefore, in my opinion, do infringe this claim, so that they practically use the entire combination.

The claims in reissue No. 8,840, which it is insisted that the defendants infringe, are as follows:

"(1) In a kiln for drying lumber, the steam-pipes, C, arranged upon the inclined ground floor, B, and underneath the inclined floor, O, of the drying chamber on which the cars run, as and for the purpose herein set forth.

"(2) The steam-pipes, C, set up in gate form across the kiln, with free expansion joints and headers running across and lengthwise of the kiln, substantially as and for the purpose herein set forth.

"(3) The broad chimney, M, extending entirely across the kiln, and provided with the two chimneys, M', M', separated by inclined deflecting boards, as set forth."

"(5) In combination with a drying chamber and a chimney which opens therefrom at the top and at one end of said chamber, the curtain or sliding door, N, located as shown, and extending across the chamber to form a downward extension of the chimney of the full width of the drying chamber, substantially as and for the purpose as set forth.

"(6) In combination with the broad chimney, M, kiln, A, and heating chamber underneath, the sliding door or curtain, N, arranged in the mouth of the chimney, and leaving an opening at the bottom, whereby the hot air is compelled to descend to the floor of the kiln before passing out through the chimney, as set forth.

"(7) The combination with the drying chamber, A, curtain, N, forming a downward extension of the chimney, and the opening, E, for the admission of the hot air from below, of the curtain, II', depending from the ceiling at a point nearly over the inner edge of the opening, E, and reaching from side to side of the kiln, substantially as and for the purpose as set forth."

The model shows certainly the steam-pipes, C, arranged upon the inclined ground floor, B, and underneath the inclined floor, O, of the drying chamber, in every essential particular as called for by the first claim. It also shows the steam-pipe, C, set up in gate form, and with expansion joints and headers, substantially as provided in the second claim, although specific technical expansion joints may not be used, the return bends of the pipes answering, perhaps, as a substitute for the technical expansion joint; but all the practical purposes in the heating device shown and described in the second claim are necessarily involved, it seems to me, in the form of construction shown in the model in the proof. So, too, the model shows the broad chimney, M, with the two small chimneys separated by inclined deflecting boards, substantially as described in the third claim

of the letters patent. There is proof in the record tending to show that defendants have not, in all cases, used the broad chimney with the double flues and two small chimneys, but have used only one large chimney with a single flue; but I deem this a mere colorable evasion. One broad chimney with a single flue may do all, or substantially all, that the double-flued chimney does, and I think Mr. Curran cannot be permitted to violate his own patent by so slight a variation in the structure. I also find in this model the curtain or sliding door, N, described in the fifth claim, and which is claimed in combination with the other parts of the machine. It is true, there is no special sliding door, but in place of it there is a suspended curtain; but it seems to me to perform just the function which the claim provides shall be performed by the sliding door, N; that is, it forms a downward extension of the chimney of the full width of the drying chamber, and is evidently for the purpose of forcing the air down to the bottom of the chamber before it escapes through the chimney, thereby compelling it to pass along and among the lumber to be dried.

What I have said in regard to the fifth claim applies with equal force to the sixth claim, which covers substantially the same curtain or sliding door, N, arranged in the mouth of the chimney.

The seventh claim covers the curtain depending from the top of the drying chamber, and whose function is to deflect the air from the top of the drying chamber onto the lumber in the drying-room, and it only needs an inspection of the model to see that this feature of the device is most palpably infringed. There may be and probably are some slight mechanical deviations from the specific directions given in both of these patents for the construction of the lumber-dryers therein described; but it is evident that the main features of both these devices are involved in the construction of the defendants' drier. They have copied substantially all that is covered by the patents, and have made a drier which is, in principle, the same as the patents were intended to describe and protect.

The finding of the court, therefore, is that the defendants infringe the first, second, fifth, sixth, and seventh claims of the reissue patent No. 8,846, and the first, second, third, fifth, sixth, and seventh claims of reissue No. 8,840. There will be a decree enjoining defendants from the further use of these patents, and a reference to ascertain and report damages.

STUTZ v. ARMSTRONG and another.

Circuit Court, W. D. Pennsylvania. July 1, 1884.

1. PATENTS FOR INVENTION—REISSUE—DELAY.

There is no unbending rule by which to determine what is unreasonable delay in applying for the reissue of a patent to correct a mistake in the claim by broadening it; and each case must be decided upon its special facts and merits.

2. SAME—REISSUE SUSTAINED.

In this case, where the original letters patent were dated March 20, 1877, and upon an application filed on January 28, 1879, a reissue, which broadened the claim, was granted on December 30, 1879, no adverse rights having accrued in the mean time, the court sustain the reissue.

3. SAME—COMBINATION—PATENTABILITY.

There is no patentable combination in a mere aggregation of old devices which produce no new effect or result due to their concurrent or successive joint and co-operating action; but it is by no means essential to a patentable combination that the several devices or elements thereof should coact upon each other. It is sufficient if all the devices co-operate with respect to the work to be done and in furtherance thereof, although each device may perform its own particular function only.

4. SAME—DISCLAIMER—REV. ST. § 4922.

A disclaimer under section 4922, Rev. St., need not be filed (except where costs are sought to be recovered) until the court has passed upon the contested claims alleged to contain that of which the patentee was not the inventor.

5. SAME—PATENT No. 194,059 AND REISSUE No. 9,011 CONSTRUED—INFRINGEMENT.

Reissued patent No. 9,011, dated December 30, 1879, and letters patent Nos. 194,059 and 198,432, dated respectively August 14, 1877, and December 18, 1877, for improvements in coal-washing machinery, construed, sustained, and held to be infringed.

In Equity.

George H. Christy, for complainant.

D. F. Patterson, for respondents.

ACHESON, J. The plaintiff's inventions, for which the patents in suit were granted to him, relate to improvements in machinery for washing coal, an operation whereby the mined and broken coal is freed and separated from the stones, slate, and other objectionable substances with which it is intermixed. The patents are three in number. One is reissue No. 9,011, dated December 30, 1879, granted upon an application filed January 28, 1879, the original letters patent No. 188,691 having issued March 20, 1877. The defendants are charged with the infringement of the fourth and fifth claims of the reissue. The other patents are numbered 194,059 and 198,432, and bear date August 14, 1877, and December 18, 1877, respectively. The defendants are charged with the infringement of the third claim of each of these latter patents.

It is a fact worthy of mention, not by way of raising any estoppel, but as indicating the relations of the parties, and as plenary proof of infringement, that, under a written agreement, which recognizes the plaintiff as inventor, the plaintiff built for the defendants, in 1877, two coal-washing machines, embodying his said patented improve-

ments. These two machines the defendants paid for. Afterwards, without license from the plaintiff, the defendants built six more of the same identical machines. The present suit is for the unauthorized construction and use of these six machines.

The improvements covered by the four above-specified claims are susceptible of conjoint use, and they are so used by the defendants in the machines complained of.

The first question in the case arises upon the reissue, and touches the validity of the fifth claim thereof, which was not in the original patent. It is as follows:

(5) "In a coal-washing apparatus, the combination with the cam, *F*, fixed upon the shaft, *u*, of the guide, *m*, connected to the piston-rod, *r*, and closely embracing said cam and shaft, as set forth."

For the proper understanding of the claim a brief explanation is necessary. The separation of the coal from the foreign substances is effected by the action of a current of water forced by means of a box-shaped piston, *P*, below a sieve supporting the layer of crushed coal. The material upon the sieve being lifted up by the action of the water current, settles with more or less rapidity, according to the specific gravity of the coal and its impurities, so that the latter are first deposited. In order to obtain a complete separation the uplifting action of the water must be a sudden one, and the interval between two consecutive strokes of the piston must be sufficient to allow the necessary time for the material to deposit. This movement is accomplished by means of a differential cam, *F*, fixed upon the shaft, *u*, and receiving its rotary movement through a pulley. The piston is raised up by a slow and uniformly progressing speed until it has attained its highest position. This is done by the aid of the guide-piece, *m*, which is forked, or composed of four legs or standards placed a sufficient distance apart to admit the cam, *F*, in one direction, and the cam-shaft, *u*, in the other, and is fixed to the piston-rod, *r*, and upon which the action of the cam, *F*, is transmitted. The cam, *F*, having lifted up the piston, *P*, to its utmost extent, will soon let escape the fork-shaped guide-piece, *m*, so that the piston, becoming free, falls down upon the body of water. The shock to the latter will produce a current which acts with great force below the layer of coal, etc., at the sieve.

Undoubtedly, the combination which is the subject of the fifth claim of the reissue is the plaintiff's invention, and its utility in a coal-washing machine is not denied. Its omission from the original patent, it is alleged by the plaintiff, was owing to the mistake of his then solicitors. Upon this point he now testifies:

"I claimed the cam with the four-legged yoke, right from the start, and I think the record of the papers sent to the attorney prove this; I think it was simply overlooked by the party who took the patent out."

Now, turning to the file-wrapper and its contents in the matter of the original grant, there is to be found therein abundant evidence, it

seems to me, to establish the alleged mistake. The guide, *m*, and its function are described in the original specification substantially as in the reissue; and while no claim was then made for the precise combination now in question, it does certainly appear that the guide-piece, *m*, as a valuable element in a patentable combination, was within the contemplation of the inventor. Hence, one of his claims as originally framed was as follows:

"The box, *B*, with the box-shaped piston, *P*, to receive additional weight; the valve, *V*, the differential cam, *F*, *with the guide-piece, m*, and piston-rod, *r*, as shown and described."

The examiner, in his letter to the inventor's solicitors, suggesting divers corrections and amendments, pointed out that the *cam* was old. The solicitors then substituted a new set of claims, from which the guide-piece, *m*, was omitted altogether. The eighth amended claim was for "the differential cam operating to lift and suddenly drop the piston." But the examiner adhering to his objection to this claim, the solicitors, in view of his references, struck it out. I am satisfied, from an attentive perusal of the papers in the case, that the solicitors did not comprehend the function of the guide-piece, *m*, or its value, and for this the true explanation may possibly be found in the fact that the inventor was of foreign speech, and may not have been able fully to explain the matter.

The authority of the commissioner of patents to correct the alleged mistake, if clearly established, by a reissue, is distinctly recognized by the supreme court in the recent decisions upon the subject of reissues.

Says Mr. Justice BRADLEY, in *Miller v. Brass Co.* 104 U. S. 352:

"If a patentee who has no corrections to suggest in his specification, except to make his claim broader and more comprehensive, uses due diligence in returning to the patent-office, and says, 'I omitted this,' or 'my solicitor did not understand that,' his application may be entertained, and, on a proper showing, correction may be made."

And in *James v. Campbell*, Id. 371, the same learned judge says:

"Of course, if, by actual inadvertence or mistake, innocently committed, the claim does not fully assert or define the patentee's right in the invention specified in the patent, a speedy application for its correction, before adverse rights have accrued, may be granted."

If the decision of the commissioner of patents here, that an actual mistake was inadvertently and innocently committed, is not conclusive, still, upon the evidence before me, I am of opinion that he committed no error in that regard.

But the defendants contend that the delay in this case in applying for the reissue was unreasonable, and therefore that as respects its fifth claim it is contrary to law and void. The supreme court has laid down no unbending rule by which to determine what is unreasonable delay in applying for the correction of such a mistake as existed here; and it seems to me that each case must be decided upon its

special facts and merits. The application here was within two years after the grant of the original letters patent; the exact lapse of time being one year, ten months, and eight days. Now, while this fact may not be conclusive, it would seem to be entitled to some consideration, in view of that provision of the patent laws by which nothing less than two full years' public use of an invention is a bar to an application for a patent. In *Miller v. Brass Co.* the fact that much more than two years had elapsed between the grant of the original letters patent and the application for the reissue, was evidently in the mind of Mr. Justice BRADLEY, and suggested the illustration employed by him on page 352 of the reported case. And in all the like cases in which the supreme court has ruled against the validity of the reissue, (so far as I know,) the lapse of time has been greatly in excess of two years.

Again, the correction of the mistake here by the reissue was *before any adverse rights had accrued*,—a consideration, in my judgment, of paramount importance, and evidently regarded by the supreme court as of great consequence, as appears by the quotation *supra* from Mr. Justice BRADLEY's opinion in *James v. Campbell*.

Furthermore, in determining whether this inventor has been guilty of inexcusable delay, perhaps it ought to count something in his favor (as his counsel urges) that being of foreign birth and education, and of alien tongue, he encountered peculiar difficulties in acquiring a knowledge of our language and laws. At any rate, he is a meritorious inventor, and in the absence of an authoritative decision invalidating his reissue for the cause assigned, I am indisposed to declare it void. Under all the circumstances, I think his application for the reissue was within a reasonable time.

The fourth claim of the reissue is as follows:

(4) "The partition, *n*, within the box, A, and in combination with the valve, *V*¹, and the sieve, *s*, said partition being arranged in relation to the other parts as described, whereby the current entering through the valve is deflected upward against the sieve, and the lower part of the box, A, is left as a receptacle for small particles of sulphur and slate, all as set forth."

This claim is identical with the fourth claim of the original, and of course its validity is not affected by the reissue. The machine has water chambers or boxes arranged in pairs, A and B, each pair of boxes being connected by the valve, *V*¹. The curved partition, *n*, projects beneath this valve forward into the box, A, and upwards towards the sieve. With each stroke of the piston, P, in the box, B, the partition, *n*, performs two important functions: *First*, it deflects the current of water, which then enters through the valve, upwards against the sieve so that it will do its proper work; and, *secondly*, it cuts off the water in the lower part of the box, A, from the action of such current, and thereby makes a dead-water chamber in the lower part of the box, A. The valve, *V*¹, opens with the downward stroke of the box-shaped piston to admit the current which sweeps along the

curved partition, *n*, in its gradually deflected path or course towards and through the sieve, *s*, and with the upward motion of the piston the valve closes to prevent the back flow. The curved partition, *n*, is not shown in any of the machines upon which the defendants rely as showing anticipation. Unquestionably, it is a new and useful device in coal-washing machines, and is the plaintiff's invention.

The defendants, however, insist that there is no patentable combination between the partition, valve, and sieve, because, as they allege, no new operation or result is due to their united action; that the partition and valve are altogether independent of each other, and in nowise aid or co-operate with each other in performing their respective functions, and the claim is founded upon a mere aggregation of parts, which operate independently of each other, producing no result due to their joint and co-operating action. Now, certainly there is no patentable combination in a mere aggregation of old devices which produce no new effect or result due to their concurrent or successive joint and co-operating action. But it is by no means essential to a patentable combination (as the defendants' argument implies) that the several devices or elements thereof should coact *upon each other*; it is sufficient if all the devices co-operate with respect to the work to be done, and in furtherance thereof, although each device may perform its own particular function only. Here there is complete coaction of the elements of the combination upon the through-going current of water. The valve, *V*¹, opens to admit the water at stated intervals, and allows the current to sweep along the upper surface of the curved partition, *n*, towards and through the sieve, *s*. It may be that if the valve were omitted the partition would still perform its functions, but the evidence shows that, for the best work, the valve is necessary, for without it the fine coal (which may amount to 10 per centum) is sucked through the sieve and lost. Moreover, here the elements of the combination are not all old. The partition, *n*, is confessedly new. And as the plaintiff might well have claimed the partition, *n*, generally and broadly, most assuredly his more limited claim cannot be successfully impeached.

The third claim of letters patent No. 194,059 is as follows:

(3) "The combination of the stationary sieve, *s*, and water-chamber, *A*, with the dam, *n*, passage, *F*, and dry screen, *f*, and with the passage, *h*, *g*², and *gg*¹, substantially as described."

This claim mainly relates to an arrangement of means whereby the cleaned coal, the waste water, and the slate and foreign substances are disposed of. The system of ports and passages is appropriate and efficient. The coal is saved in good condition, and the waste products are separated and deposited where they can be readily taken care of. Two defenses, as regards this claim, are set up: *First*, that of anticipation; and, *secondly*, that the combination is not a patentable one, it being a mere aggregation of devices lacking co-operative action. Avoiding any extended discussion of the matter, I must con-

tent myself with simply announcing my conclusion that neither of these defenses is well taken.

The third claim of letters patent No. 198,432 is as follows:

(3) "In a coal and ore separator the hinged gate-board, *b*, with its regulating arms, *cc*, in combination with the chute, *J*, as described, and for the purpose set forth."

The claim relates to means for regulating the proper supply of material to the sieve. The only defense here insisted on is a want of novelty, and, to sustain it, reliance is placed altogether on a previous patent to George Lander, which shows in a coal-washing machine a sliding gate. But Lander's patent exhibits nothing which performs the function, or anything like thereunto, of the plaintiff's regulating arms, *cc*. Furthermore, it appears from the evidence that the plaintiff's device is less complicated, and lets the material out more readily than Lander's. Upon the whole, I am not satisfied that the defendants have successfully made out this defense.

Finally, the defendants contend that this suit cannot be maintained under the provisions of section 4922, Rev. St., for want of a disclaimer by the plaintiff of certain claims, (other than those already discussed,) embracing things, it is alleged, of which he was not the original and first inventor. But no proof has been taken to show that the claims referred to are bad for the reason suggested, or for any reason, and the case is not in a condition for an adjudication in respect to those claims. The only infringement complained of is of the four claims considered in this opinion, and to them alone was the evidence directed. Moreover, it is settled that a disclaimer need not be filed until the court has passed upon the contested claims. *O'Reilly v. Morse*, 15 How. 62; *Seymour v. McCormick*, 19 How. 96.

Let a decree be drawn in favor of the plaintiff.

EVEREST v. BUFFALO LUBRICATING OIL Co., (Limited.

(Circuit Court, N. D. New York. July 16, 1884.)

1. PATENT—PROCESS.

The process of determining the grade of lubricating oils by a fire-test.

2. SAME—PRIOR USE—APPARATUS.

Previous patent for an apparatus to test coal oils cannot be regarded as an anticipation of the patent in suit.

3. SAME—EVIDENCE REQUIRED.

Proof of prior use must not be vague and indefinite. It is necessary that it be of that high character that convinces the court beyond a reasonable doubt.

In Equity.

George B. Selden and T. Outerbridge, for complainant.

James A. Allen and Corlett & Hitch, for defendant.

COXE, J. The complainant is the inventor of an "improvement in the process of determining the grade of lubricating oils." Letters patent were issued to him, dated March 7, 1876, numbered 174,506. The application was filed January 6, 1876. The complainant is also the owner of a patent for "improvements in the distillation of oils," but the consideration of this patent was on the argument withdrawn from the attention of the court.

The invention in question consists in applying a fire-test to samples of lubricating oil taken from the still during the process of manufacture, and determining the grade of reduced oil by such test.

The claim is in these words:

"The process of determining the grade of lubricating oils, which consists in applying the fire-test thereto during their manufacture, substantially as set forth."

The defenses interposed are: *First*, want of invention; *second*, prior use; *third*, description in prior letters patent; *fourth*, non-infringement.

Although the specification is awkwardly drawn, there are, it is thought, no fatal discrepancies between the claim and the other statements regarding the invention. Construing the claim to refer only to the process of determining the grade of lubricating oils by applying the fire-test during their manufacture, the conclusion is reached, not however without some hesitation, that the patentee has made an advance which rises to the dignity of invention, not invention of a high grade, certainly, but still sufficient to sustain the patent.

The evidence of prior use is vague and indefinite. It is not of that high character which convinces the court beyond a reasonable doubt. Proof which does this is always necessary.

It is argued that the patented process is described and claimed in letters patent issued to Smith and Jones, No. 35,184, May 6, 1862, for "an apparatus for testing coal oils." This patent cannot be regarded as an anticipation. It is for a method, and an apparatus which is minutely described in the specification and drawings. It is not simply a process patent. Complainant does not attempt to secure any particular mechanism. He expressly states that a chemist's sand bath with a porcelain cup heated by a Bunsen burner or a plain iron dish placed over a charcoal fire in a tinker's pot may be used. It is clear that he wishes to disclaim the use of particular apparatuses and to include them all. Although Smith and Jones use a wick and tube, it is not disputed that their invention could be successfully adopted by complainant. Indeed, if the view here taken is correct, he might have added the Smith and Jones apparatus to the others described by him in the specification. It cannot be said that the Smith and Jones patent, or any of the state statutes referred to, describes the process of fixing the grade of lubricating petroleum

oil by a fire-test while in the process of manufacture. Infringement by the defendant is sufficiently proved.

There should be a decree for the complainant, but, as he has been defeated as to one of the patents declared on, it should be without costs.

VACUUM OIL Co. v. BUFFALO LUBRICATING OIL Co., (Limited.)

(Circuit Court, N. D. New York. July 16, 1884.)

PATENT PROCESS FOR OIL—REISSUE—UNLAWFUL CLAIM.

The claim of the reissue of a patent for making an oil product by the use of steam, in vacuo, cannot be unlawfully broadened so as to include the oil product, no matter by what process produced.

In Equity.

George B. Selden and T. Outerbridge, for complainant.

James A. Allen and Corlett & Hatch, for defendant.

Coxe, J. This is an equity action founded upon reissued letters patent No. 7,321, granted to the complainant, as assignee, on the twenty-sixth of September, 1876. The application was filed January 29, 1876. The original patent, No. 58,020, was issued to M. P. Ewing, September 11, 1866.

Of the various defenses interposed but one will be examined, viz., that the reissue is void for the reason that the claim is improperly expanded. The claims are as follows:

ORIGINAL.

As a new manufacture, an oil-product, as above described, when produced from crude petroleum by the evaporation therefrom of the lighter hydrocarbons in vacuo by the use of steam or its equivalent, to prevent burning, substantially as herein set forth.

REISSUE.

An unburned, residual, heavy hydrocarbon-oil, substantially as described.

It will be observed that in the reissue the product alone is claimed, all reference to the manner in which it is produced is omitted. The original limited the invention to a heavy residual oil produced from crude petroleum by the evaporation therefrom of the lighter hydrocarbons in vacuo by the use of steam or its equivalent. The attempt in the reissue is to claim the oil product, no matter by what process produced; to sweep into complainant's net every new method of producing the desired result, and every improvement upon the old method, which had been discovered during an interval of nearly 10 years, or which may be discovered in the future. It is suggested that the claim should be read in connection with the description, and if so read the precise manner of manufacture described in the original

is pointed out. It is true that it should be so read, and it may be conceded that the original process is referred to. But the description does not limit the invention to a product produced by vacuum distillation with the aid of steam; on the contrary, the intention to provide for all contingencies is boldly announced in these words:

"It is not intended to limit the present claim of invention to the product of precisely the same process hereinbefore described, as modifications thereof may be readily made embodying the same principle of distillation at low temperature, to which the obtaining of the product in question is due."

That the claim of the reissue has been unlawfully broadened there can be little doubt; and the long lapse of time after the date of the original brings the case within the recent decisions of the supreme court.

There should be a decree for the defendant, with costs.

CRANDAL and others v. PARKER CARRIAGE GOODS CO.

(Circuit Court, N. D. New York. July 7, 1884.)

1. PATENT LAW—REISSUED PATENT—DUTIES OF COURTS.

When it can be seen that the patentee seeks, by apt words of description, to secure what he has honestly invented and nothing more, the courts should hesitate to regard with favor the accusations now so freely made against reissued patents.

2. SAME—IMPROVEMENT IN BOX-LOOPS, ETC.

Reissued patent for "improvement in box-loops for carriage tops," held valid: following *Crandal v. Watters*, 20 Blatchf. C. C. 97; S. O. 9 FED. REP. 659.

In Equity.

Neri Pine and *Charles M. Stone*, for complainants.

Stem & Peck, for defendant.

COXE, J. The complainants are owners of reissued letters patent, granted to Charles H. Davis for an "improvement in box-loops for carriage tops. The validity of the patent was adjudicated in the case of *Crandal v. Watters*, 20 Blatchf. C. C. 97; S. C. 9 FED. REP. 659. Although the issues presented are not in all respects identical, the reasoning of that case must determine the present controversy.

It is argued that the patent is void for want of novelty, and several patents, not before the court in *Crandal v. Watters*, are introduced in support of this defense. The patent issued to E. M. Blodgett July 25, 1865, for an "improvement in gaiter-fastenings," describes an apparatus bearing some similitude to the complainants' invention. The devices of the other patents referred to are dissimilar in many important particulars. The object of the Blodgett invention is "to apply the staple-fastenings of cloth-gaiters to the flap of the same in such a manner that the cloth about these fastenings will not fray out and

present an unsightly appearance." To one of the gaiter flaps is stitched a thin strip of spring metal with pointed ends slightly projecting. To the other flap a strip of thin metal is attached having flat staples riveted to it, or fastened with tangs. These staples receive the pointed ends of the strip on the opposite flap. In size, shape, object, position, and in the mode of its operation the Blodgett apparatus is unlike the one described in the patent of the complainants. The former would not, it is thought, suggest the latter to a skilled mechanic. To apply the words of Judge BLATCHFORD: "This could not be used as a substitute for the plaintiff's loop without invention. It is easy after the desired thing is obtained to see how an old thing could have been adapted or altered."

Again, it is urged that the patent is void because improperly reissued. The court, in the *Watters Case*, passed upon this question also, but it is insisted that as the decision was rendered before the new doctrine of *Miller v. Brass Co.* 104 U. S. 350, was promulgated, a different view should now be taken. I cannot think so. The opinion of Judge BLATCHFORD is very clear and positive upon this question. He says, (page 661:)

"The claim of the original patent was so framed as to seem to require that the loop should be actually applied to a carriage top, in order to infringe. It also required that the metal plate, C, should be used in such application. Makers of loops were not makers of carriages, and it was obvious that the invention was really of the loop ready to be affixed, and that the inventor was entitled to have a claim which would reach the maker of the loop. Besides, even if the claim of the original would have extended to the maker of the loop, it might have been questioned whether it would reach him when he made a loop without the plate, C: and it was plain that that was only a stiffening or strengthening plate, an adjunct, making the article better, perhaps, but yet not of the essence of the invention. The case was, therefore, one for a reissue. * * * It was no departure and no new matter to make the use of the plate, C, optional."

With the patent thus construed, the doctrine of *Miller v. Brass Co.* has little application.

Where it can be seen that the patentee seeks, by apt words of description, to secure what he has honestly invented and nothing more, the court should hesitate to regard with favor the accusations now so freely made against reissued patents.

The evidence of infringement might have been more definite and certain, but I am of the opinion that it is sufficient.

The complainants are entitled to the usual decree.

ROYER v. CHICAGO MANUF'G CO.

SAME v. SAME.

'Circuit Court, N. D. Illinois. June 28, 1884.)

1. PATENT LAW—OLD DEVICE—COMPLAINT FOUNDED THEREON NOT GOOD.

The application of an old device to another analogous use is not a patentable subject, and a bill of complaint founded thereon is not maintainable under the principles of the patent laws, and must be dismissed.

2. SAME—"PROCESS"—REQUISITES—INFRINGEMENT.

A valid patent for a process must be limited to the precise or certainly substantial description which has been given in the specifications, and in order to constitute an infringement of that process a person must be shown to have followed substantially the same process—the same mode of reaching the result—as is described in the specifications.

3. SAME—ASSUMPTION OF LAW—ONUS PROBANDI—CHANGE OF ONUS.

The law makes the assumption that the patentee is *prima facie* an inventor, but when we come to the question of infringement the *onus* is changed: it is incumbent on the plaintiff, as patentee, or his representative or assignee, to prove clearly and satisfactorily that there has been an infringement.

In Equity.

Hatch & Aldis, for plaintiff.

Frank A. Johnson, for defendant.

DRUMMOND, J. I shall decide both of these cases in favor of the defendant. I cannot now give an opinion at any considerable length in either case, but I will state my conclusions, and will speak of the second case more fully.

The first case (court, No. 17,105) is founded on a patent issued to the plaintiff, dated January 18, 1876, which he calls "an attachment for rawhide fulling machine." He states that the object of his invention is to provide an improvement in a rawhide fulling machine, for which letters patent have been already granted to him; and the improvement consists in what he calls an automatic device by which he is enabled to run the machine in one direction for a certain time, and then reverse it, the process continuing automatically until the leather is finished. It seems to me that the evidence shows that this improvement was nothing more than the application to rawhide fulling machines of an old and well-known device used in washing-machines; and the testimony of one of the witnesses clearly establishes that the plaintiff obtained his idea from an examination and description of the same device used in a washing-machine, and, under the suggestion and with the assistance of the witness, applied it to the fulling-machine. It therefore comes within the rule which has been so long settled, that the application of an old device to another analogous use is not a patentable subject, and therefore I think the bill is not maintainable under this principle of the patent law, and must be dismissed.

The other case between the same parties, (court, No. 17,106,) I must admit, is one attended with some difficulty. That is on a patent

issued to the plaintiff, April 21, 1874, for what he calls "an improvement in the treatment of rawhide, especially for the use of belts and laces." He refers, in the first place, in his specifications, to the removal of the hair by means of sweating, which is an old process known to every tanner. The hide is dried perfectly hard; how, he does not state. It is then inserted in water for 10 or 15 minutes,—long enough to lose its extreme stiffness. Afterwards the fulling process commences. This may be done in a machine patented by him. It seems clear that he does not claim any particular mode of fulling. Then, he says "the hide before it is passed into the machine is stuffed with a mixture of twenty parts tallow, two parts wood tar, and one part resin," which seems to be the most important part of the process. I do not think that the proof shows, in this case, that the application of these substances to a hide was new. It is claimed, on the part of the plaintiff, that Louis Royer, his brother, never applied tar to the hides. I am not so clear about that. I would be inclined to say that the weight of the evidence is that he did; but, however that may be, it is certain, I think, that the tar had been applied to hides before the application was made by the plaintiff. He further states in the specifications that the hide is moistened with water four or five times during the day, and describes the manner in which it is done, which may be termed only the ordinary way of curing or of manufacturing the particular article which is the subject of the patent in this case. He avoids the use of lime, acid, or alkali. He then says: "I am aware that hides and skins have been prepared by a fulling or bending operation to render them pliable, but this mode alone does not answer for the preparation of machine belts and laces. It is necessary to make use of a preparation, substantially such as before described, to render rawhides fit for use, and durable." Then he describes the effect of the application of the tallow, wood tar, and resin, and what he claims is "the treatment of the prepared rawhide in the manner and for the purpose set forth." Now, if this is a valid patent for a process, it must be limited to the precise, or, certainly, substantial, description which has been given in the specifications; and, in order to constitute an infringement of that process, a person must be shown to have followed substantially the same process, the same mode of reaching the result, as is described in the specifications.

I am not entirely satisfied from the proof that the plaintiff was the first inventor of the process which he claims in his patent. It is admitted by the plaintiff's counsel that his brother, Louis Royer, was engaged for a long time in a process which was substantially similar to that for which the patent was granted to the plaintiff in this case; but it is insisted that he did not reach what may be termed a complete and perfect invention; that it resulted in a mere experiment, and therefore it did not deprive the plaintiff of his right, or prevent the patent from taking effect. It is not always easy to determine where experiment ends, and when a complete, perfected invention

begins, or may be said to exist. In this case, while it is true that Louis Royer did not continue the work upon his process, and it was to some extent abandoned, it is very questionable whether he had not before that completed the invention, and whether he abandoned it because he had not completed it. I have great doubts whether it may not be said, under the evidence, that he had substantially completed the invention which the plaintiff claims in his patent, and whether he did not abandon the work from some other cause. There are many circumstances which may prevent a man from going on and making a discovery, which he has made, available or profitable, and I am inclined to think that may be true in this case. I can only say, in relation to it, I have great doubt upon that point. I am not satisfied to the extent that I think a chancellor ought to be, to reach a decree in such a case.

In my opinion, the plaintiff is not within that provision of the law which declares that a patent is not valid provided the thing patented has been in public use or on sale for a particular time. Section 4920. I do not feel inclined to declare the patent invalid on that account, under the peculiar circumstances of this case. Great latitude should be allowed to a person in completing the invention for which he seeks protection under the law, and although it may be said it is not as clear as it might be, I think the plaintiff in this case should not, on that account, be deprived of his right under the patent law; but I think the plaintiff has not made out in this case what may be called a clear infringement of the invention covered by his patent. Indeed, it may be said that it is difficult to declare what are the precise limits of the invention which is claimed in the specifications in this case.

I do not think it is satisfactorily shown by the evidence that the defendant has used substantially the same process as that described in the specifications of the plaintiff's patent. It seems to me there is so great a variance between the mode of manufacturing the article which the defendant makes and sells, as to take it out of the purview of what may be called that which constitutes the infringement of a patent. For instance, the defendant in all cases applies something different from that which the plaintiff describes in his specifications; and while what is done by the defendant removes to a greater or less extent those substances from the hide, as alum and salt, still it is imperfectly done,—how far accomplished the proof does not clearly show,—and perhaps there is some conflict in the evidence on that point. But the only position which could then be taken by the plaintiff is, nevertheless, that the defendant substantially observes and follows the process of the plaintiff. Even then I hardly think the conclusion necessarily follows.

It is said that the great invention here on the part of the plaintiff is a process by which raw hide reaches a certain result, and that the process of the defendant is what may be called a "tawing" process,—tanning,—and it is different from the plaintiff's in that respect only.

Suppose that to be so, unless it can be alleged and proved, in eliminating the difference between the operation of the defendant and that of the plaintiff, the substantial invention of the plaintiff remains, then the defendant would not be liable.

I have already said that this case is not free from difficulty. I have proceeded on the assumption which the law makes, that the plaintiff, *prima facie*, is an inventor, and with that assumption, in connection with the evidence, it is doubtful whether he is the inventor which he claims to be. Then, when we come to the question of infringement, the *onus* is changed: it is incumbent on the plaintiff to prove clearly and satisfactorily that there has been an infringement. It is an affirmative fact which it is incumbent on the plaintiff to prove, and I do not think that has been done in this case. It is often very difficult, when we take the state of the art into account, where there has been some little thing done which has produced important consequences, to say where the precise line of demarkation is between what is old and what is new. That is one of the difficulties in this case. The line between what is old and what is new has not been so distinctly and clearly marked out by the plaintiff as it ought to have been, and that is very important where the change is what may be called a slight one. Where some new and important principle has been discovered, which strikes the mind of every one as something of great value, there is no difficulty. Difficulty arises only where the change made by the inventor is inconsiderable. It cannot be questioned that the plaintiff in this case has bestowed much labor in completing the operations for which he claims a patent. He had a serious struggle in obtaining his patent. He did not seem to know certainly what he had discovered; what was, in fact, the invention for which he claimed a patent. It was only after repeated applications and amendments and changes that the patent was granted.

Bill dismissed.

AVERY and another v. WILSON.

(Circuit Court, W. D. North Carolina. June Term, 1884.)

1. PATENTS FOR INVENTIONS—REMEDIES—CONCURRENCE OF EQUITY AND LAW.

In cases of patent infringement the statutes of the United States have conferred original and concurrent jurisdiction upon courts of equity, and they may determine, without the assistance of courts of law, the legal rights of the plaintiff and the infringement of the defendant, and may ascertain the amount of loss and damage by taking an account of the defendant's profits, and afford a complete remedy for the wrong committed, and prevent its continuance by injunction.

2. SAME—LUNACY OF INFRINGER—ACCOUNT—INJUNCTION—COSTS.

The defendant having admitted the infringement, but pleaded the fact of his lunacy at the time of the commission of it, the court decrees a perpetual injunc-

tion on account of the profits obtained by the defendant through the infringement, as well as costs in favor of the plaintiff.

3. SAME—MAINTENANCE OF LUNATIC.

Equity's superintendence and care is only exercised during the period of mental incapacity, when the lunatic is unable to provide maintenance for himself and family. After the restoration of such person to a condition of sanity, the courts cannot properly allow the expense of past maintenance, although his incapacity for self-support and the incidental expenses necessarily incurred during the lunacy had greatly diminished his estate, and the damages claimed were caused by him while he was a lunatic. An account ordered as to such damage cannot take the past maintenance of the lunatic into consideration, after the establishment of his sanity.

4. SAME—EQUITY—COSTS IN INTERMEDIATE PROCEEDINGS—DISCRETION OF COURTS.

Courts of equity having a large discretion in matter of costs, frequently give costs in intermediate stages of a cause, without waiting for a final decree.

In Equity.

Jones & Johnston, for plaintiff.

Jos. H. Wilson & Son, for defendant.

DICK, J. This cause was set for hearing at this term by consent of parties. The proofs establish the fact that the plaintiffs are the owners of the patent-right as claimed. The defendant, in his answer, admits the infringement alleged, but insists by way of defense that he was a lunatic at the time of the tortious acts complained of, and had been so ascertained and declared by the proper inquisition of a jury. Since this finding, and before the commencement of this suit, another jury, upon inquisition, have found that he had become sane and was capable of attending to his business affairs.

As a general rule, a person *non compos mentis* is not responsible for crime, and a jury must determine the question whether the party accused had a sufficient degree of reason to know that the act which he did was wrong. There must be a criminal intent in doing an act in order to constitute crime, and a want of reason is generally evidence of a want of intent. The law presumes every man to be responsible for his acts until the contrary is shown to the satisfaction of a jury. As a general rule, a person of unsound mind cannot make a binding contract, as capacity for consent is an essential element in such a transaction. In some instances—like in the case of infancy—the question whether the contract of a lunatic is valid, void, or voidable, depends upon the purpose and object of the contract, and the circumstances attending the transaction. A lunatic is often civilly liable for his torts, as he is not entirely exempt from the general doctrine of the law, that, whenever one person receives an injury directly from the voluntary act of another, that is a trespass, although there was no design to injure. This general rule has been modified by exceptions made by the constructions of the courts in the case of lunacy, and upon this subject there is some conflict of decisions. The current of authority seems to establish the doctrine that a lunatic is not liable for injuries to the sensibilities and reputation of a person, as in such cases malice is an essential ingredient to the tort; as libel, slander,

malicious prosecution, and malicious arrest under regular process. A person *non compos mentis* is regarded by the law as incapable of a wicked intention to do such injuries. There are other cases of injuries to the person by a lunatic about which there is some conflict of decision, as assaults, batteries, false imprisonment, etc., in which a wrongful intent or culpable negligence are ingredients. In batteries there must always be an intent, express or implied, to do the injury; and legal malice is always presumed when a wrongful act is done intentionally, without just cause or excuse. Express malice is some manifestation of ill-will to a person, or an evil design or corrupt motive in doing an act which is injurious to another.

In this second class of torts many plausible arguments may be used on both sides in sustaining opposing views. These torts to the person are embraced in the legal maxim, "*actio personalis moritur cum persona*." They are torts committed by force, and are usually prompted by sudden passion or vindictive feelings, and in many cases large punitive damages are properly assessed by a jury against the tort-feasors. As the wrongful intent and motive of the wrong-doer are the usual and substantial grievance complained of, and punitive damages are generally assessed, I am of opinion that actions for such torts should not be sustained against lunatics, as they are incapable, from want of reason, of such intent and motive, unless substantial damages, capable of ready estimation, have been suffered. In no case can vindictive damages be assessed against a person *non compos mentis*. This liberality of the law to this unfortunate class of persons can work no serious injury to society, as they can be legally confined when considered dangerous; and the disposition, power, and right of self-defense will generally be sufficient to insure the personal safety and security of the citizen against the unreasoning and motiveless action of an imbecile.

Injuries to property, corporeal and incorporeal, constitute a third class of torts, in which it is generally conceded that lunatics are responsible for compensatory damages to the extent of the actual injury sustained. Some of these injuries are often prompted by malice towards the owner, or are done in a spirit of wantonness, cruelty, and revenge, as in the case of malicious mischief at the common law, and malicious injuries to property defined by statute. In such cases a sane person is liable to indictment, and also to an action for the civil injury, and punitive damages will generally be recovered. A lunatic can only be made liable for compensatory damages. In civil actions for violation and encroachment upon established rights of property, the law does not so much regard the intent of the wrong-doer as the loss and damage of the person injured.

In this case the defendant is charged with the infringement of an incorporeal right conferred by law upon the plaintiffs. A patent-right is the exclusive liberty conferred by letters patent from the sovereign on an inventor or his alienee of making and vending ar-

ticles according to his invention. A patent-right is regarded as personal property, and may be assigned; and, if it be infringed, the inventor or his alienee has a remedy at law by action of trespass on the case for damages, and a remedy in equity to prevent the continuance of the wrong by injunction. Ad. Eq. 212. In such cases the statutes of the United States have conferred original and concurrent jurisdiction upon courts of equity, and they may determine, without the assistance of a court of law, the legal right of the plaintiff and the infringement by the defendant; and may ascertain the amount of loss and damage by taking an account of the defendant's property, and afford a complete remedy for the wrong committed, and prevent its continuance by injunction.

As the proof in this case establishes the legal right of the plaintiffs, and the infringement is admitted by the defendant, the plaintiffs are entitled to a perpetual injunction, and to an account to ascertain the profits derived by the defendant from his infringement.

The counsel of the defendant insist that the order of reference should direct the master to ascertain and report the amount of expenses incurred in the maintenance of the defendant during the period of his lunacy subsequent to the infringement, and that the same may be allowed by the master in estimating the amount of profits received. It is true, as stated by counsel, that courts of equity, as representatives of the sovereign, have, within the local limits of their jurisdiction, a general superintendence and care over lunatics and their estates, and will not allow creditors to have satisfaction of their debts out of such estates until provision is made for reserving a sufficient amount for the comfortable maintenance of a lunatic, and his wife and minor children. *Adams v. Thomas*, 81 N. C. 296, and cases cited. This superintendence and care, however, is only exercised during the period of mental incapacity, when the unfortunate lunatic is unable to provide maintenance for himself and family. After the restoration of such person to a condition of sanity the court cannot properly allow the expenses of past maintenance, although his incapacity for self-support, and the incidental expenses necessarily incurred during the period of lunacy, had greatly diminished his estate, and the damages claimed were caused by him while he was a lunatic.

The counsel of defendant object to costs being allowed in the preliminary decree granting a perpetual injunction, and directing a reference to the master to take and state an account of the profits received by the defendant by reason of his admitted infringements. It is true, as insisted by the counsel, that this is not a final decree, as the cause must be heard for further directions on the report of the master; and the hearing of the cause on further directions is generally the occasion for determining the question of costs. *Humiston v. Stainthorp*, 2 Wall. 106. Courts of equity, however, having a large

discretion in matters of costs, frequently give costs in intermediate stages of a cause, without waiting for the final decree. Ad. Eq. 389; 2 Daniell, Ch. Pr. 1457. This discretion can be properly exercised in giving to the prevailing party the incidental costs which have arisen during the progress of a cause about a matter completely disposed of by the court, and not necessary to be considered on further directions. In this case, the facts appearing in the evidence and the pleadings being deemed sufficient by the court for granting a perpetual injunction, which disposes of that part of the relief asked for in the bill, I am of the opinion that the costs incident to that proceeding should be allowed the plaintiff in the decree for a perpetual injunction.

Let a decree be drawn in conformity to this opinion.

THE PILOT.

(District Court, E. D. Virginia. June 30, 1884.)

COLLISION—PILOT-BOATS—STEAMER—SCHOONER—BRIG—FAULT.

Two pilot-boats, one of them a steamer, the other a sailing schooner, make for a ship, coming from sea into the capes of Chesapeake bay, to offer pilot service. The schooner crosses the bow of the ship, and meets her on the leeward, approaching within 50 feet of her. The pilot steamer approaches the ship on the windward, and, when within 300 feet, passes off by the ship's stern. In less than half a minute after the ship passes from between the two pilot vessels they collide. The schooner is damaged and sunk, and libels the steamer. *Held*, that each of the pilot vessels had a right to approach the ship in open sea, for the purpose of proffering pilot service, as these vessels had done, and that the steamer was not in fault in being where she was in lawful pursuit of her calling. *Held*, on all the proofs in the cause, that the collision which occurred was not by fault of the pilot steamer; and this the more true, as the schooner, when the collision was seen to be almost inevitable, made a maneuver which was the direct cause of it, and which rendered it absolutely inevitable.

In Admiralty, on a Libel for Collision.

Sharp & Hughes, for libelants.

W. Pinckney White and *Floyd Hughes*, for respondents.

HUGHES, J. The licensed pilots of Chesapeake bay and Hampton roads are a high grade of seamen, having duties and powers of great responsibility. They are relied upon for the safety of many lives and much property. A court is naturally disposed, not only to give credence to the statements of such a class of officers made on oath for its information, but to place great reliance upon them. Yet I find the evidence in this case, which is almost exclusively that of pilots, exceptionally contradictory, conflicting, confusing, and inac-

curate. I think that taken by libelants much more so, in the main, than that taken by the respondents.

Many of the statements of witnesses have to be rejected outright. It is not my duty—I cannot be expected—to go through this testimony in an effort to separate what is obviously incredible from what may be credible. I have no talisman by which to perform this task with any promise of success. I must grope my way to a decision of this case under the disadvantages imposed by a mass of conflicting and inconclusive testimony.

On the third of July, one year ago, a brigantine was making in from the ocean, in broad day, to enter the capes of the Chesapeake. She was on a course W. by S. The wind was a good breeze from S. S. E. The two pilot-boats Graves and Pilot made towards her to offer pilot service. The Graves was a schooner of 75 tons, 80 feet in length. The Pilot was a steamer of 189 tons, 120 feet long. Before moving for the brig they were both in the vicinity of Cape Henry. The brigantine's course lay a little south of buoy No. 2, which is about five miles from Cape Henry. The brig, when the two pilot-boats began to make towards her, was about four miles to the eastward of the buoy. The Graves crossed the course of the brig ahead of her, and got to her leeward, and was meeting her, moving nearly on a parallel line with her. She spoke the brig when about 50 feet to the leeward. This was half a mile south-eastward of buoy No. 2. Finding that the brig did not need a pilot, the Graves passed on, moving at the rate of nine miles an hour, on a starboard tack, close-hauled, with her helm slightly a-starboard, and nearly midships. Before the Pilot (steamer) had got near the brig on the windward side, after coming up on nearly a northward course from the direction of Cape Henry, the Pilot ported her helm to pass towards the stern of the brig, and was on a N. N. E. course, with helm ported, when she had come to a distance of 300 feet from the brig. This was about the moment when the Graves spoke the brig on the opposite side. The Pilot was then moving with helm a-port at the rate of about six and a half miles an hour, her course gradually changing more and more to the eastward, under the influence of her ported helm. Finding that the Graves had spoken the brig, the Pilot intended coming round to return to her cruising-ground near Cape Henry. That was also the intention of the Graves. This intention was legitimate in each one of the two boats.

Here I will pause to remark that it is idle to contend that, while the Graves was near the brig on the opposite side, the Pilot had no right to be at a position 300 feet south of the brig. She was offering a pilot service to the brig. That was the business she was on. She had a right to be within 300 feet or 50 feet of the brig. She had the right to be as near on one side of the brig as the Graves had a right to be on the other, in an open sea. And each had the right, after leaving the brig, to make its way back to its usual cruising

ground in the manner most convenient to itself; the Pilot keeping out of the schooner's way.

It is true that a steamer must not only keep out of the way of a sailing vessel, but must also avoid bringing about such a conjunction of circumstances as tends to produce collision with her. *The Carroll*, 8 Wall. 302. And if the Graves, the Pilot, and the brig had been in a *cul de sac* of navigation, in which there was probable or imminent danger of collision, then the Pilot ought to have taken care not to go into it herself, even though, by keeping away, she relinquished her right to speak the brig. But there was no *cul de sac* in the vicinity of the collision in this case. The occurrences of the occasion all took place on the Atlantic ocean, where each pilot-boat was at full, unrestricted, and equal liberty to exercise its vocation of approaching, hailing, and speaking ships of commerce in proffer of pilot service.

In the case under consideration, neither pilot-boat had any apprehension, or ground for apprehension, of a collision with the other, up to half a minute before the contact; and there was no probable danger of such a casualty. There was no ill-will. The testimony all shows that there was most excellent good feeling between these pilots. Whatever untoward casualty was about to occur would not occur through design. There was no malice in any breast. Any injury that should be sustained or inflicted would be the result of accident. There might be fault,—either fault in fact or fault in law; but, nevertheless, whatever should happen would be unintentional and accidental. As to what each pilot-boat thought the other was going to do, it may be said that, while custom cannot be allowed to excuse fault, if committed in violation of any one of the statutory rules of navigation, yet that one pilot-boat, coming up to speak a vessel on one side, may naturally entertain some definite idea, founded on what pilot-boats usually do on such occasions, as to what another pilot-boat, coming up to speak the same vessel on the other side, will do after speaking. When each of two pilot-boats approaches a vessel to speak her, on opposite sides, each knowing that the other is on the other side of the spoken ship, I think it is natural for each one to presume that the other, after speaking, will remain for a little while on her own side of the spoken vessel, unless some *vis major* or other cogent circumstance prevents. This is, of course, not a law of navigation. This cannot be declared a custom of pilots. But I think I can at least assert that the entertaining of such an idea is too natural and sensible to be declared a fault, if a steamer be so unlucky as to be the possessor of it. In the case under consideration the Pilot did presume that the Graves would keep, for at least a brief period, to the leeward of the brig and of its wake.

We come now to consider what did happen. The brig was a larger and taller vessel than the Graves, and than the Pilot. She was under sail; I presume under full sail. I have a right to believe that the

brig and her sails were opaque, and not transparent. Some of the witnesses say that before the pilot-boats had cleared the stern of the brig, they on one pilot-boat saw what was doing on the other pilot-boat, on the opposite side of the brig. But this implies that the brig, her rigging, and sails were transparent. I feel at liberty to disbelieve all testimony implying that the brig, her sails, and rigging were transparent. I shall assume as a fact that the two pilot-boats could not see each other over the tall hulk and through the stretched sails of the brig, and that they were ignorant of everything respecting each other, except that they were on opposite sides, until the moment when the brig shot from between them. The sudden finding themselves in close proximity to each other at that moment was obviously a surprise to both. Just before this event, the two pilot-boats were running at the rate—the Graves of 9 miles an hour, or 789 feet a minute, and the Pilot of $6\frac{1}{2}$ miles an hour, or 572 feet a minute. The testimony establishes that the Graves, after passing the brig for a distance of 300 feet, came in collision with the Pilot, striking her on her port bow; that is to say, they came into collision in a little more than a third of a minute (about eleven twenty-ninths of a minute) after the Graves had cleared the stern of the brig. Of course there was no possibility of effecting very much by maneuvering the two vessels in so brief an interval. The Pilot, moving slowly, and yet reaching the point of collision at the same instant when the Graves, moving rapidly in comparison, reached it, was ahead of the Graves at the moment that the Graves cleared the brig. Calculation shows that at this moment, when the Graves was 300 feet from the point of collision, the Pilot was 217 feet, or 83 feet ahead of the Graves. The Pilot, 120 feet in length, was ahead of the Graves, 80 feet long, by more than the length of the Graves, and by within 33 feet of her own length. This fact constituted the difficulty of the situation, existing, as it did, in connection with the fact that the foremost vessel was moving more slowly than the hindmost. If either of the two facts had not existed, there could have been no collision.

Both vessels seem to have realized that the Pilot was smartly ahead. Finding herself ahead, the Pilot did all that could be done; she rang bells to increase her speed, and did increase it. Being ahead, and moving with helm a-port, the Graves being on her port quarter, the Pilot could do nothing else, in the line of her duty to keep out of the way of the Graves, but increase her speed. She did that, and would most probably have got out of the way of the Graves if the latter had kept on her course, and had made no maneuver at all. But at the critical moment, most unfortunately, the Graves hard starboarded her helm, and let fly her mainsail; thus changing her course, increasing her speed, and throwing herself upon the port-bow of the Pilot. The Pilot was moving towards the wake of the

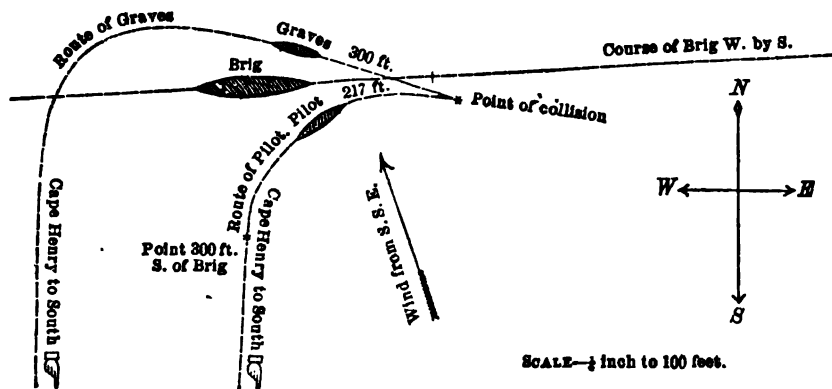
brig, on a course more or less eastward of its former course; I judge about N. E. at the time of the collision. The Graves was moving, close-hauled on a starboard tack, on a course nearly due east. These courses were, of course, converging lines, and the Pilot being ahead, would, in all probability, have passed beyond the touch of the Graves, (being the length of the Graves ahead of her,) if the Graves had held her course, with rudder amidships, and having the Pilot a-port. But instead of taking the chances of passing to the rear of the Pilot, the Graves, as already said, changed her course by hard starboarding her helm, and increased her speed on the new course by letting fly her mainsail, thus putting the Pilot on her starboard bow, in which position (the Graves moving faster than the Pilot) a collision was inevitable. It was the Graves that ran into the Pilot; and the damage which she received showed that her speed was much greater than the Pilot's. Libelants contend that the Pilot should have stopped and backed. This, even if practicable in one-third of a minute, would only have rendered the shock more severe,—so severe that the Graves would have gone incontinently to the bottom.

It is clear that the immediate and direct cause of this collision was the action of the Graves in hard starboarding her helm, and letting fly her mainsail. The rule of navigation commands the sail-vessel, when in danger of colliding with a steamer, to keep on in her course and to make no maneuver at all. This is a corollary and counterpart of the rule imposing upon the steamer the duty of keeping out of the sail-vessel's way. In the present case, therefore, inasmuch as the Graves did not observe her duty, the steamer is without blame, unless it can be shown that the steamer was in fault in the fact of being at the place of collision.

This consideration renders it important to determine the point at which the collision occurred. Indeed, the present case rests in great degree on this pivotal fact. I think the conclusion is undeniable that the point of collision was about 20 feet to the south, or windward of the wake of the brig; and, as before stated, at the distance of 300 feet from the point where the Graves cleared the stern of the brig. These facts seem to be conceded by counsel on both sides.

If the collision occurred at the point thus ascertained, two other facts are thereby established, namely: *First*, that the Pilot had remained on her own side of the brig and of the brig's wake, not crossing over to the schooner's side; and, *second*, that the schooner had not remained on her side of the brig and its wake, but had crossed over to the Pilot's side. These two facts, taken in connection with the others already stated,—namely, that it was the schooner which ran into the Pilot; that the Pilot was ahead of the schooner at the time, mending her speed to get further out of the way; and that the collision was directly caused by an unfortunate maneuver of the schooner,—would seem to settle this case adversely to the Graves.

The following diagram explains my view of the matter:



I have not mentioned the circumstance, testified to by so many of the witnesses, that the Graves, after clearing the brig, fell off a hundred feet to leeward. In order for her to have done so, she must first have passed 120 or more feet to windward in order to have been at the point of collision when it happened. Counsel for libelants were estopped by their testimony from questioning this fact, and counsel for the respondents insist that it proves that the Graves luffed around the stern of the brig on a port helm in clearing the brig. If there was this crazy rounding to the windward, and then falling off to the leeward, by the Graves, the case is very heavily against her. I have not thought it necessary to rely at all upon this feature of the evidence. I have preferred to take no account of any of the evidence given to the effect that the Graves ported her helm at the moment of clearing the brig. I have been willing to accept, in favor of libelants, two propositions much contested by counsel: *First*, that the Graves was moving on an E. $\frac{1}{2}$ N. course; and, *second*, that the Pilot was moving on a course not varying much from N. E.¹ These courses would necessarily bring them into collision if they should arrive at the point of intersection at the same time. The Pilot being nearer the point of intersection of the two courses than the Graves, moving still on a port helm, with quickened speed, would, I think, have cleared the Graves, if the Graves would have allowed her to do so, by holding steadily in her own course; but the Graves, instead, made the fatal maneuver described just at the moment to render the collision inevitable. The accident was caused by this maneuver. It was caused by the Graves. The maneuver was made in violation of the twenty-third rule of navigation. The Graves was at the point of collision on the windward of the brig's wake by no fault of the steamer. The steamer, before the brig passed from between the two, was not bound to cross

¹The Pilot's helm being a-port, I think she may have come around far enough towards east to have kept clear of the wake. But, for argument's sake, I disregard this probability.

the wake to leeward, or to keep away from those waters, or to abandon the vicinity of the place of the collision. She was where she was by right.

Decree must be for the respondents.

THE ANNIE WILLIAMS.

(District Court, D. New Jersey. June 28, 1884.)

1. COLLISION—TUG AND TOW—RESPONSIBILITY OF THE TUG.

Steam-tugs, having boats in tow, are bound to the exercise of reasonable skill and care in everything relating to their work until it is accomplished, and are chargeable for the want of either to the extent of the damage sustained; and this liability continues, although it may appear that the negligence or unskillfulness of those managing the tow contributed to the collision.

2. SAME—RESPONSIBILITY OF THE TOW.

Whenever tow-lines are used, the master of the tow is bound to obey all proper orders of the master of the tug, and when he refuses to obey such orders, or fails in reasonable skill or attention to duty, such conduct may relieve the owners of the tug from responsibility.

3. SAME—APPLICATION TO FACTS.

A tug having a schooner in tow, attached by a long hawser, in attempting to pass a boat in tow, sheered upon the latter the schooner, and caused much damage to the boat. In such a case, the tug being the motive power, the law regards her as the dominant mind in the transaction, and makes her responsible for all accidents resulting from not exercising ordinary care.

In Admiralty. Libel *in rem*.

Beebe, Wilcox & Hobbs, for libelants.

Alward & Parrot, for claimants.

NIXON, J. The libel is filed in this case to recover damages caused by a collision. It alleges that on the fifteenth of November, 1882, the libelants' boat Mary, loaded with a cargo of coal, was taken in tow by the steam-tug Robert Burnett at Elizabethport, New Jersey, to be towed with three other boats to the city of New York; that the tow was made up with two boats on each side of the said tug, fastened thereto, the libelants' boat being on the outside of the port side of the tug; that they left Elizabethport between 7 and 8 o'clock in the morning and proceeded on said trip; that after they left Elizabethport the tug Annie Williams took a schooner in tow astern, by a long hawser, and proceeded after said tow, and following them; that when said tug and tow were about abreast of Mariners' Harbor, Staten island, and where there is a turn in the channel, the tug Annie Williams, with the said schooner in tow, attempted to pass the Robert Burnett and her tow between libelants' boat and the New Jersey shore; that in so doing the steam-tug Annie Williams caused the schooner to take a rank sheer, and while on said sheer the schooner came in contact with libelants' boat, striking her on the port quarter, starting

the cabin and deck, breaking the timbers and rails, and doing other serious damage. It further alleges that the collision was owing solely to the negligence and carelessness of those in command, and controlling and managing, the steam-tug Annie Williams. The answer of the claimant sets up two grounds of defense, giving his version of the transaction as follows: That the steam-tug Annie Williams, with the schooner Impudence in tow astern by a hawser about 120 feet long, proceeded after the tow in which the libelants' boat was made up; that the tug was used by the schooner as her propelling power,—the schooner being all the time in charge of her own officers and crew, and steered by them, and her immediate course in the channel directed by them, and not by the steam-tug; that the tide was running from Elizabethport towards the corner-stake light, and in the direction the vessels were moving; that while the vessels were in the waters of Staten Island sound, and the Annie Williams was proceeding on her course, the Robert Burnett suddenly stopped with all her tow, compelling the Annie Williams to pass her, which she did, on the port side, about 500 feet south-west of, and before coming to, the corner-stake light; that, in passing, the starboard side of the Annie Williams was full 40 feet from the port side of the libelants' boat; that if the schooner in tow rubbed against the libelants' boat as alleged in the libel, it did not start, the cabin or deck, or break her timbers, or do any damage; and that the schooner during the whole time was astern of the tug and under the control of her commander, who was standing at her wheel, steering the course of the said schooner, and if he had followed in a straight line in the wake of the Annie Williams the schooner would have passed the tow without colliding or touching; and that the pretended collision was not occasioned by the negligence or carelessness of those having charge of the Annie Williams, but by the conduct of those in charge of the libelants' tow and schooner, and by circumstances beyond the power of the said Annie Williams, and those controlling her, to prevent.

The only interpretation to be put upon the answer is that, inasmuch as the schooner in tow of the Annie Williams was manned by and was under the control of her own crew, the schooner alone is answerable for all damages arising from a collision; and, *secondly*, that if any collision occurred no injury in fact resulted therefrom. The last question is not properly before the court, but must be considered hereafter, on a reference to ascertain the damages, if a reference is ordered. With regard to the first, the proposition is not true, without qualification. Steam-tugs having boats in tow are not liable as common carriers; nor are they insurers. They are, nevertheless, bound to the exercise of reasonable skill and care in everything relating to the work until it is accomplished, and are chargeable for the want of either to the extent of the damage sustained. And this liability continues, although it may appear that the negligence or unskillfulness of those managing the tow contributed to the collision.

They may be both in fault, and in such cases are accountable to an innocent suffering party, either jointly or severally, as such party may determine.

The relative duties of the tug and tow were fully discussed by the late Justice CLIFFORD in the case of *The Express*, 3 Cliff. 462, and it was there determined that where a vessel was drawn by a hawser, both vessels had duties to perform, and that both might be held in fault in case of an accident; that when tow-lines were used, the master of the tow was bound to obey all proper orders of the master of the tug; and that where he refuses to obey such orders, or fails in reasonable skill and attention to his duty, such conduct might relieve the owners of the tug from responsibility. But, however culpable the conduct of the tow may be, the owner of the tug cannot claim such release from responsibility in any case where he also was in fault, and it is now well settled that where both tug and tow contribute to the accident by lack of skill or care, the injured party may maintain his suit and recover his damages against one of the offending parties.

Thus, in *The New Philadelphia*, 1 Black, 76, the supreme court held as a rule of law in the admiralty, as at the common law,—

"That when a third party has sustained an injury to his property from the co-operating consequence of two causes, though the persons producing them may not be in intentional concert to occasion such a result, the injured person is entitled to compensation for his loss from either one or both of them, according to the circumstances of the accident, and particularly so from the one of the two who had undertaken to convey the property with care and skill to a place of destination, and there shall have been in so doing a deficiency in either."

To the same effect, and as illustrating the same principle, is the decision of the supreme court in *The Atlas*, 93 U. S. 319, where it is said:

"Parties without fault * * * bear no part of the loss in collision suits, and are entitled to full compensation for the damage which they suffer from the wrong-doers, and they may pursue their remedy *in personam*, either at the common law or in admiralty, against the wrong-doers, or any one or more of them, whether they elect to proceed at law or in the admiralty courts."

The question then is, do the facts of this case show a want of reasonable care and skill on the part of the respondents' tug, having the schooner in tow? She was the following vessel, and was undertaking to pass the tow to which the libelants' boat was attached, on the port side of the channel. Being the motive power, the law regarded her as the dominant mind in the transaction, and made her responsible for all accidents resulting from not exercising ordinary care. It is impossible to ascertain from the conflicting testimony the width of the channel at the point of passing. About 200 feet is the average of the evidence upon the subject. A mud-digger with a scow on her starboard side, anchored in the channel on the New Jersey side, made the attempt to pass more difficult and hazardous. The weight of the

proof does not sustain the allegation of the answer, that the Robert Burnett suddenly stopped, which rendered it necessary that the Annie Williams should go ahead. There seems to have been no slacking of speed by her until after the collision. Without dwelling at length upon the testimony, I am clearly of the opinion that the Annie Williams must be held responsible for want of care. No attempt should have been made to pass, with the mud-digger and scow on her port, and a tow nearly a hundred feet wide on her starboard side, where the whole channel was about 200 feet in width, having a deeply-laden schooner in tow with a hawser, sheering wildly, and not controllable by her rudder. He also added to the violence of the concussion by ringing extra bells for the engineer to work up, hoping to break the sheer by increasing the speed. The distance between the vessels was too short to accomplish any such result. The master of the Williams states, in his examination, that noticing the sheer of the schooner he rang to the engineer to throw the boat wide open, so as to pull the schooner off her sheer.

There must be a decree in favor of the libelants, with costs, and a reference to ascertain the amount of the damages, unless the parties will agree that the commissioner may report the amount from the evidence already taken.

THE SARATOGA.

(District Court, S. D. New York. June 17, 1884.)

1. COMMON CARRIER—BILL OF LADING—EXCEPTIONS OF "NEGLIGENCE."

A general ship is a common carrier; an exception in her bills of lading against loss "by any act, neglect, or default of the master or mariners" is invalid.

2. SAME—LOSS "BY THIEVES OR ROBBERS."

An exception against loss "by thieves or robbers" is valid, unless the theft be invited or made easy through some negligence of the ship.

3. SAME—ORDINARY NEGLIGENCE.

Such an exception serves only to relieve the ship from her liability as *guarantor* against theft, and from that extreme care which naturally accompanies such a guaranty. She is still bound to use all customary and reasonable vigilance against theft, according to the nature of the articles and the temptations and facilities for stealing them.

4. SAME—CASE STATED.

Where the steamer S. received on board a box of gold coin valued at \$23,600, a few hours before sailing, which was put in the locker beneath the floor of the "glory-hole," in the run of the ship, and the scuttle to the locker was provided with a bar across it designed to be fastened by a padlock, and also with a stout lock in the edge of the scuttle, and the box of coin was at once put in the locker and the lock fastened, but the bar and padlock were not used or fastened, and a former discharged employe had previously gone to the glory-hole, taken out the lock, and carried it off and got a key fitted to it, and had then replaced the lock in the edge of the scuttle, and, shortly after the box was shipped, again went aboard and went to the glory-hole, unlocked the scuttle, broke open the box in the locker, stuffed the bags of coin about his waist, se-

cured them by a strap, and left the ship by the usual gang-way, unobstructed, though observed and interviewed by two seamen, who supposed him to be smuggling, *held*, that the ship was chargeable with neglect of customary, ordinary, and reasonable vigilance against the theft of the coin in not using the bar and padlock; in not providing any check or guard against access to the glory-hole; in not preventing tampering with the lock; and in not having suitable and proper watch against suspicious persons on sailing days; and in not observing and stopping a person when leaving the ship who was so visibly and plainly stuffed with his plunder.

In Admiralty.

Butler, Stillman & Hubbard, for libellant.

Goodrich, Deady & Platt, for the *Saratoga*.

BROWN, J. The libel in this case was filed to recover \$23,600, the value of a quantity of Spanish gold coin shipped, on the twenty-seventh day of May, 1880, on board the steam-ship *Saratoga*, and consigned to Havana, but which was not delivered there because stolen from the steamer, as the evidence shows, before she left New York. The coin was in bags contained in a wooden box, which was strapped with iron, and was about 18 inches long, 12 wide, and 8 deep. It was received on board the steamer, as she lay at her wharf, about 1 o'clock in the afternoon, some three hours only before she sailed. It was delivered to one of the quartermasters, who immediately carried it to the locker, where it was deposited and locked up. The evidence leaves no reasonable doubt that, within an hour or two afterwards, the locker was entered by a former employe of the ship, who had been discharged on the previous voyage; that the box was broken open by him, the bags of coin stuffed around his waist; and that, with the coin about him, he went off the steamer, by the usual gangway, and in broad daylight, shortly before the ship sailed.

The bill of lading exempts the vessel from liability for loss occasioned by "pirates, robbers, thieves, * * * or from any act, neglect, or default of the master or mariners."

The defendant's vessel was a general ship, and a common carrier. The clause of the bill of lading exempting her from liability for any "act, neglect, or default of the master or mariners" is therefore invalid, and affords no defense, if the loss was occasioned through their negligence. *Railroad Co. v. Lockwood*, 17 Wall. 357; *Bank of Kentucky v. Adams Exp. Co.* 93 U. S. 174; *The Hadji*, 16 Fed. Rep. 861; 18 Fed. Rep. 459.

It is not necessary to consider the conflicting views as to the ship's liability under the exception of "thieves, robbers," etc., had the theft been committed by one of her own employes, (*Spinetti v. Atlas Steamship Co.* 80 N. Y. 71; *Taylor v. Liverpool, etc.*, L. R. 9 Q. B. 546;) nor what effect, in the consideration of that question, should be given to the principles laid down by the supreme court, in *Railroad Co. v. Lockwood*; since Jacques, who is satisfactorily shown to have committed the theft, was not at this time in the ship's employ, but had been previously discharged.

The exception of loss by thieves or robbers is valid, unless it be shown that there was negligence on the part of the ship which contributed to the theft or facilitated it; and upon defendant's proving that the theft was committed by a person not belonging to the ship, the burden of proof is upon the libelants to show to the satisfaction of the court that the loss might have been avoided by the exercise of reasonable and proper care on the part of the ship, and that the theft would not have occurred if such care had been exercised. If the carelessness of the ship was such as to invite the theft, or to make it easy, or if the attempt would not have been successful except through the lack of such watchfulness and care as was reasonably incumbent upon those having charge of such treasure, then the loss must be held to be occasioned by the carrier's negligence and inattention to his duty, as well as through the direct acts of the thief.

In *Clark v. Barnwell*, 12 How. 272, 281, the court say:

"But if it can be shown that it (the loss) might have been avoided by the use of proper precautionary measures, and that the usual and *customary* methods for this purpose have been neglected, they may still be held liable. It is competent for the libelants to show that the respondents might have prevented it (the loss) by proper skill and diligence in the discharge of their duties."

In *Transp. Co. v. Downer*, 11 Wall. 129, 133, the court say:

"If the danger might have been avoided by the exercise of proper care and skill on the part of the defendant, it is plain that the loss should be attributed to the negligence and inattention of the company, and it should be held liable, notwithstanding the exception in the bill of lading." See, also, *Six Hundred and Thirty Quarter Casks of Sherry Wine*, 14 Blatchf. 517; *Dedekam v. Voss*, 3 Blatchf. 44; *Richards v. Hansen*, 1 FED. REP. 54, 63; *The Invincible*, 1 Low. 225; *The Montana*, 17 FED. REP. 377.

There can be no doubt that this rule, which, upon the above authorities, is applicable to the other exceptions of the bill of lading, is equally applicable to an exception of loss through theft or robbery. The exception of loss by "robbers, thieves," etc., applies to all goods alike; but it does not, therefore, follow either that the ship is relieved of all care whatsoever against loss by theft, or that only the same kind of care is required as regards coin, or other valuables, as would be sufficient as respects ordinary merchandise. The effect of the exception is to relieve the ship as a common carrier from its liability as a *guarantor* against loss by theft; and also to relieve the ship, as I think, from that high degree of care, which may be termed extreme care, which might naturally be expected to accompany its extreme obligation as a *guarantor* against theft in any event. But notwithstanding the exception of theft, the ship still remains liable for all ordinary, all customary, all reasonable diligence in the care of the goods intrusted to it; having reference to the nature of the goods themselves, their liability to injury or loss, whether by theft or by any other cause, the temptations to theft, and the facility with which it may be committed. This principle is recognized and well settled in

respect to the oldest and most constant exception in bills of lading, namely, "perils of the seas." Though a loss happen from the violence of the winds or waves, it is not deemed to arise from a peril of the seas if it might have been avoided by the exercise of ordinary and reasonable human skill and vigilance. *The Reeside*, 2 Summ. 567, 571; *The Titania*, 19 Fed. Rep. 101. Though a loss by "breakage" be excepted, this does not authorize the handling of glassware in the same manner as goods not liable to injury by breakage; nor is it claimed that because losses by robbery and theft are excepted, valuables, such as coin, watches, or diamonds, may be stowed on board ship with no other care than that which ordinary merchandise requires. Notwithstanding any special exceptions, all goods received must be handled and stowed, or stored, according to their nature, and their liability to injury or loss. The rates of freight differ in respect to different classes of goods in consequence of the different care and trouble which they require. The freight upon this box of coin, only 18 inches long, and weighing altogether but 137 pounds, was \$29.50; and the obligation to make reasonable provision for the safety of such treasure is universally recognized by providing safes or lockers to receive it. Coin is free from liability to most of the various kinds of injury to which ordinary merchandise is exposed; its peculiar danger is that of theft; the only care required in regard to it is vigilance against theft; and to protect against this danger, reasonable vigilance must still be exercised, notwithstanding the exception.

The principal facts relied on to show negligence in this case relate to the place of the locker, its imperfect fastening, and the want of reasonable watch of persons coming on board and going off the ship. The locker was a small place in the run of the ship, beneath the deck of the "glory-hole," about six feet high, six feet long, and four feet wide. It was lined with sheet-iron; and the only access to it was through a scuttle two feet square in the deck or floor of the glory-hole. The latter was a small room in the after-part of the ship, approached only through the rear of the cabin by stairs descending about six or seven feet. It was used as a sleeping-room for the waiters, and had 10 or 12 berths. The scuttle to the locker beneath was a part of the floor of this room, flush with it, and designed to be fastened by means of an iron bar extending across it, which was permanently fastened at one end, and at the other end was fastened by a padlock. In the edge of the scuttle upon one side was a heavy lock having two stout bolts projecting, when locked, into the adjoining edge of the deck or floor. There was a key-hole in the scuttle, the key of which was in charge of the purser. When the box of coin was put in this locker, the purser was called and the lock fastened. But the bar across the top was not secured by the padlock, either then or at any time during the voyage following. Before the box was placed in the locker the purser had left the key loose upon his desk or hung up in his room. His room was approached by two doors, which were usu-

ally locked when he was not present. No person acted as guard or watch over the locker, or to prevent access to the glory-hole, during the afternoon before the ship sailed. Two or three days previous Jacques had gone on board the ship under pretense of desiring to get his clothes from the glory-hole, (where he had slept prior to his discharge,) and had removed the lock from the scuttle, taken it away with him to a locksmith, had a key fitted to it, and had afterwards brought the lock back and replaced it in the scuttle. How he first removed the scuttle so as to be able to take the lock off does not appear; nor does it appear whether the scuttle was left unlocked, or whether he obtained the key for a short time from the purser's room to unlock it. Shortly after the box had been put in the locker, he for the third time came aboard the ship, having a valise with a strap about it, and went to the glory-hole under the same pretense as before. Meeting two waiters, he sent them forward to the bar with money to get some beer, and during their absence, it would seem, went down the locker, and by means of a short, pointed iron bar belonging to the ship broke open the box, removed the bags of coin, locked the locker as before, and stuffed the bags about his person, securing them by the strap which he had brought with the valise. As he came up the stern of the ship, he had a bundle wrapped in green cloth under his arm, and asked one of the seamen present if he could not get aboard a schooner off the stern of the steamer. The man offered to take the roll and pass it down to him, which Jacques declined, saying he would go out by the gangway. When he went to go off his great paleness excited remark, as well as the evident stuffing out of his person. Two other seamen meeting him observed this, and thought he might be stealing clothes or smuggling cigars. They had some conversation with him concerning the probability of his being observed as he went off the gangway. Satisfied that he was not stealing clothes, they did not report him. No attention was given him as he passed out of the gangway, nor does it appear conclusively that there was any person there at that time upon the watch for suspicious characters. The quartermaster assigned to that duty was not examined. The loss was not discovered until the vessel arrived at Havana, and, on opening the locker, the box was found broken open and all the coin gone except a small bag in one corner.

I cannot hold, upon the evidence, that the place where the locker was put was, in itself, an improper one, so as to constitute negligence. The evidence shows that the place of this locker, in the run of the ship, under the glory-hole, was frequently used for such purposes; and that in some of the last and best steamers built that place was selected as the safest. In those the scuttle was secured by two iron bars across the top, fastened by padlocks, without any lock in the edge of the scuttle. In other cases, safes or lockers in the cabin are used, with upright doors.

There are several particulars, however, wherein I feel bound to

hold that the ship did not exercise the customary and reasonable vigilance required in the care of such treasure:

(1) The failure to lock the iron bar across the top of the scuttle. This bar was a part of the equipment of the ship, and one of the provisions for the security of the locker. The failure to use it was neglect of one of the customary and ordinary means of security. It cannot be called immaterial or unnecessary. Even if not used when there was no coin in the locker, had it been used as soon as the coin was put there, it would probably have prevented the theft, as there is no evidence that Jacques was provided with ready means to unlock the padlock, and every obstruction is of the greatest importance where the theft, to be successful, must be accomplished in a very brief space of time.

(2) The lack of reasonable vigilance to prevent tampering with the fastenings of the locker before the coin was placed there. No safe can be of any value if proper care is not exercised to prevent its locks or keys being tampered with. This care is equally necessary whether the safe at the moment contains valuables or not. The evidence shows that no special care was taken of the key of the main lock, until after the coin had been received. I am inclined to think, however, that the key was immaterial in this case, because the inference from the evidence is that the scuttle, before the coin was received, was left unlocked. But it was want of reasonable care to leave the lock unfastened, when it was so slightly secured in the edge of the scuttle that the whole lock was easily removable.

(3) Neglect of any precautions to prevent access to the glory-hole after this treasure was received. If it be said that the waiters, whose berths were in the glory-hole, might be expected to supply the needful precaution against thieves, the evidence shows that no reliance was to be placed on them, and that they were plainly remiss in the duty which they owed to the ship in not reporting at once their clear observation and knowledge that Jacques was engaged in some illicit or criminal design. Some guard or check ought to have been provided against repeated access to the glory-hole and locker by persons having no business there.

(4) I cannot resist the conclusion that there was negligence also in the proper observation of Jacques upon his repeated visits to the ship after his discharge, and also at the time when he left the ship with his booty visibly and plainly stuffed about him. These repeated visits excited the suspicions of two of the seamen, who observed him as above stated. They knew the danger of theft of their clothing on sailing days, and they gave Jacques sufficient watch and examination to satisfy themselves that he was not stealing their clothes. They did suspect he was carrying off smuggled articles; and, in my judgment, they knew that he was engaged in some criminal project. The plan of the theft required Jacques to come upon the ship three times in the prosecution of his design during the few days the ship

was lying in port. He had no business there. His repeated visits were of themselves suspicious, as the two seamen well understood, and these visits should have been known and observed by some responsible officer of the ship. The habit of admitting friends of the passengers on sailing days on board the ship undoubtedly gives opportunity for thieves to come aboard, but this renders it obligatory to keep reasonable watch of the movements of suspicious characters. Had reasonable attention and watch been given at the gangway, it is difficult to see how Jacques, stuffed out, pale, and staggering with 125 pounds of gold in bags about his waist, could have passed unobserved.

While the facts in this instance present none of those evidences of gross negligence which were exhibited in the case of *King v. Shepherd*, 8 Story, 849, 861, I cannot avoid the conclusion that there was a lack, in the particulars above mentioned, of that reasonable vigilance and caution to prevent theft which the law imposes upon the carrier, notwithstanding the exception of loss by theft or robbery; and a lack of that care also which, by the common understanding, the ship is expected to exercise. This negligence, both before and at the time of the theft, co-operated with it. Without this neglect, I am satisfied the theft would not have been accomplished; and the libellant is therefore entitled to a decree for \$22,871.50, with interest from June 1, 1880, and costs.

THE HADJI.

(Circuit Court, S. D. New York. July 1, 1884.)

1. COMMON CARRIERS—BILL OF LADING—NEGLIGENCE—RELEASE OF RESPONSIBILITY AGAINST INSURABLE DAMAGE.

If a condition in a bill of lading, relieving the carrier from liability for "any damage that can be insured against," is to receive an unqualified construction, and be deemed to include a loss arising from the negligence of the carrier, it is obnoxious to public policy, and therefore void.

2. SAME—PUBLIC POLICY.

Public policy demands that the right of the shipper to absolute security against the negligence of the carrier, and of all persons engaged in performing his duty, shall not be taken away by any arrangement or agreement between the parties to the service.

3. SAME—IMPLIED RELEASE.

The same reasons that forbid the recognition of an express contract between the carrier and the shipper, exempting the former from liability for his own negligence, forbid a contract between them which is designed to work the same result. That which cannot be done directly, will not be permitted to be done indirectly.

4. SAME—THE OBJECTION DEFINED.

The objection to a condition releasing the carrier from liability for an insurable damage lies in its tendency to impose upon the shipper the burden of protecting himself against a risk which it is the carrier's duty to assume, and which the law will not permit him to evade. It is better that the carrier

should be paid a higher freight, consequent upon his insuring himself against damage to which his own negligence may contribute, than that he should be given immunity by the shipper.

In Admiralty.

Sidney Chubb, for libellant.

Butler, Stillman & Hubbard, for claimant.

WALLACE, J. The proofs show satisfactorily that the libellant's merchandise was injured by the sea-water which entered the hold of the *Hadji* through the seams of the ballast-tanks, owing to the faulty construction of the tank. The top of the tank was not made sufficiently rigid; its motion removed the head of the rivets which fastened the seams between the several plates of iron forming the top, and the water from the tank entered by the opened seams. The goods were shipped under a bill of lading containing various restrictions of liability on the part of the carrier, among which was the following: "No damage that can be insured against will be paid for." Insurance was effected by the libellant in two marine insurance companies, and before the libel herein was filed the insurers paid to libellants the loss arising from the injury to the goods.

If the condition relieving the carrier from liability for "any damage that can be insured against," is to receive an unqualified construction, and be deemed to include a loss arising by the negligence of the carrier, it is obnoxious to public policy, and therefore void, according to the authorities which are controlling upon this court. The law, as tersely stated in *Noy, Max. p. 92*, "If a carrier would refuse to carry unless promise were made to him that he shall not be charged with any miscarriage, that promise is void," is the rule of the federal courts. He may stipulate, however, for such a reasonable modification of his common-law liability as is not inconsistent with his essential duties to the public; he may absolve himself from responsibility as an insurer against accident or misfortune; but he cannot exempt himself from the consequence of his own negligence or that of his employees. Public policy demands that the right of the shipper to absolute security against the negligence of the carrier, and of all persons engaged in performing his duty, shall not be taken away by any arrangement or agreement between the parties to the service. *York Co. v. Central R. Co.* 3 Wall. 107; *Railroad Co. v. Lockwood*, 17 Wall. 357; *Bank of Kentucky v. Express Co.* 93 U. S. 174. The same reasons that forbid the recognition of an express contract between the carrier and the shipper, exempting the former from liability for his own negligence, forbid a contract between them which is designed to work out the same result. That which cannot be done directly, will not be permitted to be done indirectly. If the carrier may refuse to carry unless the shipper will look to some other party in case of miscarriage, the result is the same, and the consequences to the public are the same, as though he refused to carry at all, unless upon his own terms as to liability.

In this view it is quite immaterial, under such a stipulation as is contained in the bill of lading, whether the shippers can or cannot obtain insurance which will protect from loss by the carrier's negligence, or whether the libelants actually did obtain such insurance. It suffices that the carrier cannot divest himself of his own responsibility for negligence by requiring the shipper to protect himself against it; and that an agreement having this operation is void.

Authorities are cited holding that the carrier may, by stipulation in his contract, reserve to himself the benefit of any insurance which the shipper may have effected upon the goods; and thus, although the loss might arise from his misconduct, may secure the indemnity taken by the shipper. These authorities fall short of the point. It is one thing to sanction a contract by which a carrier is permitted to indemnify himself against loss out of a fund which the shipper has received or may receive on account of the loss, and another to sanction one which requires the shipper to obtain such a fund as a condition of the carrier's undertaking, or which absolves the carrier from liability in default of obtaining the fund.

Rintoul v. New York Cent. R. Co. 17 FED. REP. 905, was a decision of this court. The bill of lading contained a clause providing that in case of loss or damage to the property transported, whereby any legal liability might be incurred, the carrier should have the full benefit of any insurance that might have been effected on the property by the shipper. The learned judge who decided that case placed the right of the carrier to enforce such a stipulation upon the ground that the shipper was under no obligation to insure, and the stipulation was not, therefore, one in effect to exempt the carrier from liability. He states: "If it was a part of the bill of lading that the owner must insure for the benefit of the carrier, such condition would be unfair." This observation applies to the contract which was sustained in the case of *Phoenix Ins. Co. v. Erie & Western T. Co.* 10 BISS. 18; and in the case of *Carstairs v. Mechanics' & Traders' Ins. Co.* 18 FED. REP. 473, where a similar stipulation was held valid.

It is true, as all these cases assume, that a common carrier may make a valid contract of insurance for protection against the consequences of his own negligence. He is under no higher obligations towards the insurer not to be careless, than is any other party who desires insurance; and one of the principal objects contemplated by the contract of insurance is the protection against loss to the assured, of which the primary cause may be his negligence, or that of his agents. Ang. Ins. § 125. This being so, it does not seem unreasonable to hold the shipper to the contract he has seen fit to make with the carrier. But it is quite another thing to permit a carrier to compel the shipper, as a condition for the transportation of his goods, to enter into an independent contract with a third party for the carrier's benefit, in order that the latter may escape loss arising from his own conduct. It may be that, when the carrier insures himself,

he will charge the shipper a higher price for carrying his goods, while, if the shipper agrees to insure for the carrier's benefit, he may get a lower rate from the carrier; but the objection to the condition lies in its tendency to impose upon the shipper the burden of protecting himself against a risk which it is the carrier's duty to assume, and which the law will not permit him to evade. The only effect that can be given to the stipulation here is by construing it as exempting the claimants from liability for any damage that the shipper could insure against, not arising from the carrier's own negligence, (*Yale Co. v. Central R. R.* 3 Wall. 107; *Bank of Kentucky v. Adams Exp. Co.* 93 U. S. 174;) and in the courts of this state, where it is held that carriers may, by express contract, exempt themselves from liability arising from their own negligence, the rule is that when the general words may operate without including the negligence of the carrier or his servants, it will not be presumed that it was intended to include such negligence in the exemption. *Wells v. Steam Nav. Co.* 8 N. Y. 375; *Steinweig v. Erie Ry. Co.* 43 N. Y. 123.

In the case of *Mynard v. Syracuse, etc., R. Co.* 71 N. Y. 180, the contract released the carrier from "all claims on account of any damage or injury to the property, from whatsoever cause arising." But it was held that the exemption did not include an injury arising from the carrier's negligence.

It is the first duty of a common carrier by water to provide a vessel tight, stanch, and fit for the employment for which he holds it out to the public. Ang. Car. § 173. The breach of this duty is the personal default of the vessel-owner. *Lyon v. Mells*, 5 East, 428. The loss sustained by the libelants, therefore, arose from the carrier's own negligence.

The other points urged by the appellants as a defense to the action are not of sufficient merit to require consideration.

The decree of the district court is affirmed, with interest and costs.

THE EXILE, Her Tackle, etc.

(District Court, D. New Jersey. July 5, 1884.)

1. LIBEL FOR WAGES—SAILOR—SHIPPING ARTICLES—CONTRACT.

After a sailor has put his name to the shipping articles the court must regard the terms of those articles as the contract finally entered into by the parties.

2. SAME—SIGNING IN PRESENCE OF BRITISH CONSUL—INFERENCE—ESTOPPEL.

When it appears that a sailor signed the shipping articles in the presence of the British consul at Bordeaux, in the absence of proof to the contrary one must assume that the consul took pains to explain to him the nature, purpose, and effect of the agreement. The sailor cannot afterwards absolve himself from the performance of the duties undertaken by him, by alleging that he did not understand what he agreed to.

*Libel in Rem.**Beebe & Wilcox*, for libelants.*Jas. K. Hill, Wing & Shoudy*, for claimants.

NIXON, J. This is a libel for wages. The defense is that the libelant had signed shipping articles for a voyage and deserted before the voyage was ended. The proofs show that the Exile is a British vessel, and that she was lying in the port of Bordeaux, France, about the first of August, 1883, when the libelant, in the presence of the British consul, signed an agreement for a voyage "from Bordeaux to Sandy Hook," and "or any port or places in the United States of America, or dominion of Canada," and "or any port or places in the known world, where employment may be obtained, trading to and fro, and back to a final port of discharge in the United Kingdom, or continent of Europe, calling for orders if required; voyage not to exceed one year." He was to act as cook and steward during the voyage, at \$30 per month,—\$20 of the wages being advanced on entry. The shipping articles are exhibited in the suit, and bear date July 30, 1883. The bark sailed for New York on the fifth of August, and arrived at that port on the eleventh of the following September. It appears in the proofs that as soon as he reached the port of New York he had conversation with the master about leaving the vessel. He asked for his discharge, alleging that he understood he shipped only to New York, or some port in the United States, of which nation he was a citizen. The master insisted, however, that he had signed for the voyage, which would not terminate until their return to the United Kingdom or the continent of Europe; but consented to discharge him in a few days, if he could satisfactorily fill his place, and if, in the mean time, he would clean up things, and properly attend to his work. On the thirteenth of September, between 4 and 5 o'clock in the afternoon, in the absence of the master, but in the presence of the mate, he packed up his clothes and left the bark. The official log of the Exile shows the following entry of the date of September 13, 1883: "David Mitchell deserted this afternoon, taking his effects." It is properly attested by the names of the captain and first mate. The libelant subsequently demanded of the master the balance of his wages due, to wit, \$22; and, payment being refused, he filed this libel to recover the same.

There is no dispute about the libelant's signing the shipping articles, or that the contract was for one year, unless the voyage was sooner ended, or that the voyage contemplated a return to the United Kingdom, or to the continent of Europe, after visiting Sandy Hook, or some other port or ports of the United States. Leaving the ship at New York without a discharge was a forfeiture of the wages which had accrued, unless the libelant had justifiable cause for leaving the vessel.

The libelant alleges that he had two good grounds for going ashore. The first one is that he informed the master, and the master under-

stood that he was expected to remain with him only until the vessel reached some port in the United States, whither he was bound, and where he belonged. The second is, misconduct on the part of the captain during the voyage to the United States. Bad treatment is alleged generally. The only specific acts referred to are the frequent offers of the captain that they should settle their differences by personal combat. The first is not tenable, no matter what the antecedent conversation between the parties may have been, after the libellant put his name to the shipping articles; the court must regard the terms of these articles as the contract finally entered into by the parties. The master was not present when the libellant signed the articles. The latter went before the British consul at Bordeaux, and signed in his presence, and one must assume, in the absence of proof to the contrary, that the consul took pains to explain to him the nature, purport, and effect of the agreement. He cannot now absolve himself from the performance of the duties undertaken by him, by alleging that he did not understand what he agreed to. I have had more doubts about the second ground. Seamen are entitled to proper treatment by their officers; and offers to fight by the master is certainly unofficer-like conduct. But in the present case it seems to have been harmless bravado. It was doubtless exasperating, but no injury resulted to the libellant, especially after he declined the contest, and told the captain that he had come on board, not to fight, but to do his duty.

After a careful review of the whole testimony, I am of the opinion that, under the general principles of the maritime law, the libellant has forfeited his wages by leaving the ship, without permission or discharge, in the midst of the voyage, and that the libel must be dismissed. In consequence of the master's belligerent disposition, I shall withhold costs.

OZARK LAND CO. v. LEONARD.

(Circuit Court, E. D. Arkansas. April Term, 1884.)

1. EJECTMENT—POSSESSION BY DEFENDANT—ARKANSAS RULE.

In Arkansas, before the plaintiff can recover in ejectment, he must show that at the time of the commencement of the action the defendant was in possession.

2. POSSESSION—CUTTING AND HAULING OFF TIMBER, NOT.

The mere act of cutting timber on land, and hauling it off, is not such possession of the land as will entitle the owner to maintain ejectment against the trespasser, and occasional intrusions of this sort do not constitute possession, whether done under claim of title or not.

In Equity.

John B. Jones, for plaintiff.

T. W. Brown and *O. P. Lyles*, for defendant.

CALDWELL, J. This a suit to remove a cloud from title to lands. The defendant has demurred to the bill. All the questions raised by the demurrer have been decided in *Lamb v. Farrell*, 21 FED. REP. 5, save one.

The one question remaining to be decided arises on this clause of the bill:

"Your orator further represents that no person whatever is in the actual possession of said lands; that your orator, by virtue of being the legal owner of said lands, is in constructive possession thereof; that said lands are wild and uncultivated lands, and chiefly valuable for the timber standing and growing thereon; that said lands are well timbered, and valuable for such timber. Your orator further represents that said J. W. Leonard is trespassing on said lands, and cutting and hauling off the most valuable trees, and is using said clouds, and pretending to be the owner of said lands by virtue of said conveyances."

And as a basis for an injunction (not moved for) it is further alleged that the defendant is a non-resident and insolvent.

It is said this clause of the bill shows the defendant is in possession of the lands, and that as the plaintiff claims to hold the legal title he has an adequate remedy at law. The statute of this state requires the action for the recovery of real property to "be brought against the person in possession;" and to entitle the plaintiff to recover, he must show "that at the time of the commencement of the action the defendant was in possession." Gantt, Dig. §§ 2251, 2258. Whether the defendant was in possession at the commencement of the suit is an issuable fact; and unless the plaintiff proves the affirmative to the satisfaction of the jury, he must fail in his suit. *Tyler, Ej. & Adv. Enj.* 472; *Owen v. Fowler*, 24 Cal. 192; *Owen v. Morton*, Id. 373; *Pope v. Dalton*, 81 Cal. 218; *Williamson v. Crawford*, 7 Blackf. 12; *Pope v. Pendergrast*, 1 A. K. Marsh. 122.

The bill alleges that no one is in possession of the lands, and that they are wild and uncultivated. It is true, the bill further alleges

that the defendant is trespassing on the lands by cutting and hauling off timber. But the mere act of cutting timber on land, and hauling it off, is not such possession of the land as will entitle the owner to maintain ejectment against the trespasser. Occasional intrusions of this sort do not constitute possession, whether done under claim of title or not. It is not a claim of title, but "possession," that the statute of this state makes essential to the successful maintenance of an action of ejectment. It is clear, the facts set out in the bill would not amount to adverse possession on the part of the defendant. "Going upon land from time to time, and cutting logs thereon, does not give possession. Such acts are mere trespasses upon the land against the true owner, whoever he may be. * * * But it never was supposed that the hunter had possession of the forest through which he roamed in pursuit of game; and no more can a wood-chopper be said to possess the woods into which he enters to cut logs." *Thompson v. Burhans*, 79 N. Y. 93; *Austin v. Holt*, 32 Wis. 478, 490; *Washburn v. Cutter*, 17 Minn. (Gil.) 335; 3 Washb. Real Prop. 133, 134.

There is nothing on the record to show the land is not susceptible of actual occupation, cultivation, and improvement. The case is not within the rule of *Ewing v. Burnet*, 11 Pet. 41, and *Door v. School-dist.* 40 Ark. 237.

Under the consent rule, in the old form of the action of ejectment, the defendant was compelled to confess lease, entry, and possession, or pay the costs of suit, and the plaintiff could bring another action, (3 Bl. Comm. 205; *Tyler*, Ej. 458, 472;) and in many of the states, by statute, actions of ejectment may now be brought against persons claiming title or interests in real property, although not in possession. *Harvey v. Tyler*, 2 Wall. 328, 348; *Tyler*, Ej. 458, 472. But neither of these rules, as we have seen, have application here. In this state a verdict and judgment in ejectment is final and conclusive on the title and right of possession put in issue by the pleadings. Where this is the rule it is difficult to perceive why the possession of the land by the defendant should be an indispensable prerequisite to the plaintiff's right to have the merits of their respective titles tried at law. It is probably another instance of the continuance of a rule after the reason for it has ceased to exist, and after it has become an obstruction rather than an aid to the administration of justice. However this may be, the old rule is imbedded in the statute law of this state, and the courts are powerless to change it.

Section 723 of the Revised Statutes of the United States provides that "suits in equity shall not be sustained in either of the courts of the United States in any case where a plain, adequate, and complete remedy may be had at law;" but the supreme court say: "This is merely directory of the pre-existing rule, and does not apply where the remedy is not plain, adequate, and complete; or, in other words, where it is not as practical and efficient to the ends of justice, and to

its prompt administration, as the remedy in equity." *Oelrichs v. Spain*, 15 Wall. 211, 228.

On the face of the bill it is not "plain" the plaintiff could successfully maintain an action of ejectment against the defendant, if he should, as he probably would, deny his possession. On the contrary, it is quite plain the defendant would have the verdict on that issue. Demurrer overruled.

LIGGETT & MYER TOBACCO Co. v. HYNES.

'District Court, W. D. Arkansas. May Term, 1884.)

1. TRADE-MARK—INFRINGEMENT.

In a case where it is claimed that a trade-mark has been infringed, to constitute an infringement it is not necessary that the device complained of should be a *fac simile* of the device of complainants. There may be an infringement without exact similarity.

2. SAME—RESEMBLANCE.

Two trade-marks are substantially the same in legal contemplation, if the resemblance is such as to deceive an ordinary purchaser, giving such attention to the same as such a purchaser usually gives, and to cause him to purchase the one supposing it to be the other.

3. SAME—LIABILITY TO DECEIVE.

The resemblance need not be such as would deceive persons seeing the two trade-marks placed side by side, or as would deceive experts.

4. SAME—INTENTION TO DECEIVE.

There may be an infringement without a specific intent to deceive the public. If the effect of the device, when considered alone or in connection with the shape, size, character, and appearance of the article upon which it is placed, is to deceive, the party adopting it must be held to have intended deception; as every man is held to have intended the necessary, natural, and probable consequences of his own acts.

This is a bill in equity, brought here on account of citizenship of the respective parties, to perpetually restrain the defendant from using the mark attached to complainant's exhibit, "Robert S. Hynes' Plug Tobacco," on plug tobacco, complainants claiming to have an established right to the use of the mark of a "star" affixed to plugs of tobacco as a trade-mark, and complainant's mark is shown on complainant's exhibit, "Liggett & Myer's Plug Tobacco." Specimens or samples of both the complainant's and defendant's goods are produced in court and offered in evidence; also wood engraving of the same in the brief of the complainant.

Paul Bakewell, for complainant.

Clendenning & Sandels, for defendant.

PARKER, J. The law is well settled that a party who has appropriated a particular trade-mark to distinguish his goods from other similar goods has a right or property in it which entitles him to its exclusive use, and that this right is of such a nature that equity will

protect it by injunction from innovation. *Hostetter v. Van Winkle*, 1 Dill. 329. The leading principle upon which the law of trade-mark is based, is that the honest, skillful, and industrious manufacturer, or enterprising merchant, who has produced or brought into the market an article of use or consumption that has found favor with the people, and who, by affixing to it some name, mark, device, or symbol which serves to distinguish it as his, and to distinguish it from all others, has furnished his individual guaranty and assurance of the quality and integrity of the manufacture, shall receive the first reward of his honesty, skill, industry, or enterprise, and shall in no manner and to no extent be deprived of the same by another, who to that end appropriates and applies to his production the same, or a colorable imitation of the same name, mark, device, or symbol, so that the public are or may be deceived or misled into the purchase of the productions of the one, supposing them to be those of the other. 6 Wait, Act. & Def. 23, and authorities there cited.

The question to be considered in this case is whether the conduct of the defendant amounts to an infringement of the plaintiff's trade-mark, or an injury to his legal or equitable rights. As was well remarked by the Kentucky court of appeals in the case of *Avery v. Mickle*: "The object of the trade-mark law is to prevent one person from selling his goods as those of another, to the injury of the latter and of the public." It grew out of the philosophy of the general rule that every man should so use his own property and rights as not to injure the property or rights of another, unless some priority of right or emergency exists to justify a necessarily different manner of use.

It is true, in this case, that the trade-mark upon the tobacco of defendant is not a *fac simile* of that upon the tobacco of plaintiff. If it was, it would, of course, be an infringement. They are not exactly similar. But to constitute an infringement exact similarity is not required; there may be an infringement without it. The supreme court of the United States in *Gorham Co. v. White*, 14 Wall. 511, declares: "Two trade-marks are substantially the same in legal contemplation if the resemblance is such as to deceive an ordinary purchaser,"—giving such attention to the same as such a purchaser usually gives, and to cause him to purchase the one supposing it to be the other. The same court, in *McLean v. Fleming*, 96 U. S. 255, says: "Where the similarity is sufficient to convey a false impression to the public mind, and is of a character to mislead and deceive the ordinary purchaser in the exercise of ordinary care and caution in such matters, it is sufficient to give the injured party a right to redress." Nor need the resemblance be such as would deceive persons seeing the two trade-marks placed side by side, (*Manuf'g Co. v. Trainer*, 101 U. S. 64,) or such as would deceive experts, persons, because of their peculiar knowledge from their being wholesale or retail dealers, or in any other way specially conversant with the trade-mark simulated.

But the trades-man brings his privilege of using a particular trade-mark under the protection of equity if he proves, or it is apparent or manifest to the court by inspection, that the representation employed bears such a resemblance to his as to be calculated to mislead the public generally, who are purchasers of the article, to make it pass with them for the one sold by him. If the *indicia* or signs used tend to that result, the party aggrieved will be entitled to an injunction.

This principle is sustained by the cases above referred to; by *Walton v. Crowley*, 3 Blatchf. 440; 2 Story, Eq. Jur. 951; 2 Kent, Comm. 453; and a long and unbroken line of authorities, American and English.

The difference in the trade-marks of the plaintiff and defendant, in this case, would, perhaps, be at once detected by the intelligent user of tobacco, looking for his favorite brand, just as the man of luxurious tastes would discern his favorite brand of champagne. But the plaintiff is entitled to protection if the trade-mark of defendant would deceive the ordinary purchaser, purchasing as such persons ordinarily do. In this connection we must not lose sight of the character of the article, the use to which it is put, the kind of people who ask for it, and the manner in which they usually order it.

There is no proof in this case, coming from living witnesses, that the defendant adopted the trade-mark complained of with the specific intent of selling his tobacco as the tobacco of plaintiff, or that he expected to deceive the public. But if it is apparent to the court from an inspection of the two articles, or the court is able to see by such inspection, that plaintiff's trade-mark is so simulated as probably to deceive customers or patrons of his trade or business, there is good ground for the court to enjoin. *Filley v. Fassett*, 44 Mo. 173. If the effect of the simulated trade-mark is to deceive the public into the belief that the article upon which it is placed is the article of some other manufacturer, then it is a deception, whether it was the actual intention of the person using the simulated trade-mark to deceive or not, as the principle of law applies that persons are held to have intended the necessary, natural, and probable consequences of their acts.

In looking at the trade-mark to see whether it is so far an imitation of another as to deceive ordinary customers exercising ordinary care when purchasing, we must not look at the device alone, but we must also examine the article upon which it is placed, and if there is a resemblance in it to another article bearing the trade-mark that is claimed to have been infringed, and if this resemblance, when blended with the appearance of the device, has a tendency to deceive the ordinary public into the belief that they are buying the other article, then the very nature of the article becomes potential evidence in the case to show a purpose to deceive.

In this case, if the device of defendant was upon a plug of tobacco different in shape from that of complainant, the chance of deception

would be so slight that no court could find from the appearance of the two designs that the ordinary public would be deceived. Now, while there is no trade-mark in the shape of the plugs of tobacco of complainant, and consequently the defendant could make his plugs in any shape he pleased, without being guilty of an infringement, yet when he makes his plugs in such a way as to give them the general appearance of complainant's, and puts on them a device of such a character, and of such shape and appearance, as that the customer generally, when he sees the shape and appearance of the plug, and the device on it, will be deceived into the belief that it is complainant's tobacco that he is buying, there is a state of case presented by blending the size, nature, structure, and appearance of the plug with the device which would not exist if we viewed either the plug of tobacco or the device separately.

Taking this as the true rule, and applying it in this case, I am forced to the conclusion that the ordinary mass of purchasers would be deceived, after paying ordinary attention when purchasing, into the belief that they were buying the tobacco of complainant, when in fact they were getting the tobacco of the defendant. Ordinary care, in this connection, means the care that men ordinarily exercise when buying chewing tobacco.

Entertaining this view of the case, I think complainant is entitled to an injunction enjoining defendant from using the device adopted by him; and it will be so ordered.

SHEERER, Guardian, v. MANHATTAN LIFE INS. Co.¹

(Circuit Court, D. Kentucky. July 15, 1884.)

1. INSURANCE—CONSTRUCTION OF POLICY—"ON OR BEFORE."

Where an insurance policy contains a stipulation that the policy shall determine if the premium is not paid "on or before the day" fixed, and by a separate instrument, delivered simultaneously with the policy, and for the same consideration, the company agrees, after the payment of three annual premiums, to issue a paid-up policy for a proportionate amount on the surrender of the policy to the company "on or before it shall expire by the non-payment of the fourth or any subsequent annual premium," the stipulation and agreement should be read together as one contract, and the word "on" in the contract should be construed to mean the instant of the expiration of the policy.

2. SAME—PAID-UP POLICY.

In such a case the time of the surrender of the policy is of the essence of the contract, and the insured is not entitled to a paid-up policy on the surrender of the original policy after it has expired by non-payment of a premium. Former opinion in this case, 16 FED. REP. 720, modified.

In Equity.

¹Reported by Geo. Du Relle, Asst. U. S. Atty.

James S. Pirtle and Goodloe & Roberts, for complainants.

Fellows, Hoyt & Schell and Young & Trabue, for defendant.

BARR, J. After the demurrer to the bill was overruled, the defendant answered, and upon the issues made has taken testimony. It appears from this evidence that the defendant holds the note of Duerson for \$491.40, which is as follows, viz.:

"\$491.40.

NEW YORK, May 9, 1869.

"Twelve months after date, for value received, I promise to pay to the Manhattan Life Insurance Company of New York, or order, four hundred and ninety-one 40-100 dollars, with interest, payable annually in advance. In case of the death of William F. Duerson, insured in policy No. 17,241, the amount of this note is to be deducted from the amount of the said policy, or canceled by profits.

"No. 18,401.

WM. F. DUERSON."

This note is for the same amount as the annual premium due that day, and although the complainant exhibits a receipt for that premium paid in cash, the note was, no doubt, taken for a premium loan as of that date. The receipt of May 9, 1869, for the annual premium, acknowledges the receipt of cash, and nowhere indicates that it was paid with a premium loan, or that one was made. The receipt for the next year, May 9, 1870, has a memorandum at the bottom which would indicate that \$42.65 had been paid as interest in advance, and as the premium loan of that date is stated at \$163.80, this interest must have included another loan. The evidence is that neither the cash nor the note, given May 9, 1870, was received by the home office. This, however, does not affect the right of complainants, as the receipt for the premium is signed, and was delivered by the proper officers of the company. It appears that no interest has been paid after May 9, 1870, upon either note. The testimony also proves that the agreement under which complainants claim the right to a paid-up policy was executed and delivered simultaneously with the original policy, and that after the assured failed to pay the premium due May 9, 1871, the original policy was marked off on the company's books, and no longer considered an existing liability, and that the reserve which was intended to provide for the payment of the loss has been distributed among the policy-holders of the company, and that, by reason thereof, the company's ability and condition as to the payment of this loss has materially changed since May 9, 1871. In other respects the record remains as when heard on the demurrer.

The learned counsel for the defendant insist that complainants are not entitled to relief, because (1) the agreement made the right to a paid-up policy conditional upon the surrender of the original policy on or before it expired by the non-payment of the fourth or any subsequent annual payment, and the time of surrender is of the essence of the contract; (2) that the right to a paid-up policy is forfeited because of the neglect to pay the interest on Duerson's notes in advance.

The last proposition need not be considered further than to call attention to the fact that neither the policy nor the note declares that the non-payment of the interest in advance shall forfeit the right to recover a loss or to a paid-up policy. The only provision in the policy in regard to premium loan notes is that in adjusting the loss there shall be deducted "therefrom the amount of all unpaid notes given for loans" on that policy. The note which is exhibited by defendant provides that the amount of it "is to be deducted from the amount of said policy or canceled by profits," and, although the interest is to be paid in advance, there is no penalty for its non-payment.

But the other is a much more serious question. In considering it on demurrer, the then court expressed much doubt, but, following the view expressed by the Kentucky court of appeals in *Montgomery v. Phoenix Mutual Life Ins. Co.* 14 Bush. 54, overruled the demurrer. It now appears that the agreement and the policy were delivered simultaneously, and for the same consideration. They must therefore be read together, and as one agreement. The two, thrown together, would read, upon the point under consideration, thus, viz.: "In case the said Sallie W. Duerson shall not pay the said premiums on or before the day hereinbefore mentioned for the payment thereof, then, and in every such case, the said company shall not be liable for the payment of the sum assured, or any part thereof, and this policy shall cease and determine;" and "it is hereby understood and agreed that after the receipt by the Manhattan Life Insurance Company of not less than three annual premiums, on within policy No. _____, and on the surrender of said policy to said company on or before it shall expire by the non-payment of the fourth or any subsequent annual premium, the said company will issue a policy not subject to any subsequent annual premiums," etc.

It is insisted for the complainants that "on or before it shall expire" must mean after the policy has expired, else the word "on" is without meaning. The defendant's counsel, on the contrary, insist that the agreement requires the surrender while the policy is alive, and the surrender of a live policy, and upon this draw a distinction between this case and that of *Montgomery*, in which the policy provided for the surrender of the policy within 12 months *after* its expiration. We think the word "on" in this agreement means at the instant of the expiration of the policy, and the word "before" any time in advance of that instant. We, however, do not concur in the suggestion that there is a material difference between the case at bar and *Montgomery's*. Here the surrender of the original policy may be made at the very instant of its expiration, when the policy, if alive at all, has no appreciable value. The value of the policy surrendered may not be a consideration for the paid-up one. Indeed, we are inclined to the opinion that under this agreement Mrs. Duerson was entitled to the full insurance, \$10,000, until noon, May 9, 1871, and a paid-up policy for the lesser sum commencing from that time. The

contract is not explicit upon this point, but the fair and reasonable construction is that the annual payment made May 9, 1870, paid for the full insurance, \$10,000, for the current year, and that the insurance for the lesser sum did not commence until the end of this current year, and this, without regard to the date of the election, (if within the year,) to take a paid-up policy.

If this be the proper construction, then the argument which is so earnestly urged, that the surrender of a live policy for the \$10,000 and for a part of the current year was to be a material consideration for the delivery by the company of a paid-up policy for the lesser sum, is not a sound one. This argument may, however, be unsound, and yet the time of the surrender of the original policy be intended by the parties to be of the essence of the contract. Reading the policy and the agreement as one contract, I have concluded, after a careful reconsideration of the question and the authorities, that the time of the surrender of the old policy is of the essence of this contract.

In discussing the demurrer I considered the agreement and the policy as distinct contracts, and indicated that the surrender of the policy was a condition precedent to getting a paid-up policy, but that the time of the surrender was immaterial; but, reading the policy and agreement as one contract, I do not think this distinction a sound one, or, indeed, sustained by the language of the agreement.

This court, while always inclined to follow the decisions of the state courts, because it administers the law concurrently with them, yet is not bound by such decisions. 16 Pet. 45; 102 U. S. 14.

The very able opinion in *Montgomery v. Phoenix Mutual Life Ins. Co.*, *supra*, is not sustained by the weight of authority, and we think it, as well as the opinion on the demurrer in this case, are to be criticised, because they apply the rules of construction applicable to contracts for land, to the construction of an insurance contract. Courts in construing contracts may look to the subject-matter and the surrounding circumstances, and may avail themselves of the same light which the parties to the contract possessed. *Merriam v. U. S.* 107 U. S. 441; S. C. 2 Sup. Ct. Rep. 536.

In this case the language, strictly construed, binds the company to issue a paid-up policy only "after the receipt of not less than three annual premiums; * * * and on the surrender of said policy to the company on or before it shall expire," etc.

The right to a paid-up policy commenced only after the payment of the requisite number of annual premiums, and it was on condition that the policy was surrendered "on or before it shall expire" by reason of the non-payment of premiums. This was the time fixed within which the company was bound to issue a paid-up policy. The effect of the surrender may or may not have deprived the assured of the full insurance for the remainder of the year. In our view, it is not material to determine the effect of such a surrender; the important question is, has the agreement limited the time within which the sur-

render must be made? If we considered the subject-matter of this contract, and the circumstances under which this and other insurance companies do business, we feel constrained to give defendant a strict construction of this agreement, even though it may be a hardship upon complainants, who are infants.

The overwhelming weight of authority is against the court in *Montgomery v. Phoenix Mutual Life Ins. Co.* Most of these decisions have been delivered since that opinion, and some of them since the overruling of the demurrer. See *Atty. Gen. v. Continental Ins. Co.* 93 N. Y. 74; *Hudson v. Knickerbocker Life Ins. Co.* 28 N. J. Eq. 168; *Bussing's Ex'r v. Union Mut. Life Ins. Co.* 34 Ohio St. 222; S. C. 8 Ins. Law J. 218; *Universal Life Ins. Co. v. Whitehead*, 58 Miss. 222; S. C. 10 Ins. Law J. 337; *Coffey v. Universal Life Ins. Co.* 10 Ins. Law J. 525; *Smith v. Nat. Life Ins. Co.* 13 Ins. Law J. 330.

The bill should be dismissed, with costs.

MATTHEWS, Justice. I concur fully in the reasoning and conclusion of this opinion. The language of the contract, it seems to me, is too plain for interpretation, and its legal effect is to limit the right of the assured or his representatives to a paid-up policy to the time during which the original policy is in force, including the moment at which it would expire by non-payment of premium. The nature of the contract is such that time must be deemed of its essence.

BISCHOFFSHEIM v. BALTZER and another.

(Circuit Court, S. D. New York. July 17, 1884.)

1. SALE BY AGENT TO PRINCIPAL—WORTHLESS BONDS OF A STATE.

If an agent, in response to his principal's order to purchase for him certain bonds, purchases such from himself (he having received them in part payment on an individual contract for the delivery of iron) and charges his principal with them thus: "To bot. \$100,000 6 per cent. North Carol. Bonds, \$63,125,"—retaining them in his own possession and manifesting acts of ownership concerning them, in the event of the bonds being subsequently declared void by the highest court in North Carolina, the loss should fall on the agent, even though he had no intention to defraud.

2. SAME—PARTNERSHIP—CHOSE IN ACTION—SURVIVOR.

Upon the decease of one copartner, all the personal estate and assets of the firm, including debts and choses in action, survive to the partner still living.

3. SAME—CONFIDENCE—EQUITY.

When the relations of parties have been of peculiarly great personal confidence, it is proper to resort to equity in case of the discovery of an abuse of it. The propriety of the jurisdiction is as great when the account is opened for affording relief as it would be if the account had been left open.

In Equity.

Joseph H. Choate, for orator.

Charles M. Da Costa, for defendants.

WHEELER, J. The orator and Louis Raphael Bischoffsheim, since deceased, were merchants and bankers doing business in partnership in London. The defendants were partners doing like business in New York, and were confidential correspondents and agents of the orator's firm. The legislature of the state of North Carolina passed an act for the issue of bonds in aid of the Chatham Railroad Company in that state, against which the state was secured by mortgage of the road. The defendants and Schepeler & Co. furnished iron for the road, for which they were secured by deposit of state bonds in the Continental National Bank. The defendants were directed to buy \$100,000 in amount of these bonds for the orator's firm, and they charged that firm in account current of their dealings, on November 21, 1868, with \$63,125, the price of that amount of bonds, and reported a purchase at that price. These bonds have been adjudged by the highest court of the state to be wholly unconstitutional and void. *Galloway v. Jenkins*, 68 N. C. 147. The account, amounting to several millions, was adjusted with this item in it, and the bonds were left in the hands of the defendants for the orator's firm. In 1873 the defendants brought an action at law against the railroad company, whose name had been changed to the Raleigh & Augusta Air-line Railroad Company, to recover the price of the iron for the benefit of the orator and themselves, and failed, so far as is apparent, because their remedy, if any, was in equity; and in 1878 they brought a suit in equity to reach the property through the mortgage to the state of North Carolina, and in that suit they used the orator's bonds as their own, with other bonds of theirs, for the benefit of the orator with themselves, and they charged the orator with a part of the expenses of these suits, which were paid. Neither the orator's firm nor the orator, as survivor, was informed of the interest of the defendants in the bonds at any time until after the suit in equity was commenced by the defendants; but they supposed that the defendants had bought the bonds of others expressly for them, and had paid for the bonds the amount charged to them as the price of the bonds, and they do not appear to have before understood the precise ground of the infirmity of the bonds. This suit is brought by the orator, as survivor, to set aside the transaction, rectify the account, and recover the amount which would be due. It is resisted upon the ground that the remedy, if any, is at law and not in equity; that the next of kin or personal representatives of the deceased partner should have been made parties to the suit; and that the orator is not entitled to any recovery or relief.

It may be that the orator would have a remedy at law if entitled to relief here, but that is not decisive. The remedy there may not be so complete or convenient. Jurisdiction in equity is not understood as taken away by the statute, but as restrained merely within its usual limits. *Boyce's Ex'rs v. Grundy*, 6 Pet. 210; *Taylor v. Merchants'*

Ins. Co. 9 How. 390; *Jones v. Bolles*, 9 Wall. 364. The bill states that the price of these bonds was charged in accounts. The accounts produced in evidence show large transactions by the defendants for the orator's firm in the sale of government bonds, gold, and stocks, at the time of this transaction, the proceeds of which are credited against this and other charges. If this item should be taken out, the whole account would be disturbed. There is not probably much doubt but that a bill in equity would lie for the adjustment of this account if it was open. 1 Story, Eq. § 462. The relation of the parties was one of peculiarly great personal confidence, such as is there mentioned as a reason for resorting to equity. The propriety of the jurisdiction is as great when the account is opened for affording relief as it would be if the account had been left open. The controversy may be narrowed to this item, but that does not alter the nature of the case involving the whole to reach the ultimate balance. *Brookman v. Rothschild*, 3 Sim. 153.

Upon the decease of the other partner all the personal estate and assets, including debts and choses in action, survived to the orator. This would carry to him all right to these bonds, and to the balance due on the account, if the purchase of the bonds should be rescinded. The right of the next of kin or personal representative would extend only to the share of the deceased in the ultimate balance. The right of election to rescind, as well as the right to pursue any other course to ascertain and collect the assets, would seem to belong to him and not to them. Colly. Partn. (Wood's Ed.) § 796, note.

In *Scholefield v. Heafield*, 7 Sim. 667, the real estate of the deceased partner appears to have been involved, which was a reason for joining the next of kin, and such separate rights appear to have been involved in some other cases. Here there is no separate right of the deceased partner. The whole belonged to the partnership, and the orator is invested with it.

What the interest of the defendants was in the bonds is the subject of some debate. Schepeler & Co. had or claimed to have some arrangement with an agent for the railroad company to furnish the iron. From the answer it appears that the defendants were to provide funds to pay for the iron, which they did. By the terms of the contract, under which the bonds were deposited in bank, on the presentation of a warehouse receipt or ship delivery order for any lot of the iron, a joint order was to be given for the delivery to defendants and Schepeler & Co. of so many of the bonds at the then market price as would equal the sum payable for the iron. The defendants presented receipts or orders for a lot of the iron, and received a joint order for 250 bonds, of \$1,000 each, the delivery of which to them they acknowledged November 11, 1868, to sell at market price to pay for their deliveries of the iron. No interest of Schepeler & Co. in the bonds appears or is claimed. The iron amounted to \$167,098.73; the bonds, at market price, to somewhat less. Their interest, therefore, was that of pledgees

for sale, but to an amount equal to the value of the bonds, and they were substantially owners of the bonds.

The extent to which they acted on their own discretion as agents, or under the direction of the orator's firm as principals, is also somewhat questioned. Several communications had passed about these bonds, and the price and time of payment. The defendants sent information that the price would be about 65 per cent. for \$100,000, cash, and asked if they should buy at any time before revocation, and send the bonds. They were answered affirmatively, but not to send the bonds. This direction was kept in force; the officers and agents of the railroad company agreed to a sale at 64½ per cent. A purchase at that price was reported, the charge made for the price, and the bonds kept, the difference in amount being an equalization of interest.

The orator's firm did not so direct as to leave the defendants without agency in the transaction of the business. They understood, and had the right to understand, that the defendants were acting for them without any adverse interest. The defendants were in reality sellers, while they assumed to act for the purchasers. Their charge was, "To bot. \$100,000 6 % North Carol. Bonds, \$63,125." This was a charge as for money paid for the orator's firm to purchase the bonds, instead of, as the fact was, for bonds sold to the orator's firm. The bonds were not poor from the insolvency of the state of North Carolina; they were the result of unconstitutional legislation,—not the bond or obligation of the state at all, nor recognized as such by any department of the state. The defendants did not know that the bonds were void. They supposed them to be good, and were not blamable for not knowing that they were bad. They were declared void by a divided court, but the proceeding in which the decision was made directly affected the bonds, and was as fatal to them as the most glaring defect. This result became known in North Carolina and New York soon after this transaction.

The orator's firm did not get what was bought. They bought bonds as binding obligations of the state; what they got contained no obligation, and were not bonds of the state. They were like counterfeit notes or bills; the supposed maker was not holden. The subject of the sale did not exist, and there could be no valid and binding sale. This is elementary. 2 Kent, Comm. 468. Had the orator's firm known that the defendants were the sellers, and learned that the bonds were void when the defendants did, there seems to be no doubt but that the transaction might then have been repudiated by them. But as they were left by the defendants to suppose the transaction was, there was no way open to them for avoiding it as to the defendants. As the transaction in fact was, a charge of the bonds as sold would have failed; as the transaction was left to appear to them, the charge for money paid for the bonds would be valid. Further, had these bonds been all that they were supposed to be, the defendants could not

act for themselves as sellers; and for the orator's firm as purchasers, and make a valid sale of them. The attempted contract of sale would fail for want of parties to it, unless something should take place afterwards to make it good. This, also, is elementary. Story, Ag. § 211. There never has been any delivery of the bonds, nor anything done with them to confirm any contract. They have always remained with the defendants, and whatever has been done about them has been done by the defendants in their own names. Neither the orator nor his deceased partner has ever ratified the purchase as a purchase from the defendants; for the deceased partner, so far as has been shown, never knew of it, and when the orator became informed of it, he repudiated it. The rights of the parties appear to be the same now as at first.

The rights of the defendants growing out of the character of the bonds have all been preserved, apparently, by their own vigilance. It has been urged that they might have held on to the iron if the purchase of the bonds had been repudiated immediately, and that, therefore, they cannot now be placed as before. But the orator's firm had nothing to do with the iron. That had relation to their obtaining and not to their disposing of the bonds. Had they given notice of the transaction as it was, and that they wished to follow the iron unless the sale was approved, it might have been different in this respect; but nothing of this kind was done. The *status quo*, as between these parties, relates only to the bonds, and to the charge for the money paid for them. That is easily regained.

The question here is not whether the defendants undertook to palm off worthless bonds,—they doubtless understood that they were rendering the money's full worth,—but where this loss should fall. By the law, as here understood, as applied to the facts as they are made to appear, it should fall upon the defendants.

Let there be a decree setting aside the sale, and for a resettlement of the accounts, with costs.

J. M. ATHERTON Co. v. IVES and others.¹

(Circuit Court, D. Kentucky. April 29, 1884.)

1. INTERSTATE COMITY—DEED OF ASSIGNMENT.

A deed of assignment between residents of another state, valid according to the laws of the state where executed, is valid as to personal property in Kentucky.

2. TRANSFER OF PERSONAL PROPERTY.

The right of a state to regulate the transfer of personal property within its jurisdiction must be exercised, and the intention to do so clearly expressed by

¹ Reported by Geo. Du Relle, Asst. U. S. Atty.

statute or by settled policy, or a transfer valid by the law of the domicile of the owner will be held valid within such state.

3. DEED OF ASSIGNMENT—PREFERENCE—FRAUD.

The giving of a preference to one or more creditors is not, in itself, fraudulent as to creditors.

4. KENTUCKY STATUTE—ACT OF 1856—GEN. ST. ART. 2, CH. 44.

The act of 1856 does not operate to render void a deed of assignment giving a preference, but causes it to operate as a general assignment, upon a petition being filed within six months from date of the deed.

5. PLEDGE—WAREHOUSE RECEIPTS—LIEN.

Neither the custody of the warehouseman nor the pledge of whisky by delivery of the warehouse receipts, gives to the warehouseman or pledgee any general lien for debts not arising from the relation of warehouseman or pledgee.

At Law.

Brown & Davie, for plaintiff.

W. O. Dodd, for defendant Osborn.

BARR, J. Ives, Beecher & Co., who resided and did business in New York city, became embarrassed and made an assignment of all of their property of every kind to W. J. Osborn, in trust for the payment of their debts. In this deed of assignment they gave certain of their creditors preference over others. The deed is valid by the law of New York, where it was executed, and Osborn has accepted the trust and taken possession of the business and assets in New York. The plaintiff, with actual notice of the execution of this deed and its terms, attached certain property which belonged to Ives, Beecher & Co. for debts due it by them. This property was in this state, and in the warehouse of plaintiff, when the deed was executed and when the attachment was sued out. The warehouse receipts for the whisky attached had been delivered to plaintiff by Ives, Beecher & Co. some time before the execution of the deed, in pledge for certain of their notes given to raise money, and upon which plaintiff was to be indorser. The plaintiff, at the time of receiving these receipts, executed a writing in which it agreed that the warehouse receipts were held in trust as security for the payment of the notes, and when the notes were paid to return the pledged property, or its value, at specified rates. These notes have been paid by a sale of the whisky pledged, leaving a surplus after their payment, and the present contest is over this surplus.

Assuming that plaintiff's attachment has been properly issued and levied, the question is, who has the better right to the surplus of the pledged whisky? Plaintiff claims a superior right because of the levy of its attachment, and because of the actual possession of the whisky, which, it is claimed, gives it the right of retainer until its debts are paid. The deed of assignment which was made between residents of New York, and in that state, transferred Ives, Beecher & Co.'s personal property, which was in this state, unless there is some law or settled policy of the state preventing the application of the rule of comity by which personal property is allowed to be transferred according to the law of the domicile of its owner. Each state has

the right to regulate the transfer of property, both personal and real, within its jurisdiction, and this right exists, and may be exercised as to personal property of non-residents, if within the state, as well as residents. *Green v. Van Buskirk*, 5 Wall. 307, and 7 Wall. 139; *Hervey v. R. I. Locomotive Works*, 98 U. S. 664. But this right must be exercised by the state, and the intention clearly expressed in a statute or by the settled policy of the state, else, upon the principle of comity, a transfer of personal property, good and valid in the domicile of the owner, will be held good and valid here.

The learned counsel for plaintiff insist that this deed is fraudulent and void by the law of this state, because of the preferences given to certain creditors, and refers to article 1, c. 44, Gen. St. This article declares every conveyance or transfer made with the intent to delay or hinder or defraud creditors shall be void. The intent to delay and hinder creditors must be proven, and there is no evidence of such an intent, unless the preference given in the deed to certain creditors is such evidence. The mere fact of preference has never been held, in Kentucky, sufficient to make a deed of assignment fraudulent and void. Prior to the act of 1856, deeds of assignment, which were otherwise good, were never deemed invalid because of preferences given to some creditors over others. It was the settled law to allow such preferences. 8 Dana, 215; 4 B. Mon. 428; 18 B. Mon. 301; 3 Metc. 539. The act of 1856, which is re-enacted in the General Statutes, (article 2, c. 44,) provides that if a debtor, in contemplation of insolvency, makes a deed of assignment with the design to prefer one or more of his creditors to the exclusion in whole or in part of other creditors, such assignment shall operate as an assignment of all of the property and effects of such debtor for the benefit of all of his creditors. This law further provides that, upon petition filed within six months by a creditor, a court of equity may take control of the property and effects of the debtor, and administer them according to the provisions of the act. It will be observed that this act does not declare such assignments void, but that they shall operate as an assignment of all of the debtor's property for the benefit of his creditors, and be distributed equally, except certain trust debts are given preference by the act. The courts have declared that the act has no effect, unless a petition is filed *within six months*. If a petition is not filed within the time prescribed by the act, deeds of assignment giving preferences, as between creditors, are valid, and as effectual as if the act of 1856 had never been passed. *Wentworth v. Pointer, etc.*, 2 Metc. 460; *Whitehead v. Woodruff*, 11 Bush, 209.

In the latter case the court say:

"It has been repeatedly held that the giving of a preference to one or more creditors is not in itself fraudulent as to creditors, (18 B. Mon. 301; 3 Metc. 339; 2 Duv. 278; *Id.* 371; 8 Dana, 215;) and, although the fact is well established that Dunn confessed judgments in favor of these appellants, in contemplation of insolvency, and with the design to prefer them to the exclusion of his other creditors, such preference was not unlawful."

If, therefore, Ives, Beecher & Co. had executed this deed of assignment in Kentucky, it would not have been void, and would only have operated as a general assignment for the benefit of all their creditors in the event a petition had been filed within six months; and plaintiff could not have obtained a preference by the levy of an attachment on the assigned property at any time. The act of 1856 does not, we think, furnish a good reason for declaring this assignment, made in and according to the laws of New York, should be held invalid, and thereby giving plaintiff a preference over other creditors. If this is done, it must be in the exercise of what is called, in *Johnson v. Parker*, 4 Bush, 149, a "patriarchal and provident sovereignty." In that case the court seemed inclined, in its opinion, to invoke the exercise of this "sovereignty," and did give the home attaching creditor a preference over the trustee, under a deed of general assignment executed in another state, but the decision itself is placed upon the ground that it did not appear that the non-resident trustee had executed the proper bond, nor did it appear that the property attached was necessary to pay the debts secured by the deed of assignment. In *Bank of U. S. v. Huth*, 4 B. Mon. 428, and *Forepaugh v. Appold*, 17 B. Mon. 625, the same court expressly decided that the trustee, under a general deed of assignment executed at the domicile of the debtor, and valid there, had a better right than a non-resident-attaching creditor to the personal property of the debtor. These cases did not draw a distinction between home creditors and non-resident ones, nor was any notice taken of the fact that these attaching creditors were non-residents of the state; and we think such a distinction should never be drawn by a court, unless compelled to do so by legislative will, clearly expressed. It may be that the legislature of a state has the power to exercise such a "patriarchal and provident sovereignty," but this court will not assume such is the legislative will.

The warehouse receipts issued by plaintiff and delivered to Ives, Beecher & Co. were a symbolic delivery of the whisky, and gave them the title and constructive possession of it. The plaintiff, as warehouseman, was merely a bailee, and when the warehouse receipts were delivered, it became a pledgee as well; but neither relation gave it a general lien to cover debts or charges not connected with its position as warehouseman or pledgee for a specific purpose. Indeed, the express agreement of plaintiff to return the whisky when the specified debts were paid would seem to preclude a claim of a lien for debts other than those specified. *Baldwin v. Bradley*, 69 Ill. 32; *Duncan v. Brennan*, 83 N. Y. 487. The relation of these parties does not give plaintiff a common-law lien, and we know of no principle of law which would authorize plaintiff to retain possession of this property until its general indebtedness is paid by Ives, Beecher & Co.

The attachment should be discharged and petition be dismissed, with costs.

PENTLARGE v. KIRBY.

(Circuit Court, S. D. New York. July 15, 1884.)

1. FEDERAL COURTS—COSTS WHEN “NO JURISDICTION” ADJUDGED.

The rule is uniform in the federal courts that where the case is one of which the court has no jurisdiction, the duty of the court is to dismiss it upon that ground, and without costs.

2. SAME—REVISED STATUTES OF THE UNITED STATES.

The provisions of the Revised Statutes of the United States have made no change in the pre-existing laws upon the subject of costs; and the cases of *U. S. v. Treadwell*, 15 FED. REP. 532, and *Cooper v. New Haven Steam-boat Co.* 18 FED. REP. 588, so far as they intimate the contrary view, are disapproved.

3. SAME—CASE STATED.

The court below having dismissed the complaint because the case disclosed by it was one of which the court had no jurisdiction, it was error to award the defendant a judgment for costs.

At Law.

Brodhead, King & Voorhees, for complainant.

Edward Fitch, for defendant.

WALLACE, J. This writ of error is brought to review a judgment of the district court for the Southern district of New York in favor of the defendant for costs, and sustaining his demurrer to the plaintiff's complaint. The court below held that upon the case made by the complaint the court did not have jurisdiction of the subject of the action. For reasons which were announced orally at the hearing of the writ of error, no doubt is entertained that the district court correctly determined that the action was not one of which it had jurisdiction, but the question remains whether it was not error to order a judgment for the defendant awarding costs against the plaintiff.

The rule is uniform in the federal courts that where the case is one of which the court has no jurisdiction, the duty of the court is to dismiss it upon that ground, and without costs. *Burnham v. Rangely*, 2 Wood. & M. 417; *McIver v. Wattles*, 9 Wheat. 650; *Strader v. Graham*, 18 How. 602; *The McDonald*, 4 Blatchf. 477; *The Mayor v. Cooper*, 6 Wall. 247; *Gaylords v. Kelshaw*, 1 Wall. 83; *Hornthal v. The Collector*, 9 Wall. 560. The reason of the rule is stated by Mr. Justice SWAYNE in *The Mayor v. Cooper* as follows:

“The court held that it had no jurisdiction of the case, and yet gave a judgment for the costs of the motion, and ordered that an execution should issue to collect them. This was clearly erroneous. If there were no jurisdiction, there was no power to do anything but to strike the case from the docket.”

And in *Burnham v. Rangely*, WOODBURY, J., after citing decisions in various state courts sustaining the general rule, says:

“These generally proceed on the ground that the court has no jurisdiction to award costs any more than to award damages, or any other relief on the merits, when the case is not legally before them.”

In *Hunt v. Inhab. of Hanover*, 8 Metc. 346, DEWEY, J., repudiates the distinction which has sometimes been suggested, that no costs are

to be allowed in plain and obvious cases of want of jurisdiction, but should be allowed when the question of jurisdiction is one of doubt and uncertainty; characterizing it as too shadowy and uncertain for a rule of practical application, and as unsound in principle.

Many respectable authorities are found to the contrary, and assert that inasmuch as the court must determine whether it has authority to entertain a particular controversy, it has, to that extent, jurisdiction over the parties and the subject-matter; its decision is a judicial act; and, as an incident of the power to decide, it has the power to award costs. It will not be useful to cite them, because the law of the federal courts is decisive here.

The learned district judge who decided this case, in opinions delivered by him in *U. S. v. Treadwell*, 15 FED. REP. 532, and *Cooper v. New Haven Steam-bort Co.* 18 FED. REP. 588, suggests that the provisions of the Revised Statutes of the United States have changed the pre-existing law so that now costs are to be allowed to the prevailing party in all cases where there is not an express statutory provision to the contrary; and therefore that the federal courts are not now to refuse costs when they dismiss cases for want of jurisdiction. One of the sections of the Revised Statutes to which he refers is 914, which was originally enacted in 1872, conforming the practice in the federal courts in common-law actions as near as may be to that of the state courts. This section goes no further than to prescribe a general rule regulating practice and procedure in the federal courts, in the absence of any legislation by congress upon the subject. *Wear v. Mayer*, 6 FED. REP. 660. It speaks only when the other statutes of the United States are silent. *Peaslee v. Haberstro*, 15 Blatchf. 472. It has no application to the subject of costs, because that subject is covered by other provisions of the federal laws. Moreover, it only applies to cases of which the federal courts have jurisdiction. It does not create or extend jurisdiction, but regulates the procedure in cases which the federal courts are authorized to entertain and decide.

The other provisions of the Revised Statutes, which it is suggested have changed the pre-existing law as to costs, are those found in sections 823 and 983. These sections deal with the subject of costs in suits in equity and admiralty, as well as at common law; and if it is true that they require the courts in all cases to award costs to the prevailing party when there are no express statutory provisions otherwise, they make a startling innovation upon the law as it previously existed, and introduce a radical change. There are no express statutory provisions which authorize a disallowance of costs to the prevailing party in the large class of cases in equity and admiralty, where, in the exercise of judicial discretion, it has been the rule to disallow them, and sometimes to award costs against the prevailing party. In equity and admiralty, the essential merits and justice of the contention, rather than the result of the litigation, have always

controlled the judicial discretion in adjudging costs. These sections reproduce provisions of the act of July 26, 1853, entitled "An act to regulate the fees and costs to be allowed clerks, marshals, and attorneys of the circuit and district courts of the United States, and for other purposes." That act, by the first clause, prescribed that "in lieu of the compensation now allowed * * * the following and no other compensation shall be taxed and allowed." It then, by distinct clauses, enumerated what fees were to be taxed in causes at common law, in admiralty, and in equity, for clerks, marshals, attorneys, and witnesses, and enacted that such fees, together with certain specified disbursements, should be included in and form part of the judgment against the losing party "in cases where, by law, costs are recoverable in favor of the prevailing party." The language of this act is reproduced in the above sections of the Revised Statutes without material change. Section 828 reproduces the language of the first clause of the act of 1853, but the words "in lieu of the compensation now allowed," are omitted as manifestly unnecessary, and the words "except in cases otherwise provided by law" are added, because in the Revision there are incorporated several provisions taken from other acts of congress respecting costs in particular cases. Section 823 deals only with the amount of compensation to be allowed. Section 983 reproduces the language of the clause of the act of 1853, which authorizes costs to be made a part of the judgment against the losing party. This is the section which deals with the right to recover a judgment for costs, and it makes no change in the previous law. It leaves the right where it found it in the act of 1853, and authorizes a judgment for costs against the losing party, "in cases where, by law, costs are recoverable in favor of the prevailing party." Reading sections 823 and 983 together, they are not fairly susceptible of a construction which changes the pre-existing law. The intention to make a radical change is not to be implied in a revision; and if there is any fair room for doubt, the original acts may be resorted to in aid of interpretation. *U. S. v. Bowen*, 100 U. S. 513. From their first organization to the time of the adoption of the Revised Statutes, and since, the federal courts have always assumed to exercise the power of awarding costs as incident to their power to decide upon the rights of the parties.

In the very recent case of *Mansfield R. Co. v. Swan*, 4 Sup. Ct. Rep. 510, Mr. Justice MATTHEWS, in delivering the opinion of the supreme court, used the following language:

"As to costs in this court the question is not covered by any statutory provision, and must be settled on other grounds. By the long-established practice and universally recognized rule of the common law, in actions at law, the prevailing party is entitled to recover a judgment for costs; the exception being that where there is no jurisdiction in the court to determine the litigation, the cause must be dismissed for that reason, and as the court can render no judgment for or against either party, it cannot render a judgment even for costs."

It must therefore be held that it was error in the court below to render a judgment for costs against the plaintiff.

Following the precedent in the case of *The McDonald*, 4 Blatchf. 477, the plaintiff in error, although he succeeds in reversing the judgment of the court below, is not entitled to costs here.

The judgment of the district court is reversed, and the case remanded to that court, with directions to dismiss the suit without costs to either party.

THE GRETNA GREEN.

(District Court, S. D. Ohio. 1883.)

1. NAVIGATION LAWS—INTERSTATE COMMERCE—DOMESTIC TRAFFIC.

The navigation laws do not apply to the case of a vessel whose trips are confined to points inside one state and have no connection with any point outside that state.

2. SAME—POWERS OF CONGRESS—DISPOSITION OF THE COURTS—OBITER DICTA.

Congress has the power to prescribe the law of the highway so far as may be necessary to protect interstate commerce, but no court will undertake to expound the constitution, and declare incidental powers, unless the question is directly presented and the case imperatively requires it.

3. SAME—STEAMER—BARGES IN TOW—EFFECT IN LAW.

A steamer being subject to the navigation laws, the mere fact that she took barges in tow has nothing to do with the proper navigation of the river.

At Law.

Charming Richards, U. S. Dist. Atty., for plaintiff.

William H. Jones and Moulton, Johnson & Levy, for defendant.

SAGE, J. This is an action to recover \$200 penalty upon each of the two counts of the petition for violation of section 4492, Rev. St. The allegations of the first count are that on the twenty-first day of September, 1881, John C. Powers, the defendant, was sole owner of the *Gretna Green*, a steam-boat duly enrolled and licensed under the laws of the United States; that on that day she towed two barges, carrying a large number of passengers, on the Ohio river, from Maysville, Kentucky, to a point in Mason county, Kentucky, occupied as a "fair grounds," and that the barges were not then and there supplied with life-preservers, axes, buckets, etc., as prescribed by the board of supervising inspectors of steam-boats under the laws of the United States. The second count is for like penalty for towing the barges from "fair grounds" back to Maysville, the same day. The defendant demurred on the ground that the navigation laws of the United States were not applicable to these barges, inasmuch as they were not employed in interstate commerce.

*In the case of *Gibbons v. Ogden*, 9 Wheat. 1, the supreme court of the United States decided that the power of congress comprehends navigation within the limits of every state in the Union, so far as

that navigation may be connected with commerce with foreign nations, or among the several states, or with the Indian tribes, and that it might pass the jurisdiction and lines of a state.

In *Sinnott v. Com'rs*, 22 How. 227, the supreme court held that the law of commercial navigation of the country is placed by the constitution under the regulation of congress, and all laws passed by that body in the regulation of navigation and trade, whether foreign or coastwise, is therefore but the exercise of an undisputed power.

When, therefore, an act of the legislature of a state prescribes a regulation on the subject repugnant to and inconsistent with the regulation of congress, the state law must give way. But the supreme court also held that the power of congress over the subject does not extend further than the regulation of "commerce with foreign nations and among the several states, and with the Indian tribes."

Coming down to the case of *The Daniel Ball*, 10 Wall. 557, the supreme court held that the limitation of the power of congress over "commerce with foreign nations, among the several states, and with the Indian tribes," necessarily excluded from federal control all that commerce which is carried on entirely within the limits of a state, and does not extend to or affect other states.

Then, in *Hall v. De Cuir*, 95 U. S. 485, where a steam-boat plying between New Orleans, Louisiana, and Vicksburg, Mississippi, took on board at New Orleans a colored woman for Hermitage, a landing-place in Louisiana, who was refused accommodation, on account of color, in the cabin set apart for white persons, and brought suit under an act of the general assembly of Louisiana to enforce a provision of the constitution of that state, and for \$75,000 damages, it was held by the supreme court that inasmuch as the steamer was engaged in interstate commerce, she was not subject to the legislative control of the states along the line of the river where she navigated, but that the legislation of congress applicable to her navigation was exclusive, and the judgment of a state court of Louisiana against the boat was set aside.

In all these cases the limitation of the power of congress to the control of commerce among the several states is distinctly recognized, and also that congress has no power to make navigation, or to control the commerce which is entirely within the limits of a state. It is true that, in the case of *The Daniel Ball*, the steamer was plying on the Grand river, altogether within the state of Michigan, but she was carrying freight down the river destined to points outside the state of Michigan, and bringing freight up the river which was from points outside the state to points in the state, and it was therefore held that she was engaged in interstate commerce; that it was not necessary that the freight should be carried on the same vessel from one state to the other.

In the case at bar the petition shows that the barges were being

towed from one point in Kentucky to another point in the same state, and that her trips had no connection whatever, by any possible construction, with any point outside the state of Kentucky. The navigation laws of the United States, then, clearly, do not apply.

But it was argued with great ingenuity that inasmuch as the Ohio river is a great highway for interstate commerce, congress has the power, incidental it may be, to enact the law of that highway; otherwise, a steam-boat plying exclusively between points of the same state might refuse to recognize a code of signals for meeting and passing prescribed in accordance with the act of congress. But that is not this case. The complaint is that the barges were not provided with the means of safety for passengers as prescribed by congress. They were in tow of a steamer which, the petition shows, was regularly enrolled and licensed, and subject to the laws of congress. It may be that congress has the power to prescribe the law of the highway so far as may be necessary to protect the interstate commerce, but no court will undertake to expound the constitution and declare incidental powers, unless the question is directly presented, and the case imperatively requires it. The steamer which had these barges in tow, being subject to the navigation laws of the United States, the mere fact that she took in tow the barges had nothing to do with any interference with the proper navigation of the Ohio river.

In the judgment of the court the navigation laws of the United States have no application to the case presented by the petition. The demurrer is therefore sustained, and the petition dismissed.

YALE LOCK MANUF'G Co. v. JAMES.

(Circuit Court, S. D. New York. July 21, 1884.)

1. PATENT LAW—METALLIC DOORS AND DOOR-FRAMES OF PIGEON-HOLES IN POST-OFFICES.

It is unquestionable that the patentee, when he made his original application, intended to say that his invention did not consist simply of making, by his combination of metallic doors, door-frames, and wooden boxes, a continuous metallic frontage, but that it also consisted in *the way in which the frontage was made continuous*, viz., by the connection of the adjoining frames with each other. His definite and exact specification shows that he supposed that his patentable invention was thus limited

2. SAME—REISSUE No. 8,783.

The first and second claims of reissued letters patent No. 8,783 to the plaintiff as assignee of Silas N. Brooks, administrator of Linus Yale, Jr., are to be limited so as to require the combination of door-frames, doors, and pigeon-holes, to be by means of rivets or bolts which attach the frames both to the wood work and to each other.

In Equity.

Frederic H. Betts, for plaintiffs.

Samuel B. Clark, Asst. U. S. Dist. Atty., and *George Andrews*, for defendant.

SHIPMAN, J. This is a bill in equity, based upon the alleged infringement of reissued letters patent No. 8,783, dated July 1, 1879, which were issued to the plaintiff as assignee of Silas N. Brooks, administrator of Linus Yale, Jr., for an improvement in post-office boxes. The original patent was issued to said Brooks, as administrator, on September 19, 1871, and was reissued three times. The first reissue was applied for May 7, 1872, and was issued July 9, 1872; the second was applied for April 19, 1875, and was issued April 24, 1877; the third was applied for May 14, 1879.

The invention was described, and the original patent and the third reissue were recited in the opinion which was filed in June, 1880, in the case of the present plaintiff against the *Scoville Manuf'g Co.* 18 Blatchf. C. C. 248; S. C. 3 FED. REP. 288.

The first of the two claims of the first reissue was the first claim of the original patent. The second of said claims was as follows:

"The combination of two or more metallic frames and doors and locks with pigeon-holes; said frames having flanges, which protect and inclose wholly or in part the front edges of said pigeon-holes."

The defendant, as postmaster in the city of New York, and not otherwise, used in the post-office, provided and equipped for him by the United States government, wooden post-office boxes, with metallic fronts and doors, and open at the rear. They were manufactured by the Johnson Rotary Lock Company. The doors and door-frames made a continuous metallic frontage. The door-frames were secured to each other and to the wood-work as follows: At about the middle of each vertical edge of each door-frame there was a triangular hole, which, with the corresponding hole in the adjoining door-frame, made a rectangular hole through which the metal fastening bolt, completely filling such hole, was passed; the heads of such bolts overlapping the contiguous edges of adjoining metallic fronts, and the bolt itself passing through the wooden partition between the adjoining pigeon-holes, and being secured at the back thereof, within the post-office room, by a nut screwed upon the end of the bolt.

There were other boxes constructed substantially as above described, excepting that the metal front of each pigeon-hole was fastened to the wood-work by means of flanges and screws; but the screws which attached the frames to the wood-work did not attach the frames to each other.

Neither series of boxes would have infringed either claim of the original patent. Each series infringes the first and second claims of the present reissue, unless those claims are to receive a construction which shall compel the metallic frontage to be made continuous by rivets, bolts, or fastenings which shall attach the frames both to the wood-work and to each adjoining frame.

The plaintiff insists that these claims should not receive such a

construction, because it has been found that the invention of the specification of the reissue, although a broader one than was described in the original patent, is the invention which the history of the art and the patent show should have been described, and because the first reissue was promptly applied for, and, as issued, included in its second claim, in the view of the plaintiff, the same invention which is described in the first and second claims of the reissue.

The defendant says, among other things, that since the cases of *Brass Co. v. Miller*, 104 U. S. 350, and *Campbell v. James*, Id. 356, it has been settled by the supreme court that the commissioner of patents, in allowing the first and second claims, exceeded his jurisdiction, because the invention which was first applied for, and was "complete in itself," was clearly, specifically, and fully described in the original specification and in the claim, and an expanded claim would necessarily include an invention which was not sought to be described in the original patent; and, furthermore, that there could have been no inadvertence or mistake, because the original patent and the accompanying documents show that the patentee "did not intend it (the patent) to embrace any such broad invention" as was described in the reissue. The defendant also says that the patentee, in his application for the first reissue, ineffectually endeavored to alter the description of the invention so as to omit the fastening of the door-frames to each other as a necessary integral part of the invention, and that the second claim of the first reissue cannot fairly be construed to permit such omission, and therefore that the patentee is estopped from insisting upon a broad construction of the first and second claims of the present reissue, and that these claims are objectionable on account of the laches of the patentee. The "file-wrapper and contents" of the first reissue were not a part of the record in the *Scoville Case*.

It is unquestionable that the patentee, when he made his original application, intended to say that his invention did not consist simply in making, by his combination of metallic doors, door-frames, and wooden boxes, a continuous metallic frontage, but that it also consisted in the way in which the frontage was made continuous, viz., by the connection of the adjoining frames with each other. His definite and exact specification shows that he supposed that his patentable invention was thus limited. He described, with precision and clearness, that his metallic frontage was to be so constructed that the frames were to be fastened to each other at top, bottom, and sides, and not merely to the wood-work. "A specific invention, complete in itself," was described "fully and clearly, without ambiguity or obscurity." Under the definitions which are given in the decisions which have been referred to, and in *Manufg Co. v. Ladd*, 102 U. S. 408, of the inadvertence, accident, or mistake which permits a reissue, when a patent is said to be inoperative on account of a defect or insufficiency in the specification which arose through such inadvertence or mistake, and also of the nature of the defectiveness or

insufficiency which is meant by the statute, there was no mistake, although the patentee might have fallen into an error of judgment, or into an erroneous conclusion of fact; and, furthermore, the original patent, according to the definitions contained in the recent and perhaps in the earlier cases, was not defective nor insufficient either in its descriptive portions or in its claims.

The second claim of the first reissue, construed in the light of the contemporaneous facts, which are shown in the "file-wrapper and contents," cannot be fairly construed to mean a metallic frontage irrespective of the fastening of the frames to each other through the wood-work. Were this claim to be construed without study of the history of the application as it made its way through the patent-office, and of the amendments which it was compelled to undergo, it would probably receive the construction which naturally belongs to the first claim of the present reissue. But the patentee abandoned, under pressure from the patent-office, the clauses in the application which made the fastening of the frames to each other to be optional, and abandoned also a proposed third claim, which described the box-frames as secured to the pigeon-holes "independently of each other, by means of screws or other similar fastenings." In view of the fact that the patent-office excluded from the descriptive part of the specification suggestions of any other method of fastening than that by which the frames were to be fastened to each other, it would be singular if the intent of the office was to include in the second claim such other method of construction. If this claim has properly, and the applicant knew that it was intended to have, a narrow construction,—and of this knowledge I think there can be little doubt,—the plaintiff would not insist that the first and second claims of the present reissue ought, in view of the decision in *Brass Co. v. Miller, supra*, to be so construed as to be any broader than the third claim, which requires the combination of door-frames, doors, and pigeon-holes to be by means of rivets or bolts, which attach the frames both to the wood-work and to each other.

There is no infringement, and the bill is dismissed.

COTTIER and others v. STIMSON and others.

(Circuit Court, D. Oregon. August 1, 1884.)

1. NOTICE OF SPECIAL MATTER, UNDER SECTION 4920, REV. ST.

Notice of special matter, in an action for the infringement of a patent, is not a pleading, and, instead of being put in the answer, should be served on the adverse party.

2. SPECIAL PLEA IN ACTION FOR INFRINGEMENT.

Special matters, which may be given in evidence under the general issue, and a notice in such action, may also be pleaded specially; but special pleas must conform to the Code of Civil Procedure.

3. THE EASTMOND PATENT, No. 171,926, JANUARY 11, 1876.

Neither the Holt patent, No. 147,266, issued February 10, 1874, nor "A Treatise on Ventilation," written by Lewis W. Leeds, and printed by John Wiley & Sons, New York, 1871, anticipated the invention of Elbert Eastmond, entitled, in the application for a patent made September 22, 1875, "improvement in ventilating water-closets."

4. SAME—INFRINGEMENT—DAMAGES.

The amount of the royalty charged and paid for the use of the invention taken as the measure of damages for an infringement of the patent therefor.

Action for Infringement of Patent.

C. P. Heald and E. H. Merrill, for plaintiffs.

D. P. Kennedy, for defendants.

DEADY, J. This action is brought to recover damages for the infringement by the defendants of a patent for an "improvement in the ventilation of water-closets," applied for by Elbert Eastmond, on September 22, 1875, and issued January 11, 1876, to said Eastmond and his assignee, William T. Cottier.

The case was heard by the court without a jury, on the amended complaint, the answer thereto, and the reply. The answer contains a plea of "not guilty," and notice of the following "special matters," as provided in section 4920 of the Revised Statutes: (1) That the alleged invention was previously patented to Jared Holt, on February 10, 1874, by letters No. 147,266; (2) that it was previously described in a printed book entitled "A Treatise on Ventilation," written by Lewis W. Leeds, and published in New York in 1871; and (3) that a like apparatus and system of ventilation was previously constructed, known, and used at different places in the United States and Europe, of which proof was only offered as to two instances; namely, in the year 1871, on the south-east corner of block 55, in Portland, by J. H. Drummond and John C. Carson; and in the year 1870, in the town of Fond du Lac, Wisconsin, by Edward Squires. The answer also contains two special pleas, to the effect (1) that the plaintiffs have "constructed specimens" of their alleged invention without marking them "patented," and without notifying the defendants of the alleged infringement; and (2) that the alleged invention was not useful at the time of its production by the said Eastmond.

Both the pleas and notice conclude to "the country," as if an issue was formed thereby. And in their replication the plaintiffs join in this supposed issue by the common *similiter*,—and "the plaintiff doth the like,"—and then proceed to controvert each of the pleas and notice.

The notice is not a plea, but only an awkward substitute for one, and needs no reply. It is no part of the answer and ought simply to have been served on the adverse parties, so that the matters contained in it could be given in evidence under the general issue of "not guilty." And these matters might have been set up in special pleas, without otherwise giving notice of them, and that is the better way, as being in harmony with the system of pleading prescribed by the Code.

As the two special pleas or defenses are made under the Code, they need not have concluded to the country; and as they consisted of new matter which did not make an issue with any allegation in the complaint, they ought not to have so concluded, even at common law, but with a verification—and this the defendants are ready to verify.

The plea of "not guilty" puts in issue the alleged acts of the defendants constituting the infringement of the letters patent. But on the argument it was practically admitted that the water-closet of the defendants is an infringement in form and operation of the plaintiff's patent; and that they are entitled to recover damages therefor unless the defendants can maintain the other defenses to the action, or some one of them.

The last plea—that the invention is not useful—was abandoned on the argument, so that the defense is now confined to the omission of the plaintiffs to mark the article in question "patented;" the anticipation of the Eastmond patent by the Holt patent; Leeds' Treatise on Ventilation; and the prior knowledge and use of the invention by Squires and Carson. And as to all these the burden of proof is upon the defendant,—the patent to Eastmond and Talbot being admitted, and also that the plaintiffs are the due and lawful assignees of the same for this county. In the specification upon which the Eastmond patent issued it is stated that experiment has proven that when a water-closet is placed tightly upon a vault, and constructed so as to form a continuous and duly-proportioned air chamber between the walls thereof from the vault to the roof, with a hooded exit for the air in the peak of the latter, a current of air will flow downward into the vault through the holes in the seat and thence upward through said air chamber and out at the exit, thereby keeping the air in the closet pure. And Eastmond claims therein as his invention,—

"(1) The application of a draught of air through the vault, A, between the interior and exterior coverings of a water-closet, thence upward to the exterior atmosphere, for the purpose of keeping the water-closet pure and wholesome; and (2) a double-wall privy, seated upon its vault, so that no air can enter the vault except through the holes in the seat of the privy, whereby the atmosphere of the closet is kept pure by means of a continuous downward draught through the holes, and an upward draught through the double wall of the privy, all constructed substantially as described."

The fresh air comes in at the doorway, and as it is drawn down into the vault below, carries with it and drives before it the fetid exhalations and odors from the vault, and thus keeps the chamber of the closet ventilated. The explanation, offered on the argument, of this phenomenon is based upon the assumption that decomposition is constantly going on in the vault, which generates heat, and causes a rarification of the air, or a partial vacuum therein, into which the heavy cold air presses. But, however this may be, it is admitted in this case that the result is produced by the construction of a water-closet in the manner indicated.

Holt's invention is styled in his specification "an improvement on privy-house," and consists in a "privy-house" placed on a vault with double walls, so as to furnish an air chamber or passage from the vault to the opening in the roof, with a "series of openings" in the "outer casing" below the floor "for the admission of fresh air into the vault;" and he claims as his invention:

"The outer casing, B, having the inlet openings, E, for the admission of fresh air into the vault, in combination with the walls of the interior chamber, A, arranged so as to form the ventilating passages, C, substantially as and for the purpose specified."

The successful working of this invention also assumes that a more or less vacuum is formed in the vault from natural causes, into which the fresh air from without will pass and drive upward and outward the lighter fetid air. But these inventions are not identical. Indeed, they are radically different, both in operation and result. In Holt's patent the fresh air is admitted below the seat, and instead of directly ventilating the chamber of the closet, must have the effect in some measure to drive the foul air up through the holes in the seat into the chamber, as well as up the air passage between the walls. By causing the fresh air to mix with the foul, the latter may be diluted and rendered so much the less offensive as it rises into the chamber, but that is all.

Counsel for defendants contend that the downward draught of air in the Eastmond patent is only an extended or double use of the upward draught of the Holt patent, and therefore not a patentable invention; citing *Roberts v. Ryer*, 91 U. S. 150, and *Brown v. Piper*, Id. 37. In the former of these cases it was held that "it is no new invention to use an old machine for a new purpose," and therefore a mere change in the form and proportions of the compartments of a refrigerator, so as to utilize the descending instead of the ascending current of endlessly circulating air, was only a double use of such refrigerator. In the latter it was held that a patent for an apparatus for preserving fish and other articles in a close chamber by means of a freezing mixture, having no contact with the atmosphere of the preserving chamber, covered nothing but a double use of the well-known ice-cream freezer. But in this case a draught of air towards a vacuum, which is not patentable, and may be used by any one, is applied by the Eastmond patent to the ventilation of a water-closet in a peculiar and essentially different manner from that in the Holt, and, so far as appears, with very different results.

Objection is made to the introduction of the book entitled "A Treatise on Ventilation," because it does not appear to be a "printed publication," within the meaning of the statute; and it was admitted subject to the objection. It is a book of 226 pages, and purports to be the second edition of two courses of lectures delivered on the subject of ventilation by Lewis W. Leeds, before the Franklin Institute, at Philadelphia. By the title-page it appears to have been printed

by "John Wiley & Son, New York, 1871," who style themselves "publishers." But there is no other evidence than what is furnished by this copy that the work was ever on sale or in circulation.

In Walk. Pat. § 56, it is said that "a printed publication is anything which is printed, and, without any injunction of secrecy, is distributed to any part of the public in any country. Indeed, it seems reasonable that no actual distribution need occur, but that exposure of printed matter for sale is enough to constitute a printed publication."

But something besides printing is required. The statute goes upon the theory that the work has been made accessible to the public, and that the invention has thereby been given to the public, and is no longer patentable by any one. Publication means put into general circulation or on sale, where the work is accessible to the public. See *Reeves v. Keystone Bridge Co.* 5 Fisher, 467.

In the nature of things, it is not improbable that this work has been regularly published and is in general circulation; at least, among those interested in the subject. It is not likely that it was printed for private circulation. But I doubt if the evidence is sufficient to warrant such a conclusion. It does not appear that any other copy of it is or ever was in existence, or that it was ever placed publicly on sale, or otherwise distributed among or made accessible to the public or any considerable portion of the community.

But, waiving this objection, the invention of Eastmond is neither described nor referred to in it. The portion of the work relied on to prove the anticipation of the invention is a sort of supplemental chapter, found on pages 171 to 176, both inclusive. It is devoted to the ventilation of hospitals, and particularly describes a plan furnished by the author to the sanitary commission, during the war, which appears to have received a prize at the Paris exhibition, as a part of an American sanitary collection. It is illustrated, on page 173, by a diagram of a hospital with a latrine, or water-closet, attached, showing the method of ventilation by the application of heat below to form upward currents of air between the walls of the building and the action of the wind in passing over the escape or ventilator in the roof of the building, with an upward slope, thereby sucking the air from below and forming a partial vacuum, which helps to maintain the current of air from below. The author styles it the principle of the Emerson ventilator applied to ridge ventilation. In the adjoining latrine a current of air appears to be sent down through the holes in the seat, from whence it is drawn through the vault and upward, and discharged through a large ventilating shaft, instead of a passage between the walls. This ventilation of the latrine is particularly described on page 175, and the author says was first applied by him to the ventilation of the latrine-room of a hospital in Washington in 1863.

But the radical difference between the two systems is this: The ventilating shaft in Leeds' plan must be brought in contact with ar-

tifical heat, so as to rarify the air therein and cause the current to flow upward. This would be impracticable in the case of the ordinary detached water-closet, for the ventilation of which the Eastmond patent is particularly intended.

The Squires closet has no other resemblance to the Eastmond patent than the ventilating space, not made by a double house, but by an outer and inner wall, consisting of the weather-boarding on the one side and the ceiling on the other, and cutting an inch of the girt and plate away, so as to make the opening between the walls continuous. It also has a hip roof with a ventilating pipe in the top; but this pipe does not appear to be covered with a hood and open at the sides, as the one in the Eastmond patent, with a view of producing a vacuum therein by the action of the wind. The foul air may pass up from the vault between the walls and out this ventilator, if there is any adequate cause to produce such result. It does not appear from the evidence that the ventilation of this closet involves in any way the use of a current of fresh air; and, if it does, it is not shown when or how it enters. The holes in the seats, according to the diagram, appear to be closed, and there are no indications thereon that the current is expected to enter the door-way and pass down through the seat into the vault, as in the Eastmond patent. But it is stated on the diagram that the house projects over the vault four or five inches on each side. This being so, it might be inferred that a current of fresh air entered the vault below the floor, as in the Holt patent, through the space caused by this projection, between the vault and the sill of the house. But it is also stated on the diagram that the house "is not banked around at the bottom, but sides run down into ground," and this, if so, will prevent the fresh air from entering there. The burden of proof is on the defendants to show the similarity in these structures and their mode of ventilation, and they have not succeeded.

The Carson closet is an ordinary one, weather-boarded outside and ceiled inside, and seated on a vault above the ground. It may take air downwards through the holes in the seat, but it is open on the outside, between the roof and the plate, the width of the rafters, and it is as likely to receive fresh air through this opening as elsewhere, and thus check the upward current, if any, and even send it downward to the vault and out the holes in the seat into the chamber. Both the court and counsel examined this closet on the ground, and if the Eastmond patent does not succeed in keeping a purer atmosphere about a closet than there was about it, it is not worth talking about.

But neither of these closets were designed, nor apparently adapted nor used, to produce the result claimed for the Eastmond patent. And whatever similarity of structure or effect there may be between them is accidental, and common to most water-closets. Walk. Pat. §§ 67, 68.

The evidence supports the first special plea, so far as the omission of the plaintiffs to mark their water-closets with the word "patented" is concerned; but it fails upon the allegation that they had not otherwise notified the defendants of the alleged infringement. On the contrary, the proof is satisfactory that the defendant David Stimson was notified by the plaintiff D. W. Williams of the infringement some months before the commencement of this action, and continued the use of the water-closet until after its commencement, when the ventilator was removed from the roof.

The evidence on the subject of damages is meager. Taking the amount of the royalty charged and paid for the single use of the invention as a measure of damages, the finding will be for the plaintiff in the sum of \$25, with leave to move, on notice to the defendants, for judgment for a greater sum, as provided in section 4919 of the Revised Statutes.

TURRILL v. ILLINOIS CENT. R. Co.

SAME v. MICHIGAN S. & N. I. R. Co.

(Circuit Court, N. D. Illinois. February 6, 1880.)

1. PATENTS FOR INVENTIONS—INFRINGEMENT—DAMAGES—PROFITS.

In estimating profits made by the infringer of a patent, the comparison must be between the patented invention and what was known and open to the public at and before the date of the patent. If the rule were otherwise, a patent might be practically destroyed by subsequent inventions.

2. SAME—INTEREST.

Interest is properly allowable on a decree for profits from the time the report is in proper form for exceptions.

In Equity.

F. H. Kales and West & Bond, for complainant.

George Payson and J. N. Jewett, for defendants.

HARLAN, Justice. Looking into the records of these cases as they were presented to the supreme court of the United States in 1876, (94 U. S. 696,) I find that decrees were rendered against the Chicago & Alton Railroad Company, the Chicago, Burlington & Quincy Railroad Company, the Pittsburgh, Fort Wayne & Chicago Railroad Company, the Michigan Southern & Northern Indiana Railroad Company, and the Illinois Central Railroad Company, for the infringement of the Cawood patent. As to the three companies first named, the decrees were affirmed upon the ground that the machines used by them were infringements of that patent. The decrees against the Michigan Southern and Illinois Central were reversed, because the sums adjudged against them improperly included profits made from the use of certain other machines which were declared by the supreme

court to be non-infringing, to-wit, the "Bayonet Vise," the "Michigan Southern," and the "Beebe & Smith" machines. To that extent the decrees against those companies were held to be erroneous, and the causes were remanded, with directions for further proceedings in conformity with the opinion of the court. They were again referred to the master, with directions—upon the testimony on file, if sufficient; if not, upon additional testimony—to ascertain the amount to be deducted for the work done by the "Beebe & Smith," the "Bayonet Vise," and the "Michigan Southern" machines. To his report numerous exceptions have been filed by the defendants.

Upon the last hearing before the master, proof was made tending to show that, during the period covered by the accounting, the Michigan Southern & Northern Indiana Railroad Company had a license to use the Beebe & Smith machine, with which, it is claimed, the company could achieve the same results at less cost than was incurred in the use of the Cawood machines. The company, it is contended, saved nothing by using the Cawood machines, and made, in fact, no profits therefrom. These propositions strike at the foundation upon which plaintiff's whole cause of action rests, and must be first examined.

I doubt very much whether the question thus raised is open for consideration. The former decree embraced profits made by the company in the use of the several machines, in addition to the Cawood, which were held by the circuit court to have been infringing machines. The supreme court affirmed the decision against the two companies, now before me, as in all respects correct, except to the extent that it included in the recovery profits arising from the three non-infringing machines. There is, consequently, fair ground to contend that the only inquiry now open is, what part of the original sum found against the defendants represents, upon the standard of comparison heretofore adopted, the profits arising from the non-infringing machines? The standard of comparison now insisted upon involves the recasting of the whole account, including that portion representing the profits alleged to have been made by the use of the Cawood machine.

But, waiving any determination of the question as to my right to open the case, or to direct the accounting to be had upon a standard of comparison different from that adopted upon the original hearing. I am of the opinion that in estimating the profits made by the company from the use of the Cawood machine, we must compare that device with what was known and open to the public at and before the date of the Cawood patent. The Beebe & Smith invention was subsequent to the Cawood. The company had the right to use the former during the period of accounting, and take to itself all savings or profits derived from its use. But it had no right to use the Cawood machine, and enjoy the savings derived from such use, simply because it *may* have made the same profits at less expense from another ma-

chine, patented subsequently, which it was *at liberty* to use, but chose not to use.

The Cawood and Beebe & Smith machines were independent inventions. The latter is asserted to be, at least, equally useful with the former. The owner of each invention is entitled to be protected in the exclusive enjoyment of his patent for the term prescribed by law. If the position of defendants' counsel be tenable, a prior patent may be practically destroyed, and the owner deprived of all profits arising therefrom, by obtaining from a junior patentee a license to use his invention. If the latter be equally useful with the former, the claim of the prior patentee for profits realized from the actual use of his invention by an infringer can always be defeated by showing that the infringer was *at liberty* to use, although he did not use, the subsequent invention, and might have made thereby the same or greater profits at less cost. Indeed, upon the principle or theory asserted by defendants' counsel, the junior patentee may himself use the invention of a prior patentee without liability to the latter for profits, provided he shows that had he used his own invention he would have accomplished the same or better results at the same or less cost. I do not believe such to be the law, although in several cases cited by counsel there are general expressions which seem to sustain that view. But, after close study of those cases, I am of opinion that in no one of them was the precise point now under consideration in the mind of the court, or necessarily involved in the decision.

Defendants' counsel insist that the whole calculation of the master is faulty in theory and method, and unwarranted by the evidence. I perceive no substantial objection to the rule or theory which controlled the master in his calculations. The difficulty I have is in his interpretation of the evidence. He has not, I think, given sufficient weight to the statements of some of the witnesses, and in some instances he has construed statements most strongly against the defendants, when they should be construed most strongly against the plaintiff, by whom or in whose behalf the witnesses were called. This I say without forgetting the rule announced in 9 Wall. 803, and in 4 Fisher, 64.

Referring, first, to the evidence as it affects the claims asserted against the Michigan Southern & Northern Indiana Railroad Company, I am constrained to say that much of the criticism made by counsel for defendants is justified by the proof, when fairly interpreted. The master finds that 80-196 of the sum adjudged against that company represents the profits made by the non-infringing machines, while the defendants' counsel contend that those profits, upon the theory adopted by the master, constitute at least 104-183 of the sum found by the original decree. No one can read the evidence and reach a conclusion upon which the mind will rest in the confidence that it is absolutely correct,—this, because it is not possible

for the plaintiff to prove the exact amount of damage sustained; and it is quite as difficult for the company, under the circumstances, to show with certainty the amount of work done with different machines at its several shops during the period of accounting, and also the advantages derived from using one machine rather than another at a particular shop. I have concluded that the ends of justice, and the directions of the supreme court, will be met by allowing plaintiff a decree against the Michigan Southern & Northern Indiana Railroad Company for \$113,952.17, which is the mean between the two sums above indicated.

I have not overlooked what defendants' counsel say in regard to a further deduction upon account of rails mended prior to February 18, 1862, when plaintiff became the owner of the patent. The supreme court said that after the action of the circuit court upon the master's first report, it must be presumed that no profits were allowed for any use of the Cawood patent before the plaintiff became the owner.

Unless I have greatly misapprehended the evidence, different considerations must control the case against the Illinois Central Railroad Company. The objection made to the master's report is that it is erroneous as to the number of rails repaired. In support of that objection reference is made to the report of 1874, which was not made the basis of the original decree. The last reference was made under an order to make such reductions as the opinion of the supreme court required, and the last report makes a reference to the testimony upon which the master makes a deduction of \$2,802.78 from the original decree. It does not appear that any further deduction should have been made on account of the non-infringing machines. It is not claimed that the master has overlooked or ignored any evidence bearing upon that point, and I find nothing in the record which authorizes any deduction beyond that made by him. His report, therefore, as to the Illinois Central Railroad Company, is confirmed.

Interest will be allowed from July 12, 1879, at which date the report was in proper form for exceptions.

NOTE. This decision has been recently affirmed by the supreme court. See *Illinois Cent. R. Co. v. Turrill*, 4 SUP. CT. REP. 5. As to time of comparison in determining profits or damages, there seems to be a conflict between the foregoing opinion of Justice HARLAN and the views expressed by Judge Woods in *National Car Brake Shoe Co. v. Terre Haute Car & Manuf'g Co.* 19 FED. REP. 514.

FRYER, Jr., v. MAURER.

(Circuit Court, S. D. New York. July 17, 1884.)

PATENT LAW—TILED ARCH, ETC., FOR INTERIORS—KREISCHER'S PATENT.

The invention is old; and it is useless to attempt to sustain the patent upon refined distinctions in structure, which the patentee evidently never contemplated, and which certainly are not within the claims as expressed in the patent.

In Equity.

Geo. W. Van Siclen, for complainant.

Gen. John A. Foster, for defendant.

WALLACE, J. A rehearing was granted in this cause because it appeared that an erroneous interpretation had probably been placed upon the description in the English provisional specification of George Davis at the original hearing. Upon the rehearing, however, the defendant was permitted to introduce a new exhibit, the Guichard French patent of 1869, which supplies all that was attributed originally to the Davis provisional specification. The Guichard patent is, in fact, a complete anticipation of everything that is essential and valuable in the complainant's invention as described and claimed in his letters patent, although it is introduced as showing that in the prior state of the art there was no invention in Kreischer's hollow-tiled arch.

The complainant insists that his patent is not for a flat arch of sectional hollow tiles supported by girders, the sections of which have plane joints, and recesses where they abut against the girders to catch over the flanges of the girders; but that it is for a flooring consisting of the flanged iron girders, the flat arch of sectional hollow tiles, with recesses which go under the flanges of the girders, wooden floor joists resting on the tiles, and with air spaces between the top of the tiles and the wooden floor. The patentee might have claimed such a flooring, but he did not either in his original or reissued patent, and obviously because he did not mean to be limited to such an invention. The claim of the original is for a hollow arched tile made in three sections, having recesses in the end sections to catch over the bottom flanges of the iron girders, and the middle section being a wedge-shaped key. The iron girders are necessarily included as a feature of the invention thus claimed, because, otherwise, there would be nothing to support the arch, and nothing for the recesses to catch upon or over, and by a reference to the description of the drawings the entire conception of the patentee may be readily understood.

In the reissue two claims are inserted in the place of the one claim of the original. The first claim is merely a more specific statement of the claim of the original, except that it does not limit the invention to an arch composed of three sections, and eliminates the recess in the end sections as a constituent. As it was apparent from the

description in the original that the arch could be made of a larger number of sections, and could be made without recesses in the end sections, it was proper to make these modifications in the first claim of the reissue; and the claim of the reissue was for the same invention described in the original. The second claim in the reissue is the first claim limited by making the recesses in the end sections of the tile, which are left out in that claim, a constituent. It is the same as the claim of the original patent, except that it does not confine the invention to an arch having three sections only; and, for the reasons stated in reference to the first claim, it is for the same invention described in the original. As the reissue was obtained within two years of the issue of the original, it is valid.

But it becomes necessary for the complainant now, in view of the evidence showing the prior state of the art, to abandon the real claims of the patent, which are for a peculiar arch of hollow tiles supported by girders to be used in the walls or in the ceilings of buildings, and to substitute a claim for a flooring with air spaces for ventilation, and an arch of a special construction which is peculiarly contrived to form the ceiling of the room below.

The patentee undoubtedly conceived that when his arch was used as a ceiling under the flooring of buildings an incidental advantage could be obtained by constructing it so as to leave air spaces for ventilation to the sleepers and flooring; and he pointed out the advantages of his arch over brick arches in that respect; but he did not intend to limit himself to a claim which would not be infringed if a flooring and sleepers were not used in connection with his arch. The language of the claims is not fairly susceptible of such a construction. They would be infringed if his arch were used, although the space above it were filled up with cement, and no sleepers or flooring were used.

The slight variation between the form of the recess in the end sections of the patentee's tiles and that found in the several earlier arches of sectional hollow tiles, is not of sufficient novelty to sustain the patent. The patentee describes the arch as provided, at its end sections, with a recess "to catch over" the bottom flanges of the iron girders, when his arch is used for ceilings, but he does not suggest any special advantage arising from the form of the recess. The recess was apparently designed to assist in supporting the arch as a locking device. If it has any advantages over those which were used for the same purpose by others previously, arising from its form, the form should have been described. The form is shown in the drawings, but obviously the language of the description does not confine the patentee to any particular form, but covers any form which will enable the end tile to "catch over" the flange. It may be that the earlier recesses do not catch over, but they lock the girder, for all practical purposes, as well as those of the patentee. In any event, the patentee's change in the form of the recess does not amount to

invention. The recess in the defendant's end tiles does not differ materially from the recesses in the Garcins and Roux Freres exhibits, yet the complainant insists that the defendant has the recess described in the patent.

In conclusion, there was no patentable novelty in Kreischer's hollow-tiled flat arch, the invention which is claimed in the complainant's patent, in view of the prior state of the art. Hollow tiles were old; flat arches were old; flat arches made of hollow tiles in sections were old; flat arches of sectional hollow tiles with plane joints were old; such arches supported at the ends by girders, and used to support the floors of fire-proof buildings, were old; such arches thus supported were old when the end sections of the tiling were provided with a recess to receive the flange of the girder. Everything which is of the substance of the invention was old except a slight change in the form of the recess in the end sections of the tiling. No advantages arising from this change of form are suggested in the patent, and it is doubtful whether there are any practically. If there are any, the form is described in terms so vague that any form which serves to lock the tile to the girder will satisfy the description; and the old recesses would do this. Kreischer, doubtless, thought that his arch was new, and he described and claimed his invention broadly upon this theory. It is now shown to have been old, and it is quite useless to attempt to sustain the patent upon refined distinctions in minor details in structure which the patentee evidently never contemplated, and which certainly are not within the claims as expressed in the patent.

THE NEGAUNEE.

(District Court, N. D. Illinois. July 14, 1884.)

1. ADMIRALTY—COLLISION—PLEADING—EVIDENCE—BURDEN OF PROOF.

The failure of a respondent to allege, as a defense, that the collision was an inevitable accident, does not aid the case of the libellant. The libellant's case depends upon his sustaining the main allegations in his libel, to the effect that the collision was caused by the fault of the respondent, and if he fails of his proof in that particular he cannot recover.

2. SAME—UNEXPECTED APPROACH OF VESSELS—NAVIGATION LAWS.

In cases where two vessels approach each other unexpectedly in very dangerous proximity, the guide for their action should be rule 24 of the navigation laws, (Rev. St. 4233,) which provides that "due regard should be had to all the dangers of navigation, and to any special circumstances which may exist in any particular case, rendering a departure from the general rules necessary in order to avoid immediate danger.

3. SAME—FOG-HORNS—PROOF—FAILURE TO HEAR.

The testimony being that the fog-horn was regularly and properly blown by the vessel complained against, the proof that it was not heard by the vessel complaining does not, under the circumstances, overthrow that testimony. The proof that the horns were properly blown on each vessel, and yet not heard

on the other, simply shows that the best-known precautions which experience has suggested or the law provided, may at times fail of securing safety.

4. SAME—NO FAULT WHEN RULES COMPLIED WITH.

If the officers and crew of a vessel comply with all the rules which circumstances require them to observe, they cannot be held in fault in the event of a collision. *The Rhode Island*, 17 FED. REP. 554, distinguished.

In Admiralty.

Mix, Soble & White, (of Cleveland, Ohio,) and *W. H. Condon*, for respondent.

H. W. Magee and *C. E. Kremer*, for libellant.

BLODGETT, J. The libellant in this case, as owner of the schooner *E. M. Portch*, seeks to recover the damages sustained by his vessel by a collision with the schooner *Negaunee*. The collision occurred on the waters of Lake Michigan, nearly abreast of Ahnapee, and 12 or 15 miles from the west shore of the lake, and between the hours of 7 and 8 o'clock in the morning of September 19, 1880. The *Negaunee* is a large three-masted schooner, and was laden with over 1,100 tons of coal, bound from Buffalo to the port of Milwaukee. The *Portch* was also a large three-masted schooner, loaded with cedar ties and posts, and bound from Alpena to Chicago. The libel alleges that the collision was occasioned wholly by the fault and negligence of those in charge of the *Negaunee*, and the answer denies that there was any negligence on the part of the *Negaunee*.

The proof shows, and it is admitted, that at the time of the collision, and for several hours before, a thick wet fog had prevailed. The wind was about S. The course of the *Negaunee* was S. W. by S., and the course of the *Portch* was S. E. $\frac{1}{2}$ S. The *Negaunee* was carrying all her sails, and the *Portch* all her lower sails, but not her gaff nor jib topsails, but she had been carrying all or part of her upper sails until just before the collision. The speed of each was between four and five miles an hour, as estimated by the judgment of their respective officers and crews. The two vessels had been in company, or in sight of each other, during the day before, and from the fact that they had made the same distance during the night, I conclude that they had run at about the same rate of speed, although it is probable that the *Negaunee* may have carried more sail, as her cargo was heavier than that of the *Portch*, and she was settled deeper into the water, and probably needed to carry more sails than the *Portch* to make the same speed.

I conclude from the proof, without now taking time to discuss it, that both vessels had competent lookouts, and that both were sounding their fog-horns at the regular intervals required by the sailing rules. The *Negaunee*, being on the port tack, was sounding two blasts of her horn in quick succession, at intervals of not more than two minutes, and the *Portch*, being on the starboard tack, was sounding one blast of her horn at intervals of not more than two minutes. The concurrent proof from witnesses on the decks of both vessels is

that neither heard the horn of the other, and that the vessels were not over 150 feet apart when they sighted each other, and I am satisfied that they sighted each other about the same instant. The witnesses also agree that when they sighted each other a collision was inevitable. At this time the Portch was pointing nearly to the fore-rigging of the Negaunee, and the wheel of the Portch, by order of her captain, was put hard up, and the sheets of her after sails slacked off, by which maneuver it was intended to swing the bow of the Portch off with the wind, and, if possible, carry her astern of the Negaunee, while the Negaunee's wheel was put hard down at about the same time, for the purpose of bringing her head up into the wind. The expedients resorted to on both vessels were unavailing, and the bow of the Portch struck the Negaunee near the Negaunee's mizzen rigging, tearing out her bowsprit and breaking in her bows, but doing comparatively little injury to the Negaunee. As already said, it is agreed by the officers and crew of both vessels that when each became aware of the proximity of the other a collision was inevitable, and the most that was expected from the maneuvers adopted was to mitigate the damage.

It is urged on the part of the Portch that it was a fault on the part of the master of the Negaunee to put his wheel hard down and come up into the wind, as he thereby lost some of his headway and threw the stern of his vessel towards the Portch; while it is contended on the part of the Negaunee that her captain did the right thing, and that the master of the Portch was at fault in putting his wheel hard up; that if he had put his wheel hard down the Portch would have swung up into the wind, and the two vessels would have come together by the bows, where they are strongest, and would have glanced off from each other. Experienced practical navigators have testified on both sides, and seem about divided equally in opinion as to whether the maneuver attempted by the Portch or that attempted by the Negaunee was the best seamanship. There is, however, good authority in support of the action of the master of the Negaunee.

In the *Kedge-Anchor*, a treatise on navigation, used as a text-book at the United States naval academy, the following rule is stated:

Rule 404, (page 221.) "In cases of surprise and danger, from the accidental meeting of two ships on opposite tacks in the night, it too often happens that officers are more apt to give orders to *the stranger* than to take any measure of precaution themselves, such as hailing to put the helm up or down, and to clear them, when they may be as much in fault, and possess the same means of extricating themselves from the difficulty. In situations of this sort, it is much better that both parties should put their *helms down* rather than *up*; the ships will approach each other for a time, but will diminish in velocity, and afterwards separate."

I do not care to discuss the question of nautical skill here raised, as I think there can be no doubt that the maneuvers resorted to on each vessel must be deemed to have been adopted *in extremis*, and the master of neither is to be charged with fault for what he did un-

der the circumstances. One cannot say from the proof, with any degree of certainty, that a collision would have been averted, or the consequences any less serious, if different maneuvers had been made or attempted.

But it is urged that the Negaunee, being on the port tack, was, under the seventeenth rule of section 4238, Rev. St., required to keep out of the way of the Porteh; that the Porteh had the right of way and was to hold her course, and it was the Negaunee's duty to give the way or turn out; and this rule would be aptly invoked if the proof showed that those in charge of the Negaunee had sufficient notice of the proximity of the Porteh to enable them to execute the proper movements to give the Porteh the way. The proof, however, shows, as I have already said, that at the time the Negaunee's officers were apprised of the presence of the Porteh, they were so near together and a collision so imminent that it was futile to attempt to keep out of the way; and it seems to me that, under the circumstances, rule 17 was inoperative, and rule 24 of the same section, which requires that "due regard must be had to all the dangers of navigation, and to any special circumstances which may exist in any particular case rendering a departure from the general rules necessary in order to avoid immediate danger," became the guide of both parties; that is, that each party, under an unexpected impending peril, must do what he can promptly to avoid it.

I can see no reason for concluding, from the proof in the case, that the lookout of the Negaunee was negligent or incompetent. It is true, I think, if the testimony is to be believed,—and it is not incredible,—that these two vessels found themselves suddenly looming up out of this dense fog within 150 feet of each other, and without either having heard the fog-horn of the other, although the horns on each may have been sounded at the proper intervals. It must be remembered that the fog was wet and dense, the wind from the south, about a five-knot breeze, and the courses of the vessels such that the wind would not aid in transmitting sounds from one to the other. They were approaching each other at a combined speed of eight to ten miles an hour, and if it so happened that their horns were blown simultaneously two minutes before they sighted each other, there was time for them to have passed over nearly a third of a mile after the last blast was given on the horn of either vessel. When you add to this the fact that the horn of the Porteh was blown upon her windward side, so that her sails would tend to interrupt or break the waves of sound from her deck, I think it not unreasonable to conclude that the proper fog signals were given from each vessel, and yet were not heard on the other.

It is further urged that both these vessels were going too fast, and that, this being a mutual fault, makes this a proper case for dividing the damages. As has been before said, the proof shows the speed of the two vessels to have been substantially the same. They were near

enough together for company when the darkness of the night before shut in upon them, and too near for safety when they first saw each other in the morning. Being of nearly the same size, and both loaded, they had been so navigated during the hours of the night as to make the same progress towards their port of destination. The proof as to the distance they had thus passed over during the night, as well as the velocity of the wind, all concurs, I think, in showing that their speed at the time of the collision was not to exceed four and a half miles an hour, and the proof shows this was no more than a sufficient speed to secure steerage-way and prevent drifting to leeward. Indeed, it seems to me difficult, if not impossible, to demonstrate that the rate of speed at which these vessels were sailing contributed to the danger of either. It so happened in this case that these two vessels, running at substantially the same rate of speed, came together. A little more speed on one or less on the other would have saved the collision. But upon what basis or *data* could any navigator have calculated that he increased his own safety or that of other vessels he was liable to meet by going at a lower rate of speed? The Negaunee might have been a greater peril to herself, or any other vessel she was liable to encounter, if she had lain still, if that were possible, during such a fog.

My attention is called by counsel to the case of *The Rhode Island*, 17 FED. REP. 554, where it was held that seven miles an hour by a sail-vessel in a fog was too high a rate of speed; but in that case the sail-vessel was running in a narrow passage-way, on pilotage ground, where her officers knew she was liable to encounter other vessels, with very little room in which to maneuver, and has many other facts to distinguish it from this.

From the proof in this case, then, I cannot see that any fault for this collision can be properly laid to the crew of the Negaunee. The testimony is that her horn was regularly and properly blown. The proof that it was not heard on the Portch does not, under the circumstances, overthrow this proof from the Negaunee. The proof that the horns were properly blown on each vessel and yet not heard on the other, simply shows that the best-known precautions which experience has suggested or the law provided may at times fail of securing safety. If the officers and crew of the Negaunee complied with all the rules which the circumstances required them to observe, they certainly cannot be held to be in fault; and I am of opinion that the proof does not show any failure or neglect on the part of those in charge of the Negaunee which should make her liable for the damage sustained by the Portch.

It is objected that the answer of the respondent does not allege, as a defense in this case, that the collision was an inevitable accident; but I do not understand that it was necessary to make such an allegation. The libellant's case depends upon sustaining the main allegation in his libel, to the effect that the collision was caused by the

fault of the Negaunee, and if he fails of his proof in that particular he cannot recover. The defense does not rest upon the fact that the collision was an inevitable accident, but upon the question whether it resulted from the fault of the Negaunee.

The libel is dismissed for want of equity, at costs of libelant.

THE GEN. MEADE.

(Circuit Court, D. Nebraska. July 23, 1884.)

1. LIEN ON VESSEL—WAIVER.

A lien which has accrued upon a vessel for supplies furnished it, is not waived or lost by the acceptance of commercial paper belonging to the lessees of the vessel.

2. ADMIRALTY PRACTICE—PLEADINGS AND PROOF—VARIANCE.

When the allegations in an answer are that the owners leased certain boats to a corporation for the term of three years, while the proof disclosed separate charter-parties for each year, including the one in question, there is not such a variance as will be regarded.

3. FRAUD ON CREDITORS—LEASE OF VESSEL—EVIDENCE.

When the owners of boats lease them to a transportation company, evidence of an interest manifested by the owners in the success of the company is not a sign of bad faith in making the lease, or of an attempted fraud upon creditors.

4. LIBEL—CONTRACT FOR SUPPLIES—EVIDENCE.

In a libel against a vessel evidence examined, and held to show that supplies used upon a boat leased by a transportation company were sold to the company and on its credit, and not on that of the boat.

5. SAME.

Where supplies are furnished to and upon the credit of a transportation company, a libel cannot be maintained against a leased boat upon which they were used.

In Admiralty. On exceptions to the report of the referee.

T. P. Murphy, for libelants and intervenor.

J. M. Woolworth, for claimants.

BREWER, J. This was a libel filed against the steamer Gen. Meade for supplies furnished by the libelants in the season, and mainly in the month of April, 1882. The supplies were furnished at Bismarck, in the territory of Dakota, a foreign port. That the supplies were furnished is undisputed, but the contention of the claimants, who are the owners of the boats, was and is that they were sold to and on the credit of the Northwestern Transportation Company. After the seizure of the boat, the intervenor appeared and filed his claim for services as watchman at the port of Covington, in the state of Nebraska, also a foreign port. The case was tried in the district court, and a decree rendered in favor of the libelants and the intervenor. From this decree the claimants appeal to this court.

The case was submitted to the district court upon the testimony of the libelants, and apparently the question submitted to that court was whether, after the lien had accrued by the furnishing of the supplies,

it was waived or lost by the mere acceptance of commercial paper of the transportation company. That question the district court properly answered in favor of the libelants. After the appeal was taken, the claimants took the testimony of the general manager of the transportation company, and the case was, by consent, referred to the Hon. James W. Savage, to report on the law and fact. His report was filed on the seventh day of May, 1884, finding in favor of the claimants, and that the supplies were furnished on the credit of the transportation company, and not on that of the boat. Exceptions were filed to this report, and the case is now before me on those exceptions.

It is clear, from the testimony, that the owners in fact leased this boat and others to the transportation company, and that they were by such company operated during the season in question, as well as during the two prior years. It is true that in the argument some insinuations were thrown out against the *bona fides* of this transaction, and the letters of some of the owners were referred to as indicating an active interference in the management of the boats. I see nothing in the testimony of these letters to justify this. Doubtless, the owners, as owners, were interested in the success of the transportation company, for in its success was their assurance of pay for the use of the boats. Further, the owners of the boats, or some of them, at least, were largely interested as stockholders of the transportation company, and, of course, interested as stockholders in its success, and I see nothing which justifies any more than such natural and proper interest.

Again, it is said that there is a variance between the allegations in the answer of the claimants and the testimony in this: that the answer alleges that the owners leased the boats to the company for the term of three years, while the testimony discloses separate charter-parties for each year, one of them covering the year in question. This is a mere technicality, and must be disregarded.

Further, it is insisted that the transportation company was a corporation organized under the laws of Iowa; that it does not appear that its charter was ever filed in the territory of Dakota, and therefore that it there had no legal existence. I do not see that that is material, for, whether corporation or merely partnership, it was composed of different persons than the owners of the boats, and was therefore a different legal entity, capable of leasing from the owners and transacting business on its own account. I think, therefore, there is no escape from a consideration of the main question, and that is whether the supplies were furnished to and upon the credit of the boat, or to and on the credit of the transportation company. The libelants testify that they sold to the boat and on its credit, and not to the transportation company, and this was the testimony on which the decree of the district court was entered. But it appears from other testimony that they had, in prior years, furnished supplies to

this and other boats similarly situated, on sales to and on the credit of the transportation company. The libelants claim that in January, 1882, they wrote to Iowa to ascertain the condition of the transportation company, and, from information received there and elsewhere, doubted its solvency, and thereafter sold on the credit of the boat; but, notwithstanding this testimony, it appears that, when they sold these supplies, they took drafts drawn by the clerk of the boat on the general manager of the transportation company, and that these drafts were renewed from time to time until the failure of the company. It does not appear that they ever notified the company or the officers of the boat that they intended to change the course of business that had been pursued the prior years, and, in fact, the manner of the business was continued the same. It also appears that the company had, during these years, a general agent at Bismarck who looked after the business of the company there, and was known to be such by the libelants, though, probably, the supplies were, in fact, ordered by the captain, steward, or clerk of the boat. Now, I think it very strong inference, when business is shown to have been conducted for one or more years in a certain way, with credit given in those transactions to a certain party, and the business is conducted the ensuing year, in fact, in the same way, with no notice given of any intent to change the debtor, that there was in fact no change. I am strengthened in this conclusion by the letters and telegrams of the libelants sent to the general manager of the transportation company subsequent to the sale of these supplies. Their general tenor and effect is that of communications from a creditor to a debtor.

The proctor for the libelants lays great stress on the fact that the supplies were charged on the book of the libelants to the steamer, and that bills were made out in the name of the steamer and handed to the clerk. This, standing by itself, is of course testimony of weight; but when it is coupled with the fact that on presentation of the bills a draft drawn by the clerk on the general manager was accepted, and when it is borne in mind that naturally it would be for the convenience of both libelants and the company to keep the accounts for each boat separate, the testimony will be seen to have much less weight. Of course, if the goods were sold to and on the credit of the transportation company, it cannot seriously be contended that this libel can be sustained. See *The Grapeshot*, 9 Wall. 129; *The Lulu*, 10 Wall. 192; *The Patapsco*, 13 Wall. 329.

I think, therefore, the exceptions to the report of the referee must be overruled, and the libel dismissed, at the cost of the libelants.

So far as the claim of the intervenor is concerned, under the stipulation of the parties I think it must be sustained; that he has a lien which must be satisfied and discharged out of the boat. I understand that the two cases of the same libelants *versus* the steamer Gen. Terry and *versus* the steamer Nellie Peck are precisely similar, and the same decision is announced for those cases.

THE YOUNG AMERICA, Her Tackle, etc.

(District Court, D. New Jersey. July 2, 1884.)

1. SALVAGE—VESSEL IN PERIL—TUG—TOWAGE.

A vessel whose captain and crew, apprehending danger from a fire raging in the immediate neighborhood, exhibit a signal for a tug, is afterwards liable to the tug which responds for *salvage* and not for *towage* service.

2. SAME—ESTIMATION OF SERVICE.

The value of a service performed is not to be estimated by the light of subsequent events, but of the facts which seemed to surround it at the time.

3. SAME—PANIC—EXORBITANT DEMAND.

The court, in awarding the salvage, may take into consideration the unworthy conduct of the captain of the tug, who apparently sought to profit by the fright of the crew of the vessel, and reduce the amount from the exorbitant claim.

Libel for Salvage.

Jas. K. Hill, Wing & Shoudy, for libelants.

Beebe & Wilcox, for claimants.

NIXON, J. This is a libel *in rem* by the owner, master, and crew of the steam-tug Henry L. Waite to recover salvage for services rendered to the ship Young America under the following circumstances: At about a quarter before 2 o'clock on the afternoon of February 8, 1884, an oil tank exploded and a fire broke out in the yard of the Standard Oil Company, at Hunter's point, on the East river. The place of the explosion which caused the fire was upwards of 200 feet back from the river front, and about 50 feet south of the canal or creek which is the northern boundary of the yard, and that separates it from the Daylight or Empire oil-yard. This canal is about 125 feet in width. The Daylight oil-yard borders upon it on the south, and upon the East river on the west. When the fire began, the claimants' vessel, Young America, was lying on the river bulk-head of said yards, outside of the bark William K. Chapman, about 200 feet north of the creek, and fastened to the shore by lines. These lines were shortly afterwards cut,—by whom it does not appear,—and both vessels began to drift slowly towards the middle of the stream and down the river. It was about low water, and there is proof that there was a slight eddy, which carried them towards the mouth of the creek, and an east wind that blew them a short distance from the shore. She had a signal displayed on the port side, in her rigging, asking for a tow. The libelants' boat was docking a vessel at the foot of Fourteenth street, on the New York side of the river, when the explosion and the consequent smoke and fire in the Standard oil-yard attracted their attention. They hastened over to the other side in order to be in a position to render aid to vessels requiring help, and, being attracted by the signal on the Young America, they went alongside, fastened to her, and towed her up the river opposite to Blackwell's island, and left her there at anchor. The spars of the William K. Chapman were so entangled in the rigging of the Young America

that she also was towed to about the middle of the river, when she became disengaged and was anchored. When the vessels were taken up by the Waite, they were adrift in the river near the eastern shore, and just above the mouth of the canal or creek which separated the Standard oil-yard from the Daylight or Empire yard, on the southern side of which the fire was raging in a threatening manner. Whether they were in immediate peril or not does not clearly appear, but the testimony shows that the crew of the Young America was badly scared, and that they availed themselves with great alacrity of the offer of the tug-boat to tow them to some place where their safety would be more apparent.

Was the work performed by the Henry L. Waite and her crew, under such circumstances, a salvage or a towage service? It was certainly something more than the latter, although, as affairs turned out, perhaps a low grade of the former. It is often difficult to get a fair estimate of the value of a service by viewing it in the light of subsequent events. It ought to be looked at in connection with the facts which seem to surround it at the time. We can look back now and easily come to the conclusion that the Young America was, at no juncture of the affair, in any real danger. We can see that, after she got beyond the influence of the eddy, the young flood-tide and the easterly wind would co-operate, if she were left alone, to remove her from the impending peril. But then there was great excitement. The oil tanks were exploding, the oil taking fire and running into the creek ablaze, and the flames were extending a hundred feet in the air. The surface of the creek was not covered, nor more than half covered, with the burning oil, and yet, to the excited imagination of a number of the witnesses, the flame extended from shore to shore, and threatened to creep over into the Daylight yard, and to come in contact with other inflammable materials. They never went quite to the mouth of the creek,—certainly not beyond the mouth,—and yet some spectators believed that the water was ablaze nearly a hundred feet into the river. Such was the condition of affairs when the Waite appeared upon the scene. She came, not merely as an angel of mercy, to relieve distress and avert threatened disaster, but with an eye to business and profit as well.

The captain of the steam-tug says that he saw the signal of distress in the rigging of the Young America; that he drew along-side and asked for the captain, and was told that he was forward. He then remarked to a man, whom he afterwards understood was the mate, "You tell the captain that I will take him out for \$1,000;" and the reply came back, "Give him a line." The line was given and made fast, and the ship towed to the other side of the river.

The master of the Waite claims that a contract was entered into that he should receive \$1,000 for the service of taking charge of the ship and removing her to a place of safety, and asks the court to so decree. The master of the Young America, on the other hand, de-

nies that he made any agreement; swears that he heard nothing about the charge of \$1,000; and avers that he ordered the line to be given because he understood that the Waite had come with the offer of a mere towage service. He has an imperfect knowledge of the English language, and it is not clear from the proofs that he comprehended that \$1,000 was to be demanded for the service to be performed. But even if he did, I am not sure that a contract made under such circumstances ought to be enforced by the court. Contracts of this nature, entered into in the midst of excitement, are justly regarded by the courts with suspicion, especially when they are of such an unconscionable character. Neither the Waite nor the Young America was subjected to any peril which authorized the demand for, or the agreement to pay, any such sum for a service without risk and of so short duration.

I have read all the testimony with care, and have come to the conclusion that \$300 is a liberal allowance for the service rendered. A decree will therefore be entered for the libelants for that sum, with costs; one-half to be awarded to the owner of the tug-boat, \$25 to the master, and the remaining \$125 to be divided among the crew, including the master, in proportion to the rate of the wages, respectively, paid to them. If such division cannot be made by the proctors, a reference will be ordered. I should have made a larger allowance to the master of the Waite if I was not strongly impressed with the thought that, in his demand of \$1,000 for such a service, he was attempting to profit by the fright and necessities of the claimants.

END OF VOLUME 20.

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11

